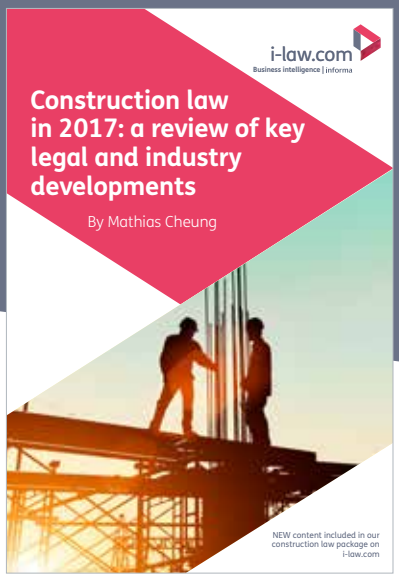
i-law.com
Business intelligence | informa

Construction law in 2017: a review of key legal and industry developments

By Mathias Cheung

NEW content included in our construction law package on i-law.com



CONTENTS

Construction law in 2017: a review of key legal and industry developments

Mathias Cheung

Mathias Cheung LLB (Hons), BCL (Oxon) is a practising barrister at Atkin Chambers, having completed his LLB at King's College London and BCL at the University of Oxford.

His expertise includes construction, engineering and infrastructure, energy and utilities, information technology, professional negligence and international arbitration.

Mathias has acted as junior counsel in a complex Technology and Construction Court dispute regarding the redevelopment of the Rolls Building, and he also has extensive experience in adjudications. He recently acted as junior counsel in an international arbitration in Hong Kong involving complex delay and defects claims.

Mathias was the winner of the SCL Hudson Prize 2015 for his essay entitled "Shylock's Construction Law: The Brave New Life of Liquidated Damages?", and has written for a number of journals, including the *International Construction Law Review*.

Construction law in 2017: a review of key legal and industry developments is published by Informa Law, Christchurch Court, 10-15 Newgate Street, London EC1A 7AZ. Informa Law is a premium legal research supplier to practitioners across the globe, and a leader in the field of construction law.
Our construction content is available online via single-user subscriptions or multi-user licences at https://www.i-law.com/ilaw/construction.htm.

Informa Law
Business intelligence | informa

Foreword

By Chantal-Aimée Doerries QC, Head of Atkin Chambers and Co-Editor in Chief, International Construction Law Review

Like most years, 2017 saw a wide range of issues from the construction industry come before the courts in the UK and overseas as reflected in Mathias Cheung's commentary. The usual topics concerning "smash and grab" adjudications, payment provisions, extensions of time, design liability and procurement, to name but a few, occupied the courts.

The most talked about case was the Supreme Court judgment in *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and Another* [2017] UKSC 59; [2017] BLR 477, which grappled with the proper interpretation of fitness for purpose obligations in a voluminous and at times internally inconsistent contract for the design, fabrication and installation of wind turbines. The central question was which party, employer or contractor, took the responsibility for a significant but unknown or unrecognised design error in the international standard which the parties had agreed the particular works should comply with?

The case is of interest because of the Supreme Court's approach to the risk apportionment and its willingness to recognise and hold the parties to provisions tucked away within technical appendices to the main conditions, which contained a fitness for purpose obligation. The fact that there were other provisions of a lesser standard, imposing a reasonable skill obligation, did not lead to the conclusion that the contractual provisions were inconsistent, rather the more rigorous standard had to prevail. It highlights in real terms what litigation risk means for clients: E.ON won at first instance before a specialist Technology and Construction judge, lost in the Court of Appeal before a court which included a former Technology and Construction judge and won in the Supreme Court. Perhaps most importantly, it reflects an increased willingness of the UK Courts to give effect to the words of commercial contracts.

An earlier step in this direction was the 2016 Supreme Court case of *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67; [2016] BLR 1 concerning the enforceability of liquidated damages. Although Jackson LJ gave the lead judgment in *MT Højgaard A/S* in the Court of Appeal, which was overturned in the Supreme Court, it is relevant in this context to note what he said in another 2017 case of *Persimmon Homes Ltd v Ove Arup and Another* [2017] EWCA Civ 373; [2017] BLR 417: "contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance."

Of course the contractor/consultant needs to be aware of the risks they are signing up to. One of the regular challenges with large infrastructure projects, and one of the causes of disputes, is that the parties rarely keep a really close eye on the detail of the contractual arrangements. *MT Højgaard A/S* serves as a useful reminder to clients and lawyers alike of the possible consequences.

This review covers the above cases and their implications and also walks us through other major cases of 2017, highlighting both the takeaways from the past year and what to watch out for in 2018. On the adjudication front, the year saw cases covering the validity of payment applications and pay less notices, the effect of interim payment valuation and the need for pay less notices for final accounts.

Other issues covered include rectification of contracts, exclusion clauses, implied terms, the prevention principle, enforceability of liquidated and ascertained damages, insolvency and professionals' responsibilities and liabilities in relation to design and advising on costs. Finally, given the international nature of infrastructure dispute resolution, readers will also be interested in Cheung's review of developments in Hong Kong, Singapore and the UAE.

Construction law in 2017: a review of key legal and industry developments

By Mathias Cheung

This commentary summarises some of the most important and interesting developments in construction law in 2017, both in the UK and abroad. The issues covered are of relevance to legal practitioners and construction professionals alike.

In the King's College Construction Law Association Annual Lecture delivered on 11 May 2017, Professor John Uff QC observed that the "construction industry has suffered from perennial difficulties for many decades" but "dispute avoidance has never been a viable answer for the problems of the construction industry".[1] Indeed, one only has to consider the proliferation of construction law decisions from the Technology and Construction Court (TCC) in England and Wales and the courts of other common law jurisdictions to see that construction disputes are very much alive and kicking.

Like death and taxes, claims and disputes are a fact of life within the construction industry, and the legal and financial stakes are high. The recent collapse of Carillion Group in the UK is a cautionary tale (and a topic to which the author will return later in this review). It is therefore important for legal practitioners and industry stakeholders generally to have their fingers on the pulse of construction law, and this neatly encapsulates the primary purpose of this overview of the key legal and industry developments over the past year.

This review spans the common law jurisdictions of the UK, Australia, Singapore and Hong Kong, as well as the ever-growing international construction arbitration space in the Middle East. The analysis will end with a wider discussion of industry developments generally and topical issues to look out for in the year ahead.

"Smash and grab" adjudications

Since the enactment of the Housing Grant, Construction and Regeneration Act (HGCRA) 1996, what have become colloquially known as "smash and grab" adjudications (adjudications concerning a failure to serve valid or timeous payment or pay less notices) are very much part of the standard repertoire of construction disputes within the UK.

This ongoing trend does not come without demur from various quarters, and has been spurred on by controversial authorities such as *ISG Construction Ltd v Seevic College*,[2] *Galliford Try Building Ltd v Estura Ltd*,[3] and (to some extent) *Matthew*

1 Professor John Uff CBE QC, "Is the Construction Industry Waving or Drawing?", SCL Paper D203 (June 2017), at paras 2 and 8.
2 [2014] EWHC 4007 (TCC); [2015] BLR 233.
3 [2015] EWHC 412 (TCC); [2015] BLR 321.

Harding (trading as M J Harding Contractors) v Paice and Another,[4] which maintained the position that the absence of a valid payment or pay less notice would prevent an employer from challenging the valuation of the interim payment in question. It was in this context that Coulson J observed at the beginning of 2017:

> "What, I think, nobody could have predicted at the time of *Caledonian Modular* was the proliferation of what I understand are (unhappily) called 'smash and grab' cases: those adjudication claims (usually, but not always, brought by contractors) based on the contention that the other party has failed to serve proper or timeous applications for payment or payment/pay less notices, thereby automatically entitling the claiming party to the sums claimed, no matter how controversial. The significant increase in these sorts of claims seems to me to arise principally from the ill-considered amendments to the 1996 Act, and the over-prescription of the payment terms included in the standard forms of contract, which have led to provisions of unnecessary complexity. I am also aware of the widely-held view that this problem has been inadvertently compounded by the run of authorities starting with *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC), which prohibit a second adjudication dealing with the detailed valuation of an interim payment already awarded by an adjudicator."[5]

On the other hand, in a more recent TCC decision, Fraser J notably took a less dim view of payment disputes, and was not impressed at all with the use of the pejorative description, "smash and grab":

> "As a term for this type of dispute or adjudication, in my judgment the phrase 'smash and grab' is best avoided. The phrase has clearly pejorative overtones. Parliament, both in the original legislation, the Housing Grants, Construction and Regeneration Act 1996, and now as amended in the Local Democracy, Economic Development and Construction Act 2009, has decided that certain timing requirements must be met so far as interim payment applications, and decisions to pay less than the amount applied for, are concerned. If employers or third party certifiers fail to comply with those legal requirements, then the party seeking payment (usually the contractor) becomes entitled to the sum (as an interim payment) for which application has been made. To describe an attempt, or the adjudication itself, by a party to enforce these legal rights as a 'smash and grab' entirely misses the point. [...]"[6]

It is clear that the courts continue to grapple with these issues and to seek the right balance between law and policy, in what has been described as "the buoyant state of the adjudication enforcement industry".[7] In 2017 alone, one sees a number of important adjudication enforcement decisions which shed light on the principles and issues concerning payment disputes and adjudications. Those issues broadly fall within three categories: (1) the validity of payment applications and pay less notices; (2) the effect of an interim payment valuation; and (3) the need for pay less notices for final accounts.

---

4 [2015] EWCA Civ 1231; [2016] BLR 85.
5 *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] BLR 344, at para 6.
6 *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC), at para 17.
7 Professor John Uff CBE QC, "Is the Construction Industry Waving or Drawing?", SCL Paper D203 (June 2017), at para 7.

Validity of payment applications and pay less notices

The start of the year was kicked off by O'Farrell J's judgment in *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd*,[8] where the employer sought to resist the enforcement of an adjudication decision by, inter alia, challenging the validity of the contractor's payment application, largely on the basis that the payment application was based on an arbitrary assessment with no breakdown or substantiation.

This followed a string of important decisions including *Caledonian Modular Ltd v Mar City Developments Ltd*,[9] *Henia Investments Inc v Beck Interiors Ltd*,[10] and *Jawaby Property Investment Ltd v The Interiors Group Ltd and Another*,[11] in which the TCC emphasised that "an application for interim payment must be sufficiently clear and unambiguous in form and intent so that the parties have notice of the application made" and of the fact that the payment regime has been triggered.[12] Those decisions are commonly cited by employers to illustrate the considerable hurdle which a party must overcome, in order to establish a "notified sum" which is payable under section 111(1) HGCRA.

In *Kersfield*, O'Farrell J adopted a sensible approach to the issue and held that the payment application was valid, given that it was clear in the context and "[t]here is no suggestion that Kersfield did not recognise it as such".[13] This is a helpful reminder that the TCC is unlikely to be sympathetic to attempts by employers to sidestep the requirement of a payment or pay less notice by arguing that there was insufficient substantiation. As O'Farrell J observed, it is always a matter of fact and degree, and "although deficiency in substantiation of a claim might justify rejection of such claim, in part or in full, it would not of itself render the application invalid", and that "the employer's remedy lies in issuing a payment notice that excludes that claim, or in issuing a pay less notice that deducts from the sums due the unsubstantiated claim".[14]

The importance of a sufficiently clear payment application was again emphasised in *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd*[15] which followed shortly thereafter. In *Surrey*, DHCJ Nissen QC similarly considered, inter alia, the validity of an interim payment application, and after discussing the line of previous authorities mentioned above, he observed that "[t]here is a high threshold to be met by any contractor who seeks to take advantage of these provisions whereby a sum automatically becomes payable if a timely employer's notice is not served",[16] clearly recognising the potentially draconian consequences.

However, it is noteworthy that, like O'Farrell J in *Kersfield*, DHCJ Nissen QC was careful not to adopt an unrealistic and legalistic approach to the interpretation of a contended payment application, stressing that "it is appropriate to construe the document relied on as a notice against both the contractual and factual setting in which it was issued".[17] DHCJ Nissen QC ultimately held that the payment application was valid, taking into account the context of the Trust's failure to issue interim certificates, and the contractor's express right under the contract to issue a

8 [2017] EWHC 15 (TCC).
9 [2015] EWHC 1855; [2015] BLR 694, at para 37.
10 [2015] EWHC 2433 (TCC); [2015] BLR 704, at para 17.
11 [2016] EWHC 557 (TCC); [2016] BLR 328, at paras 39 to 43.
12 *Kersfield*, at para 31.
13 *Kersfield*, at para 38.
14 *Kersfield*, at paras 36 to 37.
15 [2017] EWHC 17 (TCC); [2017] BLR 189.
16 *Surrey*, at para 37.
17 *Surrey*, at para 38.

payee's notice[18] – "viewed objectively, there were sufficient indications both on the face of the document itself and in the description of the attachment to the email to make clear that Logan intended to issue an Interim Payment Notice. The objective reader would also have been aware that the Contract provided a right to issue such a Notice by reason of the prior failure by the Contract Administrator to have issued an Interim Certificate".[19]

Contractors and subcontractors are likely to be encouraged by the decisions in *Kersfield* and *Surrey* to continue bringing "smash and grab" adjudications in respect of outstanding interim payment applications. However, it is important to remember that this is not necessarily a relaxation of the formal requirements of a valid payment application. As O'Farrell J noted, the payment application in *Kersfield* was "clearly identified as an interim application for payment", and was accompanied by an itemised spreadsheet.[20] In other words, the application did "set out, as a minimum, the sum claimed as due and the basis on which such sum is calculated".[21] It remains important for contractors and sub-contractors to ensure, as a matter of good practice, that all their payment applications comply with those minimum requirements – something which, from hard experience, cannot be taken for granted within the industry.

This point was perfectly illustrated by *Systems Pipework Ltd v Rotary Building Services Ltd*,[22] where the contract required the contractor to notify the "proper amount due for payment" in respect of the final account. Applying the same common sense principles discussed above to the final account notification, Coulson J took the view that "if a notice under a certain clause has a draconian effect pursuant to the contract, the notice should make clear that it has been issued under that clause".[23] Coulson J held that there was no proper notification, on the basis of:

> "[...] the basic principle that, if X is supposed to be notifying Y that a sum is due, under a clause that provides for a deemed agreement that binds the parties unequivocally, then it is a prerequisite of the arrangement that the sum due and the clause are clearly set out in the relevant notice. It is not good enough to say that the recipient could have worked it out for themselves; it manifestly fails to meet the necessary test when the alleged calculation that it is said could have been done by the recipient relied on later documents, some of which were not even in the recipient's possession."[24]

How does the above compare to the court's approach to the validity of a pay less notice? It is well established that the court would be slow to intervene and find reasons to render a pay less notice invalid. DHCJ Nissen QC in *Surrey* considered the question of whether a final certificate "had the requisite intention" of a pay less notice (it was conceded that the final certificate complied with the formal requirements of a pay less notice).

In upholding the final certificate as a valid pay less notice, DHCJ Nissen QC placed great emphasis on the factual context, and concluded that the court should not focus too much on the specific detail of the language used, but should give weight to the overall message and purpose of the Final Certificate, especially since there

18 *Surrey*, at para 39.
19 *Surrey*, at para 44.
20 *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC), at para 38.
21 *Kersfield*, at para 31.
22 [2017] EWHC 3235 (TCC); [2018] BLR 123.
23 *Systems Pipework*, at para 29.
24 *Systems Pipework*, at para 35.

was no established format[25] for pay less notices. Although the contractor argued that there was no intention on the part of the employer to issue a pay less notice in response because the employer's email asserted that the interim payment notice was void, this was roundly rejected by DHCJ Nissen QC:

> "Instead, on a broader level, the overall message and purpose conveyed by that sentence of the email was that, if he was wrong about the contractual position, the Contract Administrator was valuing the work on the same basis as had been set out in detail in the Final Certificate and accompanying breakdown and that this was the only sum to which the contractor was entitled whether by way of final account or by way of interim payment. Viewed in that way, on a broader level, one intention of the email and its attachments was that it should be responsive to the Interim Payment Notice."[26]

The importance of context cannot therefore be underestimated, and this is likely to be an important factor going forward for employers intending to challenge the validity of a payment application and refuse payment on those grounds, or for contractors who intend to question the validity of a pay less notice. Whilst the express identification of a document as a "pay less notice" or "payment application" will carry substantial weight, it is by no means a necessary condition of validity, as context can play a huge role.

The above does not mean, however, that parties should necessarily let down their guard in terms of satisfying the basic requirements of a payment application or a pay less notice, that is, the inclusion of the sum stated to be due and the basis on which such sum is calculated. This issue was considered by the Outer House of the Scottish Court of Session in *Muir Construction Ltd v Kapital Residential Ltd*.[27] In *Muir*, the employer's purported pay less notice only stated that the sum due was £0, without any substantiation or breakdown. Lord Bannantyne held that the pay less notice was invalid, because "[f]rom none of the information provided could the reasonable recipient work out the basis on which the zero sum figure was calculated [...] the PLN in order to properly provide a basis needs at least to set out the grounds for withholding and the sum applied to each of these grounds with at least an indication of how each of these sums are arrived at".[28] It is noteworthy that this same standard was also applied to an interim payment application in an earlier Scottish case.[29]

Whilst the express identification of a document as a "pay less notice" or "payment application" will carry substantial weight, it is by no means a necessary condition of validity, as context can play a huge role

Whilst Scottish decisions are not binding in England and Wales, the reasoning of the Court of Session is difficult to argue with, and it is likely that the TCC, if it were

25 In contrast to the facts in *Jawaby Property Investment Ltd v The Interiors Group Ltd* [2016] EWHC 557 (TCC); [2016] BLR 328.
26 *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EWHC 17 (TCC); [2017] BLR 189, at para 59.
27 [2017] CSOH 132.
28 *Muir*, at paras 89 to 90.
29 See *Maxi Construction Management Ltd v Mortons Rolls Ltd* [2001] ScotCS 199.

confronted with a similar situation, would reach a similar conclusion. Thus, whilst much will obviously depend on the facts and context of each case in the light of *Kersfield* and *Surrey*, and it is impossible to lay down any hard and fast rule, one thing is certain: payment applications and pay less notices should always be as clear and as properly substantiated as possible, in order to pre-empt any argument of invalidity which the other party may try to run in an adjudication or a CPR Part 8 claim for a declaration.

Before moving away from the topic of validity, it is interesting to note the 2017 Singaporean decision in *Mataban Development Pte Ltd v Black Knight Warrior Pte Ltd*, in which an employer failed to serve a valid payment response (the equivalent of a pay less notice) under the Building and Construction Industry Security of Payment Act,[30] and sought to challenge the adjudicator's findings. Seow AR observed that "a prevalent view is held in the Court of Appeal that a court should play only a limited role in a setting aside application".[31] On that basis, Seow AR held that the question as to the validity of the payment response did not go to the adjudicator's jurisdiction, and that the decision could not be set aside.[32]

It is clear that Singapore, unlike the English courts, has not introduced any procedure equivalent to Part 8 proceedings to review adjudicator's decisions on the validity of payment notices. The priority given to certainty and temporary finality by the Singaporean courts provides some interesting food for thought – is there any mileage in limiting the scope of challenges to enforcement and ensuring adjudications do not spiral out of control, or has the TCC struck the right equilibrium? Perhaps this is an issue which ought to be discussed as part of the current consultation on HGCRA reforms.

Effect of an interim payment valuation

As mentioned at the beginning, payment disputes have, more often than not, centred on the effect and conclusiveness of an interim payment valuation (the "notified sum" within the meaning of section 111(1) of the HGCRA) in the absence of a pay less notice. Contractors have, quite understandably, often sought to argue that an interim valuation represents an employer's approval/acceptance of the works and materials up to that point and should be final for all future purposes. This, however, runs counter to the provisional nature of statutory adjudication (although parties are, of course, free to agree contractually that an adjudication decision is final and conclusive).[33]

This issue was first addressed in 2017 in *Kersfield*, where O'Farrell J observed that the failure to serve a proper pay less notice does not finally determine the substantive valuation of the works, but has a much more limited function in regulating cash flow on a provisional basis:

> "I acknowledge that the default notice mechanism under the Act might result in unfairness or hardship to an employer in circumstances where the contractor received a windfall from the employer's procedural failure. However, it simply regulates the cash flow as between the parties and

30 [2017] SGHCR 12.
31 *Mataban*, at para 35.
32 *Mataban*, at paras 37 to 38.
33 See eg *Khurana and Another v Webster Construction Ltd* [2015] EWHC 758 (TCC); [2015] BLR 396.

> does not affect their substantive rights [...] This finding does not preclude a challenge to the valuation of the works and/or any claims and cross-claims for the purpose of subsequent interim payments or for the purpose of determining the sums due on a final and conclusive assessment."[34]

This issue came before the courts again in *Imperial Chemical Industries (ICI) Ltd v Merit Merrell Technology Ltd*.[35] There, it was argued by the contractor that an interim valuation (in the absence of a pay less notice) is "deemed to be the value of those works" by virtue of the *ISG* decision – it was of particular importance because the contract in *ICI* has been repudiated, and the contractor was seeking to freeze the value of the works at the amount previously paid.[36]

Fraser J took the view that "it can be difficult to reconcile the decision in *ISG v Seevic* with the ratio in *Paice v Harding"*, and "the ratio of both those Court of Appeal authorities – though neither expressly finds that *ISG v Seevic* is wrong, because it was unnecessary for the differently constituted courts to do so – cast some real doubt on whether that case would be decided in the same way now".[37] Fraser J was at pains to stress that "the value of the work remains something that can be challenged. In other words, the value of the works executed is not definitely determined by the figure in the interim assessment (or an adjudicator's decision on that interim assessment)".[38]

The *ICI* decision, which was part of a continuing trend in the TCC to row back from the effect of *ISG*,[39] stopped short of saying that *ISG* was wrongly decided, and up to the end of 2017, it remained the law that a valuation of the works in an interim payment application cannot be challenged in the absence of a pay less notice. However, it would be remiss not to mention the recent decision of *Grove Developments Ltd v S&T (UK) Ltd*,[40] which was handed down whilst writing this review. In *Grove*, Coulson J undertook a detailed review of the line of authorities from *ISG* to *Harding*, and finally departed from *ISG.* Therefore, at the time of writing, the latest word is that an employer can now dispute the underlying valuation of an interim application despite the absence of a valid pay less notice. Many in the industry fear that this has sounded the death knell for "smash and grab" adjudications, but as Coulson J pointed out in *Grove*:

> "There is also the suggestion that, if this analysis is right, the notice regime under the 1996 Act and/or this form of contract will be undermined, because every employer who misses the relevant deadline for the pay less notice will simply start a second adjudication as to the true value. But why would they? In most cases, such a course would be inefficient and costly: the employer will still have to pay the sum stated as due in the interim application. If the employer can then resolve the alleged over-valuation point in the next interim payment round, no second adjudication would be necessary."[41]

The recent cases culminating in the decision in *Grove* have certainly put the correct position under the HGCRA in the spotlight. Given that Coulson J's decision in *Grove* is currently under appeal, the jury is still out on the final position. It seems unlikely

34 *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC), at para 96.
35 [2017] EWHC 1763 (TCC).
36 *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC); [2015] BLR 233, at para 25.
37 *ICI*, at paras 203 to 204.
38 *ICI*, at para 209.
39 See also *Kilker Projects Ltd v Purton (trading as Richwood Interiors)* [2016] EWHC 2616 (TCC), at paras 24 to 25.
40 [2018] EWHC 123 (TCC); [2018] BLR 173.
41 *Grove*, at para 140; see also paras 67 to 144 for Coulson J's full analysis of the authorities.

that Coulson J's decision would be reversed, but given the conflicting authorities at the TCC level, the Court of Appeal's ruling would bring clarity by formally overruling *ISG*, and the industry should watch this space for the remainder of 2018. In the meantime, Coulson J's decision is likely to be considered authoritative, but "smash and grab" adjudications will probably continue to be an important recourse for contractors, especially during the currency of a project.

Pay less notices and final accounts

It has been the common sense view long held within the industry that the HGCRA, particularly section 111 on the effect of the "notified sum", applies equally to interim payments and final accounts. This was, of course, the view taken by the Court of Appeal in *Rupert Morgan Building Services (LLC) Ltd v Jervis and Another*,[42] where Jacob LJ observed (in relation to the HGCRA prior to the amendments in 2009) that "it is common ground that section 111(1) applies to both interim and final certificates".[43]

The position was never quite settled under the amended HGCRA and, like London buses, you can wait ages for one and then two come along at once. First, the Court of Appeal had to decide whether a pay less notice was necessary for a termination account in *Adam Architecture Ltd v Halsbury Homes Ltd*.[44] In his judgment, Jackson LJ had no difficulty at all departing from previous dicta in the House of Lords to the contrary,[45] holding that the language of section 111 of the HGCRA (as amended) clearly applies "where a payment is provided for by a construction contract". Jackson LJ took the view that:

> "[...] A contractor is entitled to refer issues concerning interim payments or the final account to adjudication. The adjudicator will reach a temporarily binding decision. The employer must pay whatever the adjudicator orders, but can argue about it later and claw back any overpayment."[46]

This has given the HGCRA a degree of doctrinal purity and certainty, as it makes sense that the statutory payment regime should apply (insofar as it regulates cash flow) whether it is an interim payment or a final account. Moreover, Jackson LJ has reinforced the point made in *Harding* that payment of the notified final account sum in the absence of a pay less notice is not normally final or conclusive, and an employer simply has to pay now and argue later. Thus, the Court of Appeal in *Adam Architecture* readily found that the notified final account sum was payable.

The default position under HGCRA may be displaced by bespoke contractual provisions, as was the case in *Systems Pipework*, where the contract provided that a final account "will be deemed to have been agreed and will be binding on the parties" in the absence of written dissent.[47] In these circumstances, the TCC would be anxious to ensure that the final account sum was properly notified, and would be slow to conclude that there was no sufficient dissent:

42 [2003] EWCA Civ 1563; [2004] BLR 18.
43 *Rupert Morgan* at para 9.
44 [2017] EWCA Civ 1735; [2018] BLR 1.
45 *Melville Dundas Ltd (in receivership) and Others v George Wimpey UK Ltd and Another* [2007] UKHL 18; [2007] BLR 257, at paras 41 to 42.
46 *Adam Architecture Ltd v Halsbury Homes Ltd* [2017] EWCA Civ 1735; [2018] BLR 1, at para 53.
47 *Systems Pipework Ltd v Rotary Building Services Ltd* [2017] EWHC 3235 (TCC); [2018] BLR 123, at para 6.

> "[...] because in this instance, the court is dealing, not with an interim application which might be capable of subsequent adjustment or modification, but a final account entitlement which, on the defendant's case, would be lost to the claimant for all time if there has been a valid notification and no dissent."[48]

Ultimately, one comes back again to the question of how the decisions in *Adam Architecture* and *Harding* are consistent with the position of interim payments under *ISG* and *Galliford*. In light of Coulson J's recent decision in *Grove*, it would be desirable for the Court of Appeal to iron out the inconsistency and bring the case law on the whole in line with orthodoxy (if indeed there is one).

Adjudication procedure and enforcement

The TCC has also seen another prolific year in terms of decisions relating to adjudication procedure and adjudication enforcement, which provide helpful guidance to the industry on the court's supervisory jurisdiction, particularly (1) Part 8 proceedings during adjudication; (2) Part 8 proceedings to resist enforcement; (3) challenges to enforcement; and (4) adjudicator's fees and adjudication costs.

Part 8 proceedings during adjudication

There has been increasing use of Part 8 claims to obtain an injunction against a party which has commenced an adjudication. The threshold that has to be met, however, should not be underestimated, as was made clear by a number of decisions in 2017. The judgment in *Jacobs UK Ltd (Formerly known as Jacobs Engineering UK Ltd) v Skanska Construction UK Ltd*[49] was one such example.

In *Jacobs*, the referring party withdrew its reference to adjudication and served a fresh notice of adjudication on substantially the same dispute, after it had failed to obtain an extension of time for its reply (because its counsel had a timetable clash – something which would resonate with many a legal practitioner). The responding party sought an injunction against the second adjudication, even though it was well established that there is no express or implied restriction that precludes a party from withdrawing a referral, and there is no general principle of abuse of process in adjudication.[50] O'Farrell J gave short shrift to the application and refused to grant any injunctive relief:

> "[...] unreasonable behaviour by one party will not automatically deprive it of the right to adjudicate the dispute in question in a subsequent reference. The court will not intervene unless the further reference is both unreasonable and oppressive. [...] The inconvenience and additional costs suffered by Jacobs as a result of the second adjudication are not so severe or exceptional so as to warrant intervention by the courts by way of injunctive relief."[51]

---

48 *Systems Pipework*, at para 18.
49 [2017] EWHC 2395 (TCC); [2017] BLR 619.
50 See *Midland Expressway Ltd and Another v Carillion Construction Ltd and Others* [2006] EWHC 1505; [2006] BLR 325, *Lanes Group plc v Galliford Try Infrastructure Ltd (trading as Galliford Try Rail)* [2011] EWCA Civ 1617; [2012] BLR 121, *Connex South Eastern Ltd v MJ Building Services Group plc* [2005] EWCA Civ 193; [2005] BLR 201.
51 *Jacobs*, at para 36.

The courts' cautious approach to Part 8 proceedings arising from the commencement of an adjudication can also be gleaned in *Merit Holdings Ltd v Michael J Lonsdale Ltd*,[52] in which Jefford J took the opportunity to emphasise that "[i]t should not be assumed that some relationship to an adjudication and an adjudication label means that it is automatically appropriate for a case to be dealt with in this way. [...] The experience of this court shows that there is a real risk of the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions".[53]

The scenario in *Merit* was a good case in point – there were a series of adjudications in the background and the Part 8 proceedings concerned the determination of whether the parties' conduct created a new contract or varied an existing contract under certain letters of intent, which turned out (unsurprisingly) to be an involved issue requiring a considerable amount of factual evidence. In the end, Jefford J refused to make any of the declarations sought, which should make parties think twice before attempting a Part 8 claim in the future:

> "Although I have been assured by the parties that I have all the relevant facts, the discomfort which Mr Hickey QC anticipated I would feel in reaching conclusions on the contractual relationship between the parties is acute when I am asked to do so in a complete vacuum of information about the circumstances of this project and its progress, which it can readily be seen may be relevant to what the parties agreed in the course of an ongoing project. I have found this issue by no means easy but I have concluded that it would not be appropriate for me to go further in determining the contractual relationship between the parties at this stage."[54]

The moral of the story is that Part 8 proceedings are not to be seen as a panacea for contentious issues arising from adjudications

It is clear that Part 8 proceedings often provide a battleground for serial adjudications, and this can lead to some rather difficult cases. One of the hardest in 2017 was arguably *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd*.[55] Here, Coulson J had to consider whether a previous adjudication determining Mailbox's entitlement to liquidated damages would preclude Galliford from commencing a subsequent adjudication regarding its entitlement to extensions of time. Coulson J summarised the conflicting principles as follows:

> "On the one hand, it is trite law that, once a crystallised dispute has arisen, a defending party in adjudication cannot seek to limit the defence previously advanced, much less to save parts of that defence for another day [...]. On the other hand, in a second adjudication, a contractor is entitled to defend himself against a claim for liquidated damages by relying on a full extension of time claim, even though he has already made a limited extension claim in an earlier adjudication [...]."[56]

52 [2017] EWHC 2450 (TCC); [2018] BLR 14.
53 *Merit*, at paras 20 and 22.
54 Merit, at para 47.
55 [2017] EWHC 1405 (TCC); [2017] BLR 443.
56 *Mailbox*, at para 2 (citing, inter alia, *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC); [2008] BLR 250 and *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1373; [2007] BLR 67).

After reviewing the relevant case law, Coulson J considered that the first adjudication decision on Mailbox's entitlement to liquidated damages was binding and could not be disturbed in any subsequent adjudication (unless and until the first decision was overturned by the court).[57] It followed that Galliford could not cherry-pick on claims to put forward as a defence and then pursue further extensions of time in any subsequent adjudication:

> "[...] the [first] dispute referred to the adjudicator by the notice of adjudication on 19 August 2016, was a dispute about liquidated damages (and therefore delay) across all the sections of the work. It therefore encompassed all of Mailbox's claims for liquidated damages, and all of GTB's entitlements to an extension of time. In this way, the crystallised dispute included all time-related issues [...] it follows that GTB were not entitled to seek to defend themselves by reference to just a few of the potential relevant events, and keep others back for another day."[58]

The moral of the story is that Part 8 proceedings are not to be seen as a panacea for contentious issues arising from adjudications. Whilst serial adjudications would often give rise to arguments regarding the scope of the respective disputes and merit the courts' intervention (as in *Mailbox*), the position is different with attempts to short-circuit complex factual inquiries (as in *Merit*) or to argue some form of abuse of process (as in *Jacobs*), and parties should carefully consider the prospects before commencing Part 8 proceedings as a tactical manoeuvre in the middle of an adjudication.

Part 8 proceedings to resist enforcement

In tandem with the growing trend of Part 8 applications arising from the commencement of adjudications, there has been an increasing use of Part 8 claims for declarations to resist enforcement of an adjudication decision, ever since the seminal decision of *Caledonian Modular Ltd v Mar City Developments Ltd*.[59] The judgments in *Kersfield* and *Surrey* discussed above arose from Part 8 proceedings resisting enforcement of adjudication decisions. The usefulness of this procedure was recognised by Coulson J in *Hutton Construction Ltd v Wilson Properties (London) Ltd*,[60] not just as a matter of form, but as a matter of practical procedure:

> "[...] If, at the outset of the case, the court is aware that there is a Part 8 claim where the arguments will be more involved than would ordinarily arise on an adjudication enforcement, the court will be able to list the hearing for a longer timeslot, and will be less concerned about fixing it within the 28 days. After all, a hearing at which final declarations are being sought is rather different to a straightforward adjudication enforcement. *Kersfield* is a good example of this sort of case: extensive pre-reading, a whole day's hearing, and a detailed reserved judgment by O'Farrell J."

As Coulson J observed, "the practice which has grown up around challenges of this sort has worked relatively well, but only where there has been a large measure of consent between the parties from the outset. The problems in the present case, and in many other recent cases, have arisen because there has been no such consent".[61]

57 *Mailbox*, at paras 57 to 58.
58 *Mailbox*, at paras 64 and 66.
59 [2015] EWHC 1855 (TCC); [2015] BLR 694.
60 [2017] EWHC 517 (TCC); [2017] BLR 344 at para 12.
61 *Hutton*, at para 13.

In those circumstances, the TCC would have to consider whether there is a short and self-contained issue requiring no oral evidence, which would be unconscionable for the court to ignore on a summary judgment application.[62]

In *Hutton*, Coulson J was quick to re-emphasise that 99 cases out of 100 would not be appropriate for a reconsideration of the adjudicator's decision during enforcement proceedings. Practically speaking, Part 8 proceedings are usually limited to declarations "that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document".[63]

The Part 8 claim in *Hutton*, however, was made late in the day, and "the points raised by the defendant endeavour to rerun the entirety of the issues in the adjudication. [...] The court, on an adjudication enforcement, simply cannot deal with all of the points – and more – raised in the adjudication". In those circumstances, and in the absence of consent, the TCC would be slow to allow adjudication to turn into "the first part of a two-stage process, with everything coming back to the court for review prior to enforcement".[64]

This case is a helpful reminder to parties that wish to resist enforcement simply because they disagree with the adjudicator's decision. Indeed, if that were possible, then almost every adjudication decision would be subject to review by the TCC, which flies in the face of the temporary finality which adjudication decisions are meant to provide. As Coulson J put it:

> "In my view, many of the applications which are currently being made on this basis by disgruntled defendants (and which are not the subject of the consensual process noted above) are an abuse of the court process. The TCC works hard to ensure that there is an enforcement hearing within about 28 days of commencement of proceedings. The court does not have the resources to allow defendants to re-run large parts of an adjudication at a disputed enforcement hearing [...]."[65]

Challenges to adjudication enforcement

The adjudication enforcement space has long thrived on jurisdictional challenges and arguments of natural justice. Veterans of the adjudication process are no doubt accustomed to general reservations as to jurisdictional objections, with the intention of keeping their powder dry pending the substantive decision of the adjudicator.

It is important to bear in mind, however, that a jurisdictional challenge can be implicitly waived if a specific objection has been taken during an adjudication, and there is no full and express reservation of the right to challenge a decision generally. The judgment in *Morgan Sindall Construction and Infrastructure Ltd v Westcrowns Contracting Services Ltd*[66] serves as an important reminder. In that case, the Outer House of the Scottish Court of Session followed previous TCC case law[67] and held that "the issue raised before the court [ie the scope of the Notice

62 *Hutton*, at para 17.
63 *Hutton*, at para 18.
64 *Hutton*, at paras 34 and 37.
65 *Hutton*, at para 21.
66 [2017] CSOH 145.
67 See eg *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); [2010] BLR 377.

of Adjudication] was plainly available to be taken during the adjudication and indeed could have been raised on receipt of the Notice of Adjudication",[68] such that the jurisdictional objection taken in the court had been implicitly waived. The importance of maintaining a general reservation of a party's right to challenge jurisdiction cannot be overstated.

Needless to say, it is in any event a tall order to actually persuade the courts that a jurisdictional objection is well-founded. As Fraser J observed in his 2016 judgment in *Amey Wye Valley Ltd v The County of Herefordshire District Council*: "Adjudicator's decisions will be enforced by the courts, regardless of errors of fact or law [...] dissatisfied parties should take steps finally to resolve the substantive dispute, rather than waste time and money opposing enforcement. Adjudication is a merely temporary resolution of any dispute."[69]

Normally, it is the responding party which would seek to raise a jurisdictional challenge in order to wriggle out of an otherwise binding decision. A rather unusual case came before the TCC in *AECOM Design Build Ltd v Staptina Engineering Services Ltd*,[70] where it was the referring party (AECOM) seeking a number of Part 8 declarations to limit the effect of the adjudicator's decision being enforced. In essence, AECOM argued that the adjudicator did not have jurisdiction to decide that the deductions which AECOM was entitled to make were limited to the sums that it would have cost Staptina to remedy the relevant defects; alternatively, AECOM argued that there was a breach of natural justice as it did not have a fair opportunity to put forward a case on the quantification of the deductions.[71]

Fraser J applied the well-established principles for the determination of the scope of an adjudicator's jurisdiction and the scope of the findings, and rejected the argument that the adjudicator's jurisdiction was limited to determining whether or not AECOM was entitled to make deductions – "a dispute cannot be defined by its potential answers. It is a wholly circular approach to considering the scope of jurisdiction of an adjudicator, and the nature of the dispute that was referred to her, by reference to one of two (or even any) potential answers".[72] Fraser J went on to note the conceptual difficulties of objecting to the scope of the answer given by an adjudicator to the question referred:

> "[...] It is fraught with even more difficulty when one considers that, almost uniquely in quasi-judicial resolution of disputes, adjudicators are entitled to be wrong in the answers that they give, both in fact and law. If there are only two answers available, yet an adjudicator were to choose (perhaps incorrectly) a third, that does not go to her acting outside her jurisdiction. That would be answering the right question but in the wrong way."[73]

The issue of breach of natural justice was similarly decided against AECOM. Fraser J made it abundantly clear that on questions of contractual interpretation, "the correct answer (as the adjudicator may see it) may not have been expressly proposed by either one of the parties. That does not mean that by choosing a different answer, the adjudicator is breaching natural justice by failing to notify the parties of this and inviting further submissions".[74] The fact that a party wished

68 *Morgan Sindall Construction and Infrastructure Ltd v Westcrowns Contracting Services Ltd* [2017] CSOH 145, at para 20.
69 [2016] EWHC 2368 (TCC); [2016] BLR 698, at para 30.
70 [2017] EWHC 723 (TCC); [2017] BLR 329.
71 *AECOM*, at paras 17 to 18.
72 *AECOM*, at para 30.
73 *AECOM*, at para 31.
74 *AECOM*, at para 44.

that it had put in more comprehensive submissions is by no means the same as a breach of natural justice.

The high threshold for a challenge to enforcement based on an alleged breach of natural justice was further illustrated by the Outer House of the Scottish Court of Session decision in *Bell Building Projects Ltd v Arnold Clark Automobiles Ltd*.[75] In this case, Arnold Clark complained that the issue of contra-charges had been left to the last minute, such that it had not been given a fair opportunity to respond by providing more substantiation. Lord Tyre took the view that there was "no obligation incumbent upon the adjudicator to request these documents", and in any event, "[s]omething had to be done last and, given the size of the adjudicator's task, it was highly likely that if the matter left to last gave rise to questions, they would have to be addressed within a very short time. In the event Arnold Clark was able to respond, and its complaint, in substance, was that the adjudicator ought to have been satisfied by the response".[76] It is clear that the courts are unlikely to be sympathetic to attempts to criticise an adjudicator for making a decision based on the (limited) materials adduced, and it would take something out of the ordinary to establish that a party has not been afforded a proper opportunity to present its case.

Closely related to the principles of natural justice is the issue of apparent bias. This is not an allegation which should lightly be made, and when it is raised it tends to attract a lot of attention – one calls to mind, for example, *Cofely Ltd v Anthony Bingham and Knowles Ltd*[77] in 2016. Interestingly, 2017 saw a Singaporean decision regarding an adjudicator's apparent bias. In *UES Holdings Pte Ltd v KH Foges Pte Ltd*,[78] the adjudicator was challenged on the basis of bias by association. Applying the well-established test for apparent bias,[79] Loh J concluded that a reasonable and fair-minded observer would be aware of the reality of previous dealings within the industry, and the last association with a connected party was remote in time and sporadic (twice in 12 years), and this was not affected by the adjudicator's failure to disclose this association.[80] This is a helpful reminder that the threshold for establishing apparent bias is a high one, and a strong and recent connection would usually be necessary.

Another popular ground for jurisdictional challenges is based on the argument that the dispute falls under different contracts. This was the basis of the challenge in *RCS Contractors Ltd v Conway*,[81] which involved the final account in respect of works at three different sites, and the adjudicator was criticised for deciding that there was one construction contract for all the works. This type of jurisdictional challenge often requires a consideration of oral and documentary evidence going well beyond the scope of a summary judgment hearing. In *RCS*, the issue was determined at a trial, although Coulson J concluded at the end of the day that there was actually only one contract on the balance of probabilities, and proceeded to enforce the adjudicator's decision.[82] What is most interesting, however, is Coulson J's criticism of the amendments to the HGCRA, which repealed the requirement of a written construction contract for statutory adjudications. Coulson J observed:

> "[...] Section 107 was, in my view, unthinkingly repealed, meaning that (as here) adjudicators have now to grapple with entirely oral contracts, with

75 [2017] CSOH 55.
76 *Bell*, at paras 30 to 31.
77 [2016] EWHC 240 (Comm); [2016] BLR 187.
78 [2017] SGHC 114.
79 See *In re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350.
80 *UES*, at paras 55 to 67.
81 [2017] EWHC 715 (TCC); [2017] BLR 376.
82 *RCS*, at paras 13 to 19.

> all the uncertainty and contention that such a situation can engender. In addition, in such cases, even if an adjudicator finds an oral contact, the responding party is likely (as again happened here) to obtain permission to defend a claimant's claim on enforcement, because only rarely will a disputed oral agreement be the subject of a successful summary judgment application. Thus in this case, the result of the repeal of section 107 has been a process lasting 16 months and the incurring of large sums by way of costs. That is the opposite of the quick, cheap dispute resolution service that adjudication was intended to provide."[83]

Parties should therefore be aware of the cost risk of pursuing an adjudication in respect of oral contracts, and there should be no illusion that the route to enforcement would necessarily be a walk in the park. It seems unlikely that Parliament would actually row back on the liberation of statutory adjudication from the strictures of a written construction contract. However, despite the temptation to challenge an unfavourable decision and fight to the very end, a little commercial common sense often goes a long way, and parties would have to properly consider whether the value of the dispute would justify the time and cost of resisting enforcement.

Adjudicator's fees and adjudication costs

Before leaving the topic of adjudication, it is necessary to mention two noteworthy decisions in relation to adjudicator's fees and adjudication costs. First, in *Christopher Linnett Ltd and Another v Matthew J Harding (trading as M J Harding Contractors)*,[84] DHCJ Nissen QC had to consider whether an adjudicator (Mr Christopher Linnett) was entitled to recover statutory interest and fixed compensation for debt recovery costs under the Late Payment of Commercial Debts (Interest) Act 1998 in respect of unpaid adjudicator's fees. Mr Harding, who was the unsuccessful responding party in the adjudication before Mr Linnett, sought to avoid paying the adjudicator's fees by arguing that the contract did not incorporate the adjudicator's terms of appointment; that he was a "consumer"; and that the contract was a "distance contract".

DHCJ Nissen QC concluded that Mr Harding "did in fact participate in the adjudication process albeit without prejudice to his jurisdictional objections and he had, by his conduct, thereby requested the adjudicator to adjudicate on the dispute", such that a contract was formed by conduct on the adjudicator's terms and Mr Harding "was a party to an adjudicator's agreement".[85]

Further, DHCJ Nissen QC had no difficulty in deciding that Mr Harding was acting in the course of business in the adjudication, as "[i]t was very much part of the Defendant's trade or business to minimise his financial liability to the employers by requesting the provision of adjudication services so as to obtain a favourable decision in that regard".[86] The argument that it was a "distance contract" was also a non-starter, as there was simply no "organised distance sales scheme", and the adjudicator's contract was concluded by offer and acceptance.[87] This decision is likely to encourage commercial parties to pay an adjudicator's fees promptly in order to avoid statutory interest and compensation.

83 *RCS*, at para 22.
84 [2017] EWHC 1781 (TCC); [2017] BLR 498.
85 *Linnett*, at paras 46 to 47.
86 *Linnett*, at para 84.
87 *Linnett*, at para 86.

The second judgment of interest is *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd*.[88] That decision addressed, inter alia, the perennial issue of whether an adjudicator has the power to award legal costs. There are various dicta to the effect that legal costs are irrecoverable under section 108A of the HGCRA – for instance, in the earlier decision of *Wes Futures Ltd v Allen Wilson Construction Ltd*, Coulson J rejected an argument that those costs could be recovered under a Part 36 settlement.[89] However, in *Lulu Construction Ltd v Mulalley & Co Ltd*, DHCJ Acton Davis QC held that the adjudicator had jurisdiction to award debt recovery costs under the Late Payment of Commercial Debts (Interest) Act 1998, because "such costs are clearly connected with and ancillary to the referred dispute and must properly be considered part of it".[90]

In *Enviroflow*, O'Farrell J performed the burial rites for any future attempt to rely on an implied term in respect of statutory debt recovery costs in a typical adjudication. O'Farrell J made it abundantly clear that such costs are irrecoverable unless there is an ad hoc agreement to the contrary after the notice of adjudication:

> "[...] That implied term falls within the definition of 'any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.' Therefore, it is caught by section 108A, subsection (2), and is ineffective unless the subject of an agreement made in writing after the notice of adjudication."[91]

The position, therefore, now seems to be settled firmly against any recovery of legal costs incurred during an adjudication. Interestingly, however, O'Farrell J has created an exception to this rule in the *Jacobs* decision discussed above. There, O'Farrell J allowed a party to recover the "wasted costs" of an adjudication as damages, on the basis that the unreasonable withdrawal of a referral was in breach of "an ad hoc agreement under which the procedure and timetable to resolve the referred dispute in the first adjudication were agreed and fixed".[92]

It is important to remember that *Jacobs* specifically involved an ad hoc agreement and unreasonable conduct on the part of the referring party. The result is unlikely to be the same in the case of a contractual or statutory adjudication. Nevertheless, parties may take *Jacobs* as a cue for more innovative arguments to recover costs as damages. The TCC will not lightly accept such arguments, for to do so would allow parties to circumvent section 108A HGCRA. For now, all that can really be said is: watch this space.

Interpretation and rectification of construction contracts

Contractual interpretation and the implication of terms are perennial questions in construction disputes, be it adjudication, litigation or arbitration. Those within the industry would no doubt recall the landmark Supreme Court decision of *Arnold v Britton*,[93] which is often considered to have reinforced a high threshold for the

88 [2017] EWHC 2159 (TCC).
89 [2016] EWHC 2863 (TCC), at para 16.
90 [2016] EWHC 1852 (TCC), at para 9.
91 *Enviroflow*, at para 53.
92 *Jacobs UK Ltd (Formerly known as Jacobs Engineering UK Ltd) v Skanska Construction UK Ltd* [2017] EWHC 2395 (TCC); [2017] BLR 619, at para 37.
93 [2015] UKSC 36.

reliance on business common sense in interpretation. The year 2017 was particularly interesting in that a number of cases saw those exact principles in action.

Contractual interpretation

While the Supreme Court judgment in *Wood v Capita Insurance Services Ltd*[94] did not concern a construction dispute and instead examined the interpretation of a poorly drafted indemnity clause in a sale and purchase of shares, it is most interesting for its discussion of the principles of interpretation. Conscious of the commonly held view that *Arnold* emasculated the role of business common sense in interpretation, Lord Hodge emphatically stated that "[o]n the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing", and that the recent developments are "one of continuity rather than change".[95]

Whilst *Wood* was not technically laying down any new principles, it serves as a helpful reminder that interpretation is a "unitary exercise" which involves an "iterative process" balancing the different considerations.[96] In fact, the court would normally deploy all the available tools to arrive at the reasonable intention of the parties:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. [...]"[97]

Although the dicta in *Wood* may have moderated the perceived effect of *Arnold,* it is not necessarily any easier to establish an interpretation largely based on business common sense and unsupported by the language used. As Lord Hodge observed, "[b]usiness common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended".[98] The courts will be vigilant to any attempt by a party to escape what is effectively a bad bargain (as in *Wood*).

It seems that short of some absurdity or impossibility, business common sense is unlikely to tip the balance in favour of one interpretation over another. This was precisely the approach taken in *Dawnus Construction Holdings v Amey LG Ltd*,[99] which arose from the Plymouth Eastern Corridor Integrated Transport Scheme. In that case, HHJ Keyser QC considered whether a recital in a subcontract incorporated from the main contract upstream a condition precedent to the commencement of legal proceedings after an adjudication.

Applying the well-established principles of interpretation,[100] HHJ Keyser QC considered that the condition precedent in the main contract was incorporated,

94 [2017] UKSC 24; [2018] Lloyd's Rep Plus 14.
95 *Wood*, at paras 14 to 15.
96 *Wood*, at para 12.
97 *Wood*, at para 13.
98 *Wood*, at para 28.
99 [2017] EWHC B13 (TCC).
100 *Dawnus*, at para 7.

as the recital unambiguously stated that the "terms and conditions of the Main Contract shall apply (save where the provisions of the agreement conflict or otherwise specifically require) as if they were repeated in this agreement".[101] HHJ Keyser QC further held that there was no conflict with the unfettered right to litigate under the subcontract, and concluded that:

> "The result gives rise to no commercial absurdity. There is nothing contrary to common sense in having a restriction on the right to litigate. There are obvious reasons why parties may find certainty and finality advantageous." [102]

Interestingly, the above emphasis on the natural and ordinary meaning of the language has also made its way into the Hong Kong courts. In *Chan Chi Lam trading as Hoi Fat Construction Company v Lam Woo & Co Ltd and Others*,[103] Mimmie Chan J had to construe a re-measurement clause based on the conventional principles of interpretation.[104] Mimmie Chan J considered that the language "clearly states that the quantities in the bills of quantities are 'provisional', and are subject to re-measurement, on a back-to-back basis",[105] and stressed that the court should not "consider any unfair consequences of a construction of the plain wording of a clause".[106] In so holding, she relied on Lord Neuberger's dicta in *Arnold* that "a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed".[107]

In contrast to the above, the Court of Appeal decision in *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd*[108] is an illuminating example of when business common sense could come to the rescue. Here, the question was whether the minimum acceptable performance levels (MAPs) or performance profit thresholds (PPTs) set out in an example table were in fact intended to be binding – an issue which the trial judge described as "finely balanced". With the principles in *Arnold* and *Rainy Sky*[109] firmly in mind, Jackson LJ observed that:

> "The contract in this case is a commercial one, made between a local authority and a building contractor. Self-evidently, Rydon intended to receive all the bonuses which were due to it under the incentivisation scheme. That was only possible if the contract specified MAPs. Also self-evidently, Sutton intended to retain their valuable power to terminate for poor service under clause 12.1.9 in conjunction with clause 13.1.1. That was only feasible if the contract contained MAPs."[110]

Jackson LJ thus concluded that both parties must have intended the contract to specify MAPs, and since the only MAPs in the contract were contained in the examples, "applying the approach mandated by the Supreme Court in *Rainy Sky* and *Arnold*, the contract properly construed must mean that the MAP figures set out in examples 1, 2 and 3 are the actual MAPs for the year 2013/2014, not hypothetical MAPs by way of illustration".[111] The unworkability of the incentivisation and termination provisions in the absence of MAPs mobilised business common sense in favour of Sutton Housing's interpretation.

---

101 *Dawnus*, at para 27.
102 *Dawnus*, at para 28.
103 Hong Kong Court of First Instance, unreported, HCCT 52/2014, 13 March 2017.
104 *Chan Chi Lam*, at paras 22 to 23.
105 *Chan Chi Lam*, at para 24.
106 *Chan Chi Lam*, at para 28.
107 *Arnold v Britton* [2015] UKSC 36, at para 20.
108 [2017] EWCA Civ 359.
109 *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50; [2012] BLR 132.
110 *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2017] EWCA Civ 359, at para 52.
111 *Sutton*, at para 53.

Therefore, it appears that business common sense now applies as some sort of a safety valve reserved for rather extreme cases where the language leads to an absurdity. Whilst each interpretive exercise very much depends on the terms of the particular contract in question, it seems from the courts' recent approach that the natural and ordinary meaning of the words used would often be the starting point and also the end point in most cases. It will not be the norm for the courts to displace the clear language chosen by the parties – if there is any unilateral or common mistake as to the terms, that is more likely to be a task for rectification, which is discussed below.

Rectification

Rectification is notoriously difficult to establish, but a recent success story is *Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd*,[112] which arose from a contract for waste recycling services for a period of 15 years. Viridor's final tender included a payment mechanism, but when the Borough drew up the contract documents, Viridor mistakenly provided an outdated, incomplete version of the payment mechanism, which contained various gaps (for example, the lack of indexation for inflation) and was inoperable. The Borough sought rectification of the contract.

Coulson J reiterated the necessary requirements for rectification, as previously stated in *Swainland Builders Ltd v Freehold Properties Ltd*.[113] On that basis Coulson J readily found that there was a common intention to index the payments for inflation, as was apparent from Viridor's tender, which was accepted by the Borough. This was an outward expression of accord, and there was no evidence of any further negotiations about indexation. Although the mistake was a glaring one, it did not follow that it could not have been a common mistake.[114]

This is perhaps a rather striking example of an obvious error in respect of a contract document. However, errors in contracts are far from a rarity despite the age of technology that we now live in. Coulson J lamented that the "error is perhaps a sad reflection of the fact that modern day contracts of this kind are so complicated that nobody (not even the consultants) bothers to check the actual documentation being signed".[115] Parties would be well advised to check and understand their contracts thoroughly, especially since the financial stakes are high.

Exclusion/limitation clauses

The courts' recent emphasis on the natural and ordinary meaning of the contractual language is also evident in various decisions concerning the interpretation of exclusion/limitation clauses. In *McGee Group Ltd v Galliford Try Building Ltd*,[116] the TCC considered whether a liability cap of 10% of the value of the subcontract only applied to loss and expense for delay and disruption but not other claims for delay and disruption. Coulson J held that the "natural meaning of clause 2.21B is plain" and capped any financial claims (be it direct loss and expense or damages) arising from delay and disruption,[117] and there was nothing to displace such a clear interpretation:

112 [2017] EWHC 239 (TCC); [2017] BLR 216.
113 [2002] EWCA Civ 560, at para 33.
114 *Viridor*, at paras 49 to 71.
115 *Viridor*, at para 67.
116 [2017] EWHC 87 (TCC).
117 *McGee Group*, at para 33.

> "[...] a clause which seeks to limit the liability of one party to a commercial contract, for some or all of the claims which may be made by the other party, should generally be treated as an element of the parties' wider allocation of benefit, risk and responsibility. No special rules apply to the construction or interpretation of such a clause although, in order to have the effect contended for by the party relying upon it, a clause limiting liability must be clear and unambiguous."[118]

Similarly, the Court of Appeal had no difficulty deciding in *Persimmon Homes Ltd v Ove Arup & Partners Ltd and Another*[119] that the overall liability cap, the limitation of liability for pollution and contamination, and the exclusion of liability for asbestos, were not confined to claims "for causing the spread of" contamination or asbestos – "[b]oth the language used by the parties and any application of business common sense lead to the same conclusion".[120] Consistent with the recent approach of the courts, Jackson LJ did not consider it necessary to resort to the principle of contra proferentem, given that "[i]n relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role".[121] Jackson LJ stressed that the courts should be slow to disturb the parties' allocation of risks:

> "In major construction contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree."[122]

A more extreme example can be found in *Goodlife Foods Ltd v Hall Fire Protection Ltd*.[123] In this judgment, HHJ Davies considered that a clause excluding "all liability, loss, damage or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason" clearly had the effect of excluding liability for personal injury and death. HHJ Davies observed that the courts should not adopt a strained interpretation, even if its effect would be draconian and was unlikely to have been intended:

> "[...] I accept that it might be thought to be intrinsically unlikely that this clause could be thought to have been intended to have such a draconian and legally impermissible effect in relation to such a narrow class of persons. Nonetheless, the words 'damage caused to your persons' seem to me to be in no way unclear or ambiguous. The surrounding words do not make it clear that only financial loss, whether direct or contingent upon physical damage to property or goods, is covered. There is no need to adopt a strained or artificial interpretation to this clause, as might have been done in the past, since it would be of no legal effect anyway due to section 2(1) UCTA 1977."[124]

118 *McGee Group*, at para 25.
119 [2017] EWCA Civ 373; [2017] BLR 417.
120 *Persimmon*, at para 49.
121 *Persimmon*, at para 52.
122 *Persimmon*, at para 57.
123 [2017] EWHC 767 (TCC); [2017] BLR 389.
124 *Goodlife*, at para 44.

The reader will take comfort in the fact that the part of the provision which excluded liability for personal injury and death in *Goodlife* was in any event void under section 2(1) of the Unfair Contract Terms Act 1977, and the court had to proceed to assess whether the other parts of that provision were nonetheless reasonable and can be severed (which HHJ Davies found in the affirmative). It is abundantly clear that the role of strained interpretations and presumptions in cutting down exclusion clauses is largely a thing of the past.

Implied terms in construction contracts

Closely related to contractual interpretation is the question of implication of terms. The Supreme Court's judgment in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Another*[125] in 2015 should still be fresh in everyone's mind, and the courts have maintained a high threshold of necessity/obviousness for terms to be implied into a contract. As Lord Sumption suggested during the hearing for *Marks and Spencer,* a term is unlikely to be implied unless the contract lacks practical or commercial coherence.

Due diligence and expedition

The Singapore Court of Appeal judgment in *CAA Technologies Pte Ltd and Newcon Builders Pte Ltd*[126] shows the hurdle that a party must overcome in order to imply a term into a building contract – in that case, the very familiar term of due diligence and expedition. Although some may say that this is a common (and arguably obvious term) to include expressly in many construction contracts, the implication of such a term is a wholly different question. Indeed, the fact that this is usually an express term militated against its implication. As Chong JA observed:

> "It is common ground among parties that due diligence clauses are commonly found in standard form construction contracts in Singapore. Given that parties to construction contracts have recourse to standard form contracts which they can either use or refer to, the fact that they ultimately agreed on a contract without due diligence clauses may well mean that they elected not to include such clauses. If so, it follows that there would then be no gap in the contract, and thus no room for a term to be implied."[127]

Chong JA further took the view that "it would usually be unnecessary to imply a term of due diligence in construction contracts that already provide for a certain completion date of the main contractual obligation".[128] Accordingly, the Singapore Court of Appeal held that there was no implied term of due diligence and expedition, following the earlier TCC decision in *Leander Construction Ltd v Mulalley and Company Ltd*.[129] The reasoning in these decisions is perfectly consistent with the general approach to the implication of terms, and it would likely be an ambitious task for any party seeking to argue otherwise.

125 [2015] UKSC 72.
126 [2017] SGCA 53.
127 *CAA Technologies*, at para 71.
128 *CAA Technologies*, at para 79.
129 [2011] EWHC 3449 (TCC); [2012] BLR 152, at paras 40 to 51; this can be contrasted with the approach in Hong Kong, eg in *Chan Shun Kei v Hong Kong Construction (Hong Kong) Ltd* (HKCFI, unreported, HCCT 2/2011, 7 February 2014).

Good faith

Since the decision of Leggatt J in *Yam Seng PTE Ltd (A Company Registered in Singapore) v International Trade Corporation Ltd*,[130] the implied duty of good faith has featured more frequently in parties' submissions and in the courts' decisions – construction disputes are no exception. Indeed, the author has encountered a number of attempts by parties in adjudications to contend for implied duties of good faith (including inter alia for the purpose of recovering adjudication costs), although those arguments have rarely found favour with adjudicators and judges alike. As Moore-Bick LJ observed back in 2016, in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*:

> "In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organising principle" drawn from cases of disparate kinds. [...] There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction [...]."[131]

This reflects the traditional scepticism of the English courts towards a general implied duty of good faith, which is in stark contrast to the approach taken in some other common law jurisdictions, most notably in Canada.[132] In 2017, this judicial trend continued in the English courts. In *Ilkerler Otomotiv Sanayai Ve Ticaret Anonim Sirketi and Another v Perkins Engines Co Ltd*,[133] the claimants sought to rely on *Yam Seng* to contend for an implied term that "each party would provide the other with accurate and honest appraisals for the prospects from time to time of the relationship continuing, and on no account to give any misleading impression of those prospects", as a limitation on a contractual right of termination. Longmore LJ gave short shrift to this argument and considered that the implied term was unnecessary and inconsistent with the proper construction of the contract. Longmore LJ further distinguished *Yam Seng*, which contemplated cooperation during performance, from cooperation in relation to termination.[134] It is therefore likely to be a tall order to establish an implied duty of good faith, cooperation or honesty, if the primary purpose is to circumvent or improve on the express terms of a carefully negotiated contract.

This reflects the traditional scepticism of the English courts towards a general implied duty of good faith, which is in stark contrast to the approach taken in some other common law jurisdictions, most notably in Canada

Similarly, within the TCC, Coulson J grappled with the concept of duties of fairness and cooperation in *Costain Ltd v Tarmac Holdings Ltd*,[135] in the context of the express provision for mutual trust in a NEC3 contract. Whilst accepting that there

130 [2013] EWHC 111 (QB); [2013] BLR 147.
131 [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494, at para 45.
132 See this author's comparative discussion of the relevant authorities in Cheung, M, "Ethics in the tender process: implied duty of good faith and remedies for breach", [2017] ICLR 242.
133 [2017] EWCA Civ 183.
134 *Ilkerler*, at paras 27 to 29.
135 [2017] EWHC 319 (TCC); [2017] BLR 239.

is a duty not to improperly exploit or mislead the other party, Coulson J was "uneasy about a more general obligation to act 'fairly'; that is a difficult obligation to police because it is so subjective", and considered that mutual trust "does little more than say expressly what Vinelott J thought was implied into all construction contracts: see *Merton LBC v High Stanley Leach* [1986] 32 BLR 51".[136] It is clear that Coulson J was reluctant to give the express term too wide a compass, and did not consider that the provision was adding much value at all.

The above can be contrasted with the Australian decision in *Probuild Constructions (Australia) Pty Ltd v DDI Group Pty Ltd*.[137] Here, the New South Wales Court of Appeal readily assumed, in the context of a discretionary power to grant an extension of time where there were acts of prevention (as discussed further below), that there was an implied duty of good faith obliging the employer to exercise that contractual discretion.[138] Given the approach of the English courts thus far, it seems unlikely that the reasoning in *Probuild* would be followed in the UK. Indeed, insofar as the prevention principle is sufficient to dispose of the issue (which is not without controversy), it is unclear that an implied duty of good faith would actually add anything, except for a convenient shorthand for the courts' value judgment.

It is therefore unsurprising that in a recent lecture in Hong Kong, Sir Rupert Jackson was less than enthusiastic about the role of duties of good faith in construction contracts. He was emphatic that there is no room for the implication of a general duty of good faith:

> "There is generally no reason to imply such a nebulous provision of little utility. There is also a wider policy consideration. A large number of individuals, who had nothing to do with drawing up the contract, have to operate in accordance with its provisions. [...] To that end, they do not speculate about ethics or metaphysics. Nor do they ring up their lawyers at every turn. They look at the black letter provisions of the contract. That is what the court should do as well."[139]

Design liability

The scope and standard of a construction professional or a designer-builder's design obligations are often the subject of heated disputes, as the technical issues and financial consequences associated with defective design are often substantial. This can be a mixed question of contract and tort, depending on the factual matrix and the parties' relationship. In 2017, the courts delivered a number of important decisions which are likely to have an impact on the extent of design liability within the industry.

Assumption of responsibility

In the much-discussed judgment in *Lejonvarn v Burgess and Another*,[140] the Court of Appeal considered whether Mrs Lejonvarn, who assisted a friend and former

136 *Costain*, at paras 123 to 124.
137 [2017] NSWCA 151.
138 *Probuild*, at para 128 (citing *Alcatel Australia Ltd v Scarcella* [1998] NSWSC 483).
139 Sir Rupert Jackson, "Does good faith have any role in construction contracts?", Pinsent Masons Lecture in Hong Kong (22 November 2017), at para 6.11.
140 [2017] EWCA Civ 254; [2017] BLR 277.

neighbour with designing and supervising landscaping works, owed a duty of care in tort in respect of defects in the works. At first instance, DHCJ Nissen QC held that there was clearly no contractual relationship, but it was fair, just and reasonable to impose a tortious duty.

On appeal, Hamblen LJ considered the well-established case law in relation to assumption of responsibility in some detail,[141] and similarly held that Mrs Lejonvarn owed a duty of care to Mr and Mrs Burgess to exercise reasonable skill and care, to the extent that she did provide professional services acting as an architect and project manager (although there was no duty or obligation as such to provide those services):

> "In particular, the context was a professional one. It was not informal or social. There was an obvious relationship of proximity. Although she was not going to be paid initially the expectation was that she would be paid for later work. She held herself out as having professional skills. She said she would perform professional services and did so. She was aware that the Burgesses would be relying upon her to properly perform those services and it was foreseeable that economic loss would be caused to them if she did not."[142]

Although it is easy to misread this case as a general imposition of liability on ad hoc advice provided to a friend, the facts went well beyond that. Mrs Lejonvarn provided considerable professional input over a significant period of time in what was a very involved project, and expected to be paid for future services down the line. Therefore, this case serves as a helpful reminder for all construction professionals that what may at first sight be informal can readily evolve into an assumption of responsibility, and if that is not the desired outcome, then express caveats that professional advice should be independently sought would be wise.

Duty to consider and advise on cost

The scope of an architect's duties in respect of cost advice and value engineering is not an easy question, as employers often engage the specialist advice of quantity surveyors when it comes to issues of cost. That, however, does not mean that an architect can effectively absolve himself from all responsibility when it comes to cost. This was at the centre of the professional negligence claim in *Riva Properties Ltd and Others v Foster + Partners Ltd*,[143] which concerned the design of a luxury hotel at the Heathrow Airport.

In *Riva*, the architect sought to elide "advice on costs" with "designing the project to match the constraint of the budget". Fraser J rejected this attempt and pointed out that cost advice is "value engineering", which involved "making changes to a design to reduce the cost of building it" and does not require a quantity surveyor.[144] Fraser J therefore concluded that the architect had a duty under its appointment to consider and advise on cost:

> "Fosters did not have a free-standing obligation to provide detailed advice to the claimants on cost. However, the cost implications of Fosters' compliance with its obligations to provide the Normal Services did have to be taken into

141 See eg *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 1 Lloyd's Rep 485, *Henderson v Merrett Syndicates* [1995] 2 AC 145.
142 *Lejonvarn v Burgess and Another* [2017] EWCA Civ 254; [2017] BLR 277, at paras 86 to 87.
143 [2017] EWHC 2574 (TCC).
144 *Riva*, at para 127.

> account by Fosters when preparing the design. If any particular element, and the biosphere is again a good example, would increase the costs substantially, then Fosters had an obligation to advise the claimants of that. Further, Fosters did have an obligation under Stage C to design the project taking account of what had been produced in Stages A and B. One stage flowed into the other."[145]

Although the architect sought to argue that the employer was an experienced and sophisticated developer, in an attempt to dilute the architect's duties, that argument was rejected:

> "An experienced businessman who engages an architect to perform Stages A to L for a hotel project to be constructed within the budget of £70 to £100 million is no less entitled to have that engagement or retainer fulfilled, and to have the scheme designed within that budget, than a complete novice who does the same, and who has never been involved in constructing a building before."[146]

An architect can therefore expect to be held to the same standards whether or not its clients are experienced, although the question of breach (ie whether reasonable skill and care has been exercised) would turn on the facts, and the client's sophistication and expectations may well be relevant factors. It would be interesting to see in future cases whether other construction professionals will similarly owe duties to advise on cost, and whether findings of breach would be made in more nuanced cases short of a complete failure to consider the relevance of cost. If an architect seeks to qualify or limit the scope of his duties, it would be essential to do so expressly in the deed of appointment.

Fitness for purpose

Rarely does a construction case reach the highest court of the land, but in 2017, the much-awaited decision in *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and Another*[147] was handed down by the Supreme Court. The court had to grapple with various provisions in the contract which could be construed as inconsistent and conflicting. The dispute arose from the design, fabrication and installation of 60 offshore wind turbines – the Technical Requirements provided that the turbines "shall ensure a lifetime of 20 years in every aspect without planned replacement", but also required the turbines to comply with the J101 standards which (due to an error) would not have provided a design life of 20 years.

Lord Neuberger applied the "ordinary principles of contractual interpretation" outlined in *Wood* (as discussed above) as a starting point, and also considered various authorities on a contractor's liability for defects arising from compliance with the specifications.[148] Lord Neuberger took the view that "where two provisions of Section 3 impose different or inconsistent standards or requirements, rather than concluding that they are inconsistent, the correct analysis by virtue of para 3.1(i) is that the more rigorous or demanding of the two standards or requirements must prevail, as the less rigorous can properly be treated as a minimum requirement.

145 *Riva*, at para 129.
146 *Riva*, at para 132.
147 [2017] UKSC 59; [2017] BLR 477.
148 *MT Højgaard A/S*, at paras 37 to 43.

Further, if there is an inconsistency between a design requirement and the required criteria, [...] it was MTH's duty to identify the need to improve on the design accordingly".[149]

Notably, the Supreme Court was unimpressed by the argument that the Technical Requirements were "too slender a thread" on which to hang a much more onerous fitness for purpose obligation. Lord Neuberger observed that the Technical Requirements were squarely part of the contract, and said: "I do not see why that can be said to be an 'improbable [or] unbusinesslike' interpretation, especially as it is the natural meaning of the words used and is unsurprising in the light of the references in the TR to the design life of the Works being 20 years".[150] Lord Neuberger also emphasised that it is "very difficult, to argue that a contractual provision should not be given its natural meaning, and should instead be given no meaning or a meaning which renders it redundant".[151]

Notably, the Supreme Court was unimpressed by the argument that the Technical Requirements were "too slender a thread" on which to hang a much more onerous fitness for purpose obligation

This case will no doubt be seen as an example of the courts' continuing emphasis on the language used by the parties, even after the decision of *Wood*. It demonstrates the point made above that business common sense is unlikely to avail a party except in extreme cases of absurdity or impossibility, and any attempt to read down a contractual provision is likely to be an uphill struggle. Parties should take this as a timely reminder to check their contracts carefully and include express, overriding provisions which clarify the overall design obligations, be it reasonable skill and care or fitness for purpose.

Delay and prevention principle

It is virtually impossible to complete any building or engineering project without rubbing shoulders with delay, extensions of time, and the prevention principle. The significance of these issues (and the factual and analytical complexity which usually entails) is one of the key drivers behind the *SCL Delay and Disruption Protocol 2nd Edition* (SCL Protocol), which was finally published in February 2017 after extensive consultation and deliberation. In addition to the new SCL Protocol, there were a number of interesting cases on delay analysis and the prevention principle over the course of last year.

Contemporaneous versus time-distant delay analysis

The latest SCL Protocol sets out detailed guidelines in Guidance Part B for each of the Core Principles. Core Principle 1, which is given particular emphasis, deals with contemporaneous programmes and records. The SCL Protocol recommends that parties invest time and cost in record keeping, and to do so in electronic and searchable formats (such as through Building Information Modelling or BIM). This

149 *MT Højgaard A/S*, at para 45.
150 *MT Højgaard A/S*, at paras 48 to 49.
151 *MT Højgaard A/S*, at para 50.

is an important reminder for construction professionals and all stakeholders in the industry, as legal practitioners are far too familiar with the often insurmountable difficulties during fact-finding exercises in the majority of construction disputes.

Core Principle 4 of the SCL Protocol emphasises that "parties should attempt so far as possible to deal with the time impact of Employer Risk Events as the work proceeds", and a "wait and see" approach is highly discouraged. This echoes the primacy attached to the keeping of contemporaneous records, and it is fair to say that time-distant delay analysis should be seen as a last resort, although it may well be inevitable given the time and cost pressures during the currency of a project.

If it does come to a time-distant analysis ex post facto, then parties should take care in choosing their methodology – whilst the guidance to Core Principle 11 provides helpful explanations of various methods,[152] the ultimate goal is "ensuring that the conclusions derived from that analysis are sound from a common sense perspective". There has been some suggestion since Akenhead J's dicta in *Walter Lilly & Co Ltd v Mackay and Another (No 2)*[153] that a prospective and a retrospective delay analysis should both produce the same result if done correctly, but in the very recent decision of *Fluor v Shanghai Zhenhua Heavy Industry Co Ltd*,[154] Edwards-Stuart J clarified the more orthodox position, which made it clear that the choice of an appropriate methodology matters:

> "[...] I would accept that a prospective analysis - in other words considering the critical path at any particular point in time as viewed by those on the ground at that time – does not necessarily produce the same answer as an analysis carried out retrospectively. The former is the correct approach when considering matters such as the award of an extension of time [...]."

A cautionary tale on time-distant delay claims can be found in *Carillion Construction Ltd v Emcor Engineering Services Ltd and Another*.[155] That case concerned the redevelopment of the Rolls Building, and the claim downstream by the main contractor, Carillion, against inter alia its mechanical and electrical services sub-contractor, Emcor, for prolongation costs arising from delay. Carillion's position was that Emcor was responsible for the critical delay, but Emcor alleged late variations at multiple points in the months leading up to actual completion – the difficulties with a time-distant delay analysis in those circumstances were immediately clear.

In the preliminary issue proceedings, Carillion argued that any extension of time for extra works instructed after the planned completion date should be non-contiguous and applied to the actual period when the delay impact was felt, instead of adding a contiguous extension to the planned completion date. This was rejected in the TCC, and in 2017, the appeal was again dismissed unanimously. Although Jackson LJ was "unable to see any answer to this argument. It is, at the very least, an oddity",[156] Jackson LJ held that the extension of time provisions can only mean that the impact of any late variations should be accounted for by extending the planned completion date contiguously. This created the potential anomaly that Carillion may not be able to claim the actual prolongation costs in respect of a period of culpable delay, but that was "not sufficient to displace the natural interpretation".[157]

152 SCL Protocol, Guidance Part B, at para 11.5.
153 [2012] EWHC 1773 (TCC); [2012] BLR 503, at para 380.
154 [2018] EWHC 1 (TCC), at para 275; see also Marshall, J, "Delay Analysis: Backwards or forwards – does it make a difference?", SCL Paper D196 (December 2016).
155 [2017] EWCA Civ 65; [2017] BLR 203.
156 *Carillion*, at para 48.
157 *Carillion*, at para 51.

The *Carillion* judgment does provide some certainty as to the general position for extensions of time – they are normally contiguous in the sense that they start on what was previously the due date for completion. It would, of course, depend on the wording of the particular contract in question, but this seems to be the consistent approach adopted throughout the industry, as Jackson LJ observed. The difficulties encountered in the *Carillion* case should incentivise parties to try and resolve issues of extensions of time and loss and expense contemporaneously, rather than some years down the line – particularly where there are various contractors and subcontractors involved, all of which may be partly or wholly liable for delays in the project.

Prevention principle and concurrency

The so-called "prevention principle" often goes hand in hand with arguments of "time at large". The relevant principles have been considered extensively in an earlier and very well-known judgment in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*,[158] and back in April 2012, Sir Vivian Ramsey even gave a lecture to the Society of Construction Law in London doubting the foundation and application of these principles. Nowadays, given that most contracts contain adequate provisions for extension of time, those principles are not as frequently invoked in court, and even less often succeed.

It is therefore interesting to see the prevention principle and "time at large" discussed in the recent case of *North Midland Building Ltd v Cyden Homes Ltd*,[159] in the context of a dispute over the implications of concurrent delay. The contractor relied on the prevention principle to argue that, in circumstances where there was concurrent delay, it should nonetheless be entitled to an extension of time, effectively circumventing the bespoke contractual provision that "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account".

Fraser J adopted John Marrin QC's definition of concurrent delay ie delay caused by two or more different events which are of "equal causative potency".[160] Fraser J then explained the prevention principle and "time at large" respectively as follows:

> "Essentially the prevention principle is something that arises where something occurs, for which it is said the employer is responsible, that prevents the contractor from complying with his obligations, usually the obligation to complete the works by the completion date. [...] If the completion date in the contract, and the mechanism for having that extended by means of awarding so many weeks to an originally agreed completion date, are inoperable or for some other reason no longer applicable, in general terms the contractor's obligation becomes one to complete the works within a reasonable time. That is what the shorthand expression 'time at large' is usually understood to mean."[161]

Ultimately, Fraser J decided the Part 8 claim on the basis that the contractual provision was "crystal clear", and there was no authority for the proposition that the prevention principle would prevent parties from agreeing to deal with concurrent delays in a particular way.[162] However, Fraser J then went on to make a further

158 [2007] EWHC 447 (TCC); [2007] BLR 195.
159 [2017] EWHC 2414 (TCC); [2017] BLR 605.
160 *North Midland*, at para 12; see John Marrin QC, "Concurrent Delay", SCL Paper 100 (February 2002).
161 *North Midland*, at para 11.
162 *North Midland*, at paras 18 to 19.

obiter observation on the effect of concurrency. There has been no shortage of academic debate concerning the applicability of the prevention principle in the event of concurrent delay for which the contractor is partly responsible, although various dicta in recent authorities tend to suggest that the principle would not be applicable.[163] Fraser J firmly came down in favour of the position expressed in those dicta:

> "[...] In so far as there may be other disputes where the parties find themselves at odds concerning the dicta in both *Adyard* and *Jerram Falkus* on the one hand, and other writing, commentary or articles which suggest such dicta are wrong on the other, cost-effective resolution of those other disputes is more likely if those parties proceed on the basis that the two authorities to which I have referred are correct. In my judgment, I agree with the analysis of each of them and would proceed on the basis that they both clearly are."

This line of reasoning suggests that the TCC will not allow an extension of time or an invocation of the prevention principle in future cases if a contractor is responsible for some concurrent delay and the employer did not actually cause any delay to the date of completion.[164] This rows back from what appears to be a broader approach in the *Malmaison* case,[165] which was affirmed by Akenhead J in *Walter Lilly*.[166] It is also noteworthy that Fraser J's latest dicta confirmed the position taken in the SCL Protocol (Guidance Part B under Core Principle 10) that "Employer Delay" occurring after a pre-existing "Contractor Delay" would not be an effective cause of delay if the works do not actually get delayed by a greater period. An authoritative reconsideration of all these points is long overdue.

It is noteworthy that the prevention principle was also invoked in Singapore last year in a rather novel context. In *TT International Ltd v Ho Lee Construction Pte Ltd*,[167] the contractor argued that the employer's termination of a construction contract was a "total act of prevention" amounting to a repudiatory breach of the contract, in an attempt to recover loss of profits as a result of the termination. Loh J roundly rejected that argument, on the basis that "[i]n terminating the Contractor's employment under clause 31.4(1), the Employer is exercising a contractual right. The mere exercise of a contractual right cannot constitute a breach of contract, let alone a repudiation of the contract".[168] It is clear that the courts generally have little sympathy with attempts to apply the prevention principle in unprecedented ways.

The above can be contrasted, however, with the recent Australian judgment in *Probuild* mentioned previously.[169] In that case, the contractor undertook various variation works but failed to make an extension of time claim within the contractual timeframes. The contract provided for a discretionary power to grant extensions of time in the absence of a proper claim. Interestingly, the New South Wales Court of Appeal held that the prevention principle coupled with an implied duty of good faith meant that the employer was obliged to grant an extension of time.

McColl JA embarked on a helpful discussion of the principles, and stressed that "[i]n the context of delaying variations, whether ordered before or after the due

163 *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm); [2011] BLR 384, at para 292, *Jerram Falkus Construction Ltd v Fenice Investments Inc (No 4)* [2011] EWHC 1935 (TCC); [2011] BLR 644, at para 52.
164 Also *Saga Cruises BDF Ltd and Another v Fincantieri SpA (Formerly Fincantieri Cantieri Navali Italiana SpA (The Saga Sapphire)* [2016] EWHC 1875 (Comm); [2017] Lloyd's Rep Plus 2 at para 251.
165 *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32 (TCC), at para 13.
166 *Walter Lilly & Co Ltd v Mackay and Another (No 2)* [2012] EWHC 1773 (TCC); [2012] BLR 503, at para 370.
167 [2017] SGHC 62.
168 *TT International*, at para 39.
169 *Probuild Constructions (Australia) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151.

date for completion, the prevention principle 'is grounded upon considerations of fairness and reasonableness'".[170] On that basis, McColl JA concluded that: "Probuild was obliged to exercise the reserve power to grant extensions conferred by cl 41.9 honestly and fairly having regard to the underlying rationale of the prevention principle to which I have earlier referred or, if necessary, because there is an implied duty of good faith in exercising the discretion cl 41.9 conferred."[171]

As discussed above in the context of implied duties of good faith, it is unlikely that an English court would decide this case in the same way, particularly in the light of the *North Midland* decision. However, the *Probuild* decision would certainly provide a beacon of hope for contractors seeking to extend the ambit of the prevention principle in future cases, and it would be interesting to see how the TCC would grapple with the discussions in the New South Wales Court of Appeal. In any event, there is an argument for saying that the prevention principle continues to act as an important "gatekeeper" against unfairness to contractors in the common law world.

Disruption analysis

Finally, it is worth mentioning that the new SCL Protocol has provided more extensive guidance on methods of disruption analysis under Core Principle 18. A good disruption analysis ought to focus on the "direct labour and task-specific plant resources" disrupted as compared to a "realistic and achievable" baseline. The SCL Protocol therefore recommends that productivity-based project-specific studies are the most reliable.[172] In particular, the "measured mile" analysis (ie a comparison of the actual level of productivity with identical or like activities in un-impacted areas or periods of works) is the preferred and most widely accepted method.

The measured mile analysis has recently been endorsed by the Supreme Court of Queensland in *Santos Ltd v Fluor Australia Pty Ltd*.[173] In *Santos*, which was an application for striking out, the defendant argued, inter alia, that a disruption claim based on a measured mile analysis was not adequately pleaded and did not particularise the causal link. Flanagan J rejected that argument, and took the view that "[t]he extent of the disruption is calculated by using a measured mile approach. It may be accepted that this approach is a widely accepted method of calculating lost productivity" (citing the SCL Protocol, Guidance Part B, para 18.6).[174]

Parties would therefore take comfort in the fact that the measured mile analysis has received some judicial approval, and is likely to be similarly recognised in the English courts. However, the complexity of such an analysis should not be underestimated, as it is a document-intensive analysis and can be difficult to undertake if there are multiple causes of disruption or ongoing disruption throughout the project. It should not be assumed that the methodology would automatically demonstrate a sufficient causal link, and it is important to adapt the methodology and ensure that the burden of proof has been discharged in each case.

170 *Probuild*, at paras 114 to 127.
171 *Probuild*, at para 128.
172 SCL Protocol, Guidance Part B, at para 18.25.
173 [2017] QSC 153.
174 *Santos*, at para 111.

Liquidated damages

The construction industry is probably still coming to terms with the new legal test for penalty clauses as laid down by the Supreme Court in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis*[175] ie "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation".[176] So far, there has been no TCC decision considering the application of the new test to a construction contract, although a number of other commercial decisions have shed light on the mechanics of the *Makdessi* test.

A helpful case study can be found in the 2017 decision of *Vivienne Westwood Ltd v Conduit Street Development Ltd*,[177] which concerned a commercial lease supplemented by a side letter providing for a discounted rent. A breach of *any* covenant under the lease, however, would render the higher rent payable both in the future and from day one of the term of the lease. DHCJ Fancourt QC held that the provision was penal in nature because it was retrospective and applicable to both trivial and non-trivial breaches:

The industry is still coming to terms with the new legal test for penalty clauses as laid down in *Makdessi*, ie "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation"

> "Two factors tip the balance in favour of the Claimant, notwithstanding the equality of bargaining power between the two well-advised parties. First, the rent increase applies for whatever remains of the first ten years of the term regardless of the nature and seriousness of the non-trivial breach of contract and when it has occurred. Second, the increased rent is payable in addition to interest on any overdue payment, any costs incurred by reason of the breach, and damages for losses caused by the breach. The obligation to pay increased rent is therefore a blunt instrument that, depending on when the Side Letter is terminated, may give rise to a very substantial and disproportionate financial detriment."[178]

One might argue that in the above decision, the court was applying some of the principles and considerations previously stated by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,[179] albeit within the context of the *Makdessi* test.[180] If so, it could be seen as a confirmation of Lord Neuberger and Lord Sumption's observation in *Makdessi* that "[i]n the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the

175 See this author's commentary in Cheung, M, "Shylock's Construction Law: The Brave New World of Liquidated Damages", (2017) 33 Const LJ 173.
176 [2015] UKSC 67; [2016] BLR 1, at para 32.
177 [2017] EWHC 350 (Ch).
178 *Westwood*, at para 65.
179 [1915] AC 79, at pages 86 to 87.
180 It is also noteworthy that the Hong Kong courts have thus far adhered to the old *Dunlop* test, and it would be interesting to see if that trend carries on: *Brio Electronic Commerce Ltd v Tradelink Electronic Commerce Ltd* [2016] HKEC 989, *Evergreen (FIC) Ltd v Golden Cup Industries Ltd* [2016] 5 HKLRD 636.

breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity".[181] In any event, this decision makes for interesting reading for those who are unsure of the precise limits of the doctrine of penalties post-*Makdessi*.

It is worth bearing in mind that even if a liquidated damages clause crosses the hurdle of the doctrine of penalties (as it often does), issues may nonetheless arise as to its certainty and enforceability where there is inadequate provision for sectional completion.[182] Such was the nature of the issues faced by the court in *Vinci Construction UK Ltd v Beumer Group UK Ltd*,[183] which involved the development works at the South Terminal of Gatwick Airport. Vinci engaged Beumer as a subcontractor to complete the new baggage handling system, which was divided into sections with different completion dates, and different rates of liquidated damages for section 5 "Baggage" and section 6 "Remaining Works". Beumer argued that the liquidated damages clause was void for uncertainty because it was unclear whether disconnection of the existing equipment was within section 6.

It is trite that the courts are reluctant to hold a provision in a contract void, particularly where it is possible to find an interpretation that will give effect to the parties' intentions. O'Farrell J noted that the parties did have some idea of what the works included, and on a proper construction of Schedule 12 to the contract, it was clear that the disconnection and removal works were grouped under section 6 after the new baggage handling system was completed.[184] This is an important illustration of the courts' approach to the interpretation of sectional completion and liquidated damages provisions – a finding of uncertainty and/or unenforceability is likely to be the last resort, which is very much in line with the courts' attempt to confine the doctrine of penalties to the most egregious cases.

Public procurement

In the light of the EU referendum results in June 2016 and the fast-approaching age of Brexit, many within the construction industry are wondering what will become of the UK's public procurement regime. The current regime is based on the Public Procurement Regulations, which implement the EU Public Procurement Directive. It is quite possible that there will be changes to the current regulations in some shape or form, and that the requirements and remedies would not be the same as those under the EU regime. The basic principles of non-discrimination, transparency and procedural fairness, however, are unlikely to change, at least insofar as the World Trade Organisation Agreement on Government Procurement continues to apply to the UK.

In the interim, however, given the likelihood of a significant transition period, and the plans under the EU Withdrawal Bill for the wholesale incorporation of all existing EU legislation into domestic law before picking and choosing which ones to amend, repeal or improve, it is a very real possibility that EU law principles governing remedies under the UK's public procurement regulations would continue to apply in the short term.

181 *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] BLR 1, at para 32.
182 See eg *Taylor Woodrow Holdings Ltd and Another v Barnes & Elliott Ltd* [2004] EWHC 3319 (TCC), *Bramall & Ogden Ltd v Sheffield City Council* (1983) 29 BLR 73.
183 [2017] EWHC 2196 (TCC); [2017] BLR 547.
184 *Vinci*, at paras 54 to 62.

This is of particular relevance in the context of the landmark Supreme Court decision in *Nuclear Decommissioning Authority (NDA) v Energy Solutions EU Ltd (Now Called ATK Energy EU Ltd)*,[185] which arose from an unsuccessful bidder's long-running claim for damages. The Supreme Court had to consider, as a matter of principle, the applicability of the three *Francovich* conditions[186] under EU jurisprudence to the claim for damages, particularly the need for the breach to be "sufficiently serious". Lord Mance, who delivered the court's judgment, held that the *Francovich* conditions applied to liability under the EU Remedies Directive for breach of the EU Public Procurement Directive, and also breaches of the UK Public Procurement Regulations:

> "Where the Court of Appeal in the present case went in my opinion clearly wrong was in its assumption that any claim for damages under the 2006 Regulations was no more than a private law claim for breach of a domestically-based statutory duty, and for that reason subject to ordinary English law rules which include no requirement that a breach must be shown to be "sufficiently serious" before damages are awarded (para 67). The Court of Appeal appears to have assumed that the categorisation in domestic law of a claim based on EU law as being for breach of statutory duty freed it automatically from any conditions which would otherwise apply under EU law. [...]"[187]

It is unclear how exactly the Supreme Court's latest ruling would pan out post-Brexit (or at any rate after the transition period) – will claims under the UK Public Procurement Regulations still be seen as "based on EU law" or purely domestic under the EU Withdrawal Bill, and how if at all will the *Francovich* principles which flow from the EU case law continue to apply? If Parliament does not resolve these issues under the EU Withdrawal Bill or otherwise, then the same issue may well come before the Supreme Court again in the not-so-distant future.

Another important decision in 2017, which is likely to have a much more lasting effect on proceedings relating to public procurement, was *Joseph Gleave & Son Ltd v Secretary of State for Defence*.[188] The case involved a military hardware procurement dispute with what was described as a "chequered history". The claimant sought to expedite the trial so that judgment could be delivered before the contract was awarded, but Coulson J rejected the request because the belated request was inconsistent with the "rather leisurely process" which had gone before,[189] and there would be an impossible timetable in the light of the complexity of the matter which would compromise the quality of the investigation and the decision.[190] Instead, Coulson J granted a stay of proceedings until the contract was awarded, as there were clear benefits to the contracting authority and other users of the TCC and no real detriment to the claimant.[191]

Therefore, it is understandable that a claimant in a public procurement dispute would often want to obtain a swift determination to pre-empt a potentially unlawful contract award. However, without generalising too much, it is perhaps fair to say that a claimant who wishes to prevent the continuation of an impugned tender process should normally apply for an injunction,[192] and if an injunction is not

185 [2017] UKSC 34; [2017] BLR 351.
186 Joined Cases C-6/90 and C-9/90, *Francovich v Italian Republic* [1995] ICR 722.
187 *NDA*, at para 37.
188 [2017] EWHC 238 (TCC); [2017] BLR 264.
189 *Gleave*, at para 29.
190 *Gleave*, at paras 31 to 34.
191 *Gleave*, at paras 53 to 57.
192 *Gleave*, at para 19.

appropriate because of the claimant's ongoing involvement in the tender process, it is likely to be a tall order to persuade the court to effectively subordinate the need for the "right" answer to the need to have an answer quickly as in an adjudication.

International trends in construction arbitration

One of the ramifications of Brexit is that the UK construction industry may, even more than before, look to (if not rely on) projects and opportunities in Asia and the Middle East. This is likely to lead to more cross-border disputes in the future, and legal practitioners in the UK will have to consider the appropriate dispute resolution forum and procedure. So far, international arbitration seems to be the preferred mode of final resolution in cross-border disputes. To that end, 2017 witnessed a number of interesting developments relating to international arbitration in jurisdictions such as (1) Hong Kong; (2) Singapore; and (3) the United Arab Emirates (UAE).

Hong Kong

In Hong Kong, the talk of the town in 2017 was certainly the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in June 2017, after a consultation process which started back in 2013. This introduced a new Part 10A into the Arbitration Ordinance (Cap. 609) and a new section 7A into the Mediation Ordinance (Cap. 620), which carved out third-party funders in relation to arbitrations (and related court proceedings and mediations) from the common law prohibition of champerty and maintenance. Interestingly, unlike in Singapore, the definition of third-party funders in Hong Kong is very broad and includes both professional funders and lawyer-funders.

The statutory recognition of third-party funders in arbitrations and mediations is clearly part of Hong Kong's continuing pro-arbitration policy, and it would be interesting to see how the funding industry develops, how tribunals deal with disclosure of information relating to third-party funding, and what shape the code of practice (which is still being finalised) will take. This timely development chimes with Hong Kong's intention to market itself as the formal dispute resolution hub for China's Belt and Road Initiative, with China and Hong Kong formally entering into the "Arrangement between the National Development and Reform Commission and the Government of the Hong Kong Special Administrative Region for Advancing Hong Kong's Full Participation in and Contribution to the Belt and Road Initiative" on 14 December 2017.[193]

Although the precise contours of the Belt and Road Initiative are still to be fleshed out, it is likely that there will be increasing participation from the UK's construction and infrastructure industry in the post-Brexit world, and that English lawyers will be involved in both contentious and non-contentious matters through their professional ties to Hong Kong. This is certainly something to watch for in the coming years.

[193] See official press release: www.info.gov.hk/gia/general/201712/14/P2017121400551.htm?fontSize=3.

Singapore

Similarly, the Civil Law (Amendment) Act 2017 entered into force on 1 March 2017 in Singapore, accompanied by the Civil Law (Third Party Funding) Regulations 2017 and related amendments to the professional conduct rules. These legislative changes confirmed that third-party funding in arbitrations (and related court proceedings and mediations) would not be unlawful or contrary to public policy.

Unlike in Hong Kong, a third-party funder must have as its principal business the funding of dispute resolution, such that lawyer-funders are not permissible. As this is intended to be a trial scheme for the general introduction of third-party funding, it will be interesting to see the industry guidelines and practices which will develop around the new legislation, and also any consultations or proposals for further reforms. For the moment, the introduction of third-party funding is likely to encourage the choice of Singapore as the seat for cross-border construction arbitrations arising from disputes in South-east Asia.

Two Singaporean decisions in 2017 would be of interest to those contemplating a construction arbitration in Singapore or looking to enforce an arbitral award there. In *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*,[194] the Singapore Court of Appeal expressly confirmed that the responding party's unilateral option to arbitrate is valid and enforceable, but dismissed the referring party's stay application because the arbitration agreement would only come into existence upon an election to arbitrate, such that the responding party was entitled to elect to litigate instead in those circumstances.

In *Prometheus Marine Pte Ltd v King*,[195] the Singapore Court of Appeal considered an application to set aside an arbitral award under section 24 of the International Arbitration Act (Cap 143A) and section 48(1) of the Singapore Arbitration Act (Cap 10), on the various bases that the High Court judge was tainted by apparent bias; that the award was induced by fraud and corruption; that the arbitrator acted in excess of jurisdiction and in breach of natural justice; and that the arbitration agreement was not made between the parties in the arbitration. The court roundly rejected all of those grounds, particularly criticising the unsubstantiated allegations of fraud, corruption and bias.

The above decisions will be welcomed as indications of the robust supervisory role of the Singaporean courts, as well as their continuing pro-arbitration approach. Further, parties in construction arbitrations should think twice before challenging an award simply because they disagree with it, and successful parties can be assured that the Singaporean courts will generally be slow to decline to enforce an arbitral award, much like Hong Kong and the UK.

UAE

The most exciting development in the UAE has no doubt been the entry into operation of the Technology and Construction Division (TCD) of the Dubai International Financial Centre (DIFC) Courts in October 2017, with specialist judges and industry-specific rules to speed up and streamline the dispute resolution process. Led by Sir Richard Field, who was previously in charge of the Commercial Court in London, this

194 [2017] SGCA 32; [2017] 2 Lloyd's Rep 104.
195 [2017] SGCA 61.

is likely to be a popular choice for the substantial construction sector in the Middle East, particularly where the dispute involves complex and technical issues but not necessarily a high monetary value.

It will be interesting to see whether foreign parties will also be drawn to the new TCD, as parties anywhere are free to opt into the DFIC Courts' jurisdiction by written agreement. Given the burgeoning cross-border infrastructure projects arising out of, for example, the Belt and Road Initiative, this may well become the trend over the coming years, and the TCD will no doubt draw inspiration from the TCC's practices in order to fine-tune its procedures and ensure that parties are given the best possible service.

Those who have been involved in proceedings in the Dubai Courts and/or DFIC Courts would be aware of the problems arising from conflicting jurisdictions between those two entities, as the Dubai Courts are assumed to be the general jurisdiction. There are concerns, for instance, that attempts to enforce an offshore arbitral award in the DFIC Courts would be frustrated if a party domiciled in Dubai commences nullification proceedings in the Dubai Courts and applies to the DFIC's Judicial Tribunal for a stay.[196] Such issues would, of course, not arise if the parties have in fact submitted to the DFIC Courts' jurisdiction by agreement.

In 2017, there was a flurry of decisions from the DFIC's Judicial Tribunal which kept the pendulum swinging. In *Gulf Navigation Holding PJSC v Jinhai Heavy Industry Co Ltd*,[197] the DFIC Courts had ordered the enforcement of an arbitral award rendered in London against a Dubai-based award debtor, but eight months later, the award debtor filed a claim with the Dubai Courts for expert examination of the substantive issues which had previously been determined by the arbitral award. The Judicial Tribunal nonetheless concluded that the Dubai Courts were the competent jurisdiction. In a similar vein, in *Ramadan Mousa Mishmish v Sweet Homes Real Estate*,[198] the award debtor commenced nullification proceedings in the Dubai Courts, and despite the existence of the DFIC Courts' enforcement order, the Judicial Tribunal again deferred to the jurisdiction of the Dubai Courts.

It would appear that the DFIC's Judicial Tribunal would only dismiss a reference if there were no proceedings before the Dubai Court and no conflict whatsoever.[199] Where a party has commenced some proceedings in the Dubai Courts, the Judicial Tribunal would readily assume that the Dubai Courts have general jurisdiction and ought to take precedence. This position may well change, and parties should stay tuned for ongoing developments. In the meantime, the thorny issues associated with the DFIC Courts' conduit jurisdiction to enforce offshore New York Convention awards may be an added factor incentivising parties in that region to submit to the TCD of the DFIC Courts from day one.

Insolvency in construction

It goes without saying that construction projects carry substantial financial and cash-flow risks, and insolvency of developers and contractors alike has been a perennial problem which manifests itself in different guises.

196 See Cassation No 1/2016 (JT) – *Daman Real Capital Partners Company LLC v Oger Dubai LLC*.
197 Cassation No 1/2017 (JT).
198 Cassation No 3/2017 (JT).
199 See eg Cassation No 5/2017 (JT) – *Emirates Trading Agency LLC v Bosimar International NV*, Cassation No 7/2017 (JT) – *Investment Group Private Ltd v Standard Chartered Bank*.

One such issue is the enforcement of adjudication decisions in the event of insolvency. It is well established that an adjudication decision would not be enforced in favour of an insolvent company where there are cross-claims.[200] What of an unsuccessful party which is insolvent? In the case of *South Coast Construction Ltd v Iverson Road Ltd*,[201] the contractor sought to enforce an adjudication decision against an employer which unilaterally gave notice of an intention to appoint administrators, triggering an interim moratorium under Schedule B1 to the Insolvency Act 1986. Coulson J took the view that the enforcement proceedings ought to continue, as the contractor would at most become an unsecured judgment creditor with no preference over other creditors, and the administrator would in fact be assisted by the determination of the only issue between the two parties. Otherwise, it would be unfair to the contractor which has, at considerable expense, obtained a favourable decision.[202] Coulson J went further and observed that "a party [...] who has a decision in its favour from an adjudicator, is in a much better position than most to argue that the court should exercise its discretion to continue to an enforcement hearing", because:

> "[...] Adjudication enforcement proceedings such as these presuppose that there has already been a decision, on the merits, by an adjudicator, that there is a sum of money which, prima facie, is due and owing under the contract or pursuant to statute. Indeed, such enforcement proceedings presuppose that the defendant is in breach of contract or in breach of statute for not paying the sum found due by the adjudicator. [...]"[203]

A second issue which is highly relevant in the event of insolvency is the enforceability of third-party guarantees and indemnities. In *Multiplex Construction Europe Ltd (Formerly Brookfield Multiplex Construction Europe Ltd) v Dunne*,[204] Multiplex entered into an Advance Payment Deed with Mr Dunne and his company due to the latter's financial difficulties. Mr Dunne's company went into administration, and Multiplex sought to enforce (by summary judgment) a guarantee against Mr Dunne which provided that "should the Sub-Contractor suffer an event of insolvency [...] the Guarantor shall immediately be liable to the Contractor for the payment of the Advance Payment". Fraser J held that the heading "guarantee" was not determinative, and the use of the word "immediately" indicated that there was no possibility of an accounting process – as such, Mr Dunne owed a primary obligation to Multiplex.[205] Fraser J refused to apply the principle of contra proferentem, and simply focused on "the words actually chosen, and what they mean",[206] providing a glimmer of clarity amid the uncertainties of insolvency.

Finally, issues of termination and enforcement of performance bonds will be crucial in the event of the insolvency of a contractor. In *Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc*,[207] the TCC had to consider whether there was a valid call on the performance bond, and whether there was a valid termination after the contractor became subject to a Company Voluntary Arrangement. Coulson J considered that there was a valid call on the bond based on an unpaid debt ascertained after insolvency, and it cannot be argued that there was no breach of

200 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507; [2000] BLR 522.
201 [2017] EWHC 61 (TCC); [2017] BLR 169.
202 *South Coast*, at paras 19 to 26.
203 *South Coast*, at paras 28 to 30.
204 [2017] EWHC 3073 (TCC); [2018] BLR 36.
205 *Multiplex*, at paras 39 to 45.
206 *Multiplex*, at paras 26 to 34.
207 [2017] EWHC 3286 (TCC); [2018] BLR 98.

contract – "insolvency would lead to a breach (and thus a claim under the bond) if the employer had followed the provisions of the contract and established a debt due, and the debt remained unpaid by the contractor".[208]

The contractor in *Ziggurat* sought to escape the termination provisions (and particularly the process of ascertaining a debt due) under the JCT Standard Form, by arguing that there was no valid notice of termination. Coulson J was thoroughly unimpressed by this belated argument, and held that "[a]s from the date that County became insolvent, whether or not the employer had given notice of termination, and regardless of belated arguments as to repudiation, clauses 8.7.3–8.7.5 applied in any event".[209] This sends an important message to insolvent parties – it would be an uphill struggle to wriggle out of contractual termination provisions and performance bonds, and the only real avenue open to the insolvent party is to challenge the quantum of the debt claimed.

Financial claims/ cross-claims between Carillion and its numerous employers and subcontractors will have to be dealt with as part of a substantial and ongoing accounting exercise

The above decisions are particularly apposite in the light of the recent insolvency of Carillion Group, the second largest contractor in the UK. This has resulted in the inevitable termination of numerous contracts (particularly government contracts in relation to the management of NHS facilities, roadbuilding, HS2, construction and management of schools, maintenance of prisons, and construction of utilities infrastructure), giving rise to issues as to the correct operation of contractual termination provisions, and special remedies arising from, inter alia, third-party guarantees/indemnities and performance bonds. Financial claims/cross-claims between Carillion and its numerous employers and subcontractors will have to be dealt with as part of a substantial and ongoing accounting exercise, including construction-related claims which the liquidators of Carillion may wish to pursue before any distribution of the assets to the numerous creditors.

The challenges and hurdles ahead cannot be overstated, which is precisely why, among other developments, the Parliamentary Work and Pensions Committee and BEIS Committee are undertaking an ongoing joint inquiry into the collapse of Carillion, in order to ascertain the likely causes of Carillion's insolvency and to avoid another similar ordeal in the future – something which the industry should follow closely in the weeks and months to come. In the meantime, the construction industry should be prepared to deal with issues and risks of insolvency in the dispute resolution process.

Concluding observations

As is apparent from the above review, the aftermath of Carillion's insolvency is likely to be in the spotlight in the year ahead. Of particular importance is the joint inquiry into the management and governance of Carillion, its sponsorship of its pension

208 *Ziggurat*, at para 27.
209 *Ziggurat*, at para 52.

funds, and the implications for company and pension scheme law, regulation and policy. This investigation will hopefully shed light on how Carillion collapsed from a going concern in 2017 into a mountain of debt. The evidence heard so far has proven to be controversial, and it will be interesting to see whether the final report is able to strike the balance between identifying responsibility within the company and addressing sector-wide problems which increase the risks of contractor insolvency. In any event, it is expected that the findings will serve as a cautionary tale for others in the construction and PFI industry, with a particular focus on risk management, aggressive accounting and bidding practices, the role of auditors, and the underlying issues of so-called "problem contracts".

At the same time, the related inquiry by the Public Administration and Constitutional Affairs Committee into sourcing public services will very likely inform the government's reconsideration of the viability of ongoing PFI and PF2 projects and the future procurement of such projects, particularly the complex contractual frameworks and the public authorities' approach to operating these contracts, which more often than not carry precarious risk allocations in terms of payment deductions and termination for performance failures. The industry should follow the ongoing evidence being provided and stay tuned for the final report, which is likely to have an impact on the government's policy and practice on procurement, monitoring and risk management of current and future PFI projects.

The collapse of Carillion has also renewed the debate over the practice of cash retention under construction contracts, which obviously has a considerable impact on cash flow and solvency. The timing of the Carillion situation coincides with two consultations launched by the government earlier in October 2017 – one on retention payments in the construction industry, and another being a non-statutory post implementation review of the 2011 amendments to the HGCRA (covering the statutory payment regime and adjudication practice). The consultations closed on 19 January 2018, and the responses are likely to be published later in the year and form the basis of future reforms. This is not to be missed.

Of equal importance are the two ongoing inquiries arising from the Grenfell Tower incident. The first, led by Dame Judith Hackitt, is an independent review of building regulations and fire safety in general, with a particular focus on their application to high-rise residential buildings. An interim report was published in December 2017, pointing out that the current system is "not fit for purpose" and "open to abuse", and calling for an overhaul in order to put safety above costs. The review is now in its second phase, and a final report is expected to be published in spring 2018, focusing on: regulation and guidance; roles and responsibility; raising levels of competence; process and enforcement; effective recourse for residents' concerns; and quality assurance of products. These findings will very likely have a significant impact on industry practice and standards going forward.

The other inquiry, led by Sir Martin Moore-Bick, has received the most media attention since it opened in September 2017. It is more specifically directed at the Grenfell Tower incident, and its primary focus will obviously be on the public authorities' obligations to ensure that buildings are maintained in line with health and safety standards. It will also look into all potentially responsible parties, which will inevitably touch on design and construction practices and the role of building control approval. This inquiry and the independent review of building regulations are both likely to take centre stage in the year ahead, and should be closely followed by all stakeholders in the construction industry.

More generally, the industry is no doubt aware of the new suite of FIDIC contracts published just before the end of 2017. There will inevitably be interesting debates and commentary on these latest amendments, as parties begin to adopt the contracts and put the amendments to use. In terms of developments in case law, the controversial case of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* was heard by the Supreme Court on 1 February 2018, and the much-anticipated judgment (expected around mid-2018) will consider anti-oral variation clauses and the doctrine of consideration, both of which are highly relevant to the construction industry. The case of *Bellman v Northampton Recruitment Ltd* was also due to be heard in April 2018 and decided in late 2018, revisiting the principles of vicarious liability – another topic close to the heart of the construction industry. Finally, the TCC and Companies Court are likely to be seized with at least some of the issues and disputes arising from the collapse of Carillion in the years ahead, and this will inevitably involve the consideration of legal principles both old and new. Until next year's review, it seems like there will be no shortage of activity within the construction industry for the remainder of this year.

Appendix:

Judgments analysed and considered in this article

2017 cases analysed:

Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735; [2018] BLR 1
AECOM Design Build Ltd v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC); [2017] BLR 329
Bell Building Projects Ltd v Arnold Clark Automobiles Ltd [2017] CSOH 55
Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd [2017] EWHC 239 (TCC); [2017] BLR 216
CAA Technologies Pte Ltd and Newcon Builders Pte Ltd [2017] SGCA 53
Carillion Construction Ltd v Emcor Engineering Services Ltd and Another [2017] EWCA Civ 65; [2017] BLR 203
Chan Chi Lam trading as Hoi Fat Construction Company v Lam Woo & Co Ltd and Others HCCT 52/2014
Christopher Linnett Ltd and Another v Matthew J Harding (trading as M J Harding Contractors) [2017] EWHC 1781 (TCC); [2017] BLR 498
Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC); [2017] BLR 239
Dawnus Construction Holdings v Amey LG Ltd [2017] EWHC B13 (TCC)
Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd [2017] EWHC 2159 (TCC)
Fluor v Shanghai Zhenhua Heavy Industry Co Ltd [2018] EWHC 1 (TCC)
Goodlife Foods Ltd v Hall Fire Protection Ltd [2017] EWHC 767 (TCC); [2017] BLR 389
Gulf Navigation Holding PJSC v Jinhai Heavy Industry Co Ltd Cassation No 1/2017 (JT)
Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] BLR 344
Ilkerler Otomotiv Sanayai Ve Ticaret Anonim Sirketi and Another v Perkins Engines Co Ltd [2017] EWCA Civ 183
Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)
Jacobs UK Ltd (Formerly known as Jacobs Engineering UK Ltd) v Skanska Construction UK Ltd [2017] EWHC 2395 (TCC); [2017] BLR 619
Joseph Gleave & Son Ltd v Secretary of State for Defence [2017] EWHC 238 (TCC); [2017] BLR 264
Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15 (TCC)
Lejonvarn v Burgess and Another [2017] EWCA Civ 254; [2017] BLR 277
Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd [2017] EWHC 1405 (TCC); [2017] BLR 443
Mataban Development Pte Ltd v Black Knight Warrior Pte Ltd [2017] SGHCR 12
McGee Group Ltd v Galliford Try Building Ltd [2017] EWHC 87 (TCC)
Merit Holdings Ltd v Michael J Lonsdale Ltd [2017] EWHC 2450 (TCC); [2018] BLR 14
Morgan Sindall Construction and Infrastructure Ltd v Westcrowns Contracting Services Ltd [2017] CSOH 145
MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and Another [2017] UKSC 59; [2017] BLR 477
Muir Construction Ltd v Kapital Residential Ltd [2017] CSOH 132
Multiplex Construction Europe Ltd (Formerly Brookfield Multiplex Construction Europe Ltd) v Dunne [2017] EWHC 3073 (TCC); [2018] BLR 36
North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC); [2017] BLR 605
Nuclear Decommissioning Authority (NDA) v Energy Solutions EU Ltd (Now Called ATK Energy EU Ltd) [2017] UKSC 34; [2017] BLR 351
Persimmon Homes Ltd v Ove Arup & Partners Ltd and Another [2017] EWCA Civ 373; [2017] BLR 417
Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2017] NSWCA 151
Prometheus Marine Pte Ltd v King [2017] SGCA 61
Ramadan Mousa Mishmish v Sweet Homes Real Estate Cassation No 3/2017 (JT)
RCS Contractors Ltd v Conway [2017] EWHC 715 (TCC); [2017] BLR 376
Riva Properties Ltd and Others v Foster + Partners Ltd [2017] EWHC 2574 (TCC)
Santos Ltd v Fluor Australia Pty Ltd [2017] QSC 153
South Coast Construction Ltd v Iverson Road Ltd [2017] EWHC 61 (TCC); [2017] BLR 169
Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC); [2017] BLR 189
Sutton Housing Partnership Ltd v Rydon Maintenance Ltd [2017] EWCA Civ 359
Systems Pipework Ltd v Rotary Building Services Ltd [2017] EWHC 3235 (TCC); [2018] BLR 123
TT International Ltd v Ho Lee Construction Pte Ltd [2017] SGHC 62
UES Holdings Pte Ltd v KH Foges Pte Ltd [2017] SGHC 114
Vinci Construction UK Ltd v Beumer Group UK Ltd [2017] EWHC 2196 (TCC); [2017] BLR 547
Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)
Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd [2017] SGCA 32; [2017] 2 Lloyd's Rep 104
Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2018] Lloyd's Rep Plus 14
Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc [2017] EWHC 3286 (TCC); [2018] BLR 98

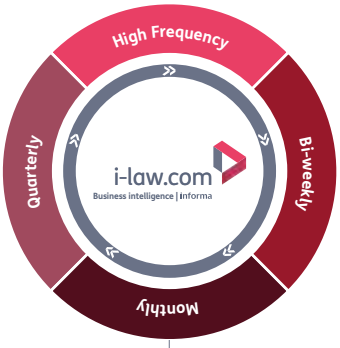
Cases considered:

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm); [2011] BLR 384
Amey Wye Valley Ltd v The County of Herefordshire District Council [2016] EWHC 2368 (TCC); [2016] BLR 698
Arnold v Britton [2015] UKSC 36
Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] EWCA Civ 507; [2000] BLR 522
Bramall & Ogden Ltd v Sheffield City Council (1983) 29 BLR 73
Brio Electronic Commerce Ltd v Tradelink Electronic Commerce Ltd [2016] HKEC 989
Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 (TCC); [2015] BLR 694
Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC); [2008] BLR 250
Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis [2015] UKSC 67; [2016] BLR 1
Cofely Ltd v Anthony Bingham and Knowles Ltd [2016] EWHC 240 (Comm); [2016] BLR 187
Connex South Eastern Ltd v MJ Building Services Group plc [2005] EWCA Civ 193; [2005] BLR 201
Daman Real Capital Partners Company LLC v Oger Dubai LLC Cassation No 1/2016 (JT)
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1914] UKHL 1; [1915] AC 79
Emirates Trading Agency LLC v Bosimar International NV Cassation No 5/2017 (JT)
Evergreen (FIC) Ltd v Golden Cup Industries Ltd [2016] 5 HKLRD 636
Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC); [2015] BLR 321
GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd [2010] EWHC 283 (TCC); [2010] BLR 377
Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123; [2018] BLR 173
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 1 Lloyd's Rep 485
Henderson v Merrett Syndicates [1995] 2 AC 145
Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC); [2015] BLR 704
Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32 (TCC)
In re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350
Investment Group Private Ltd v Standard Chartered Bank Cassation No 7/2017 (JT)
ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC); [2015] BLR 233
Jawaby Property Investment Ltd v The Interiors Group Ltd [2016] EWHC 557 (TCC); [2016] BLR 328
Jerram Falkus Construction Ltd v Fenice Investments Inc (No 4) [2011] EWHC 1935 (TCC); [2011] BLR 644
Khurana and Another v Webster Construction Ltd [2015] EWHC 758 (TCC); [2015] BLR 396
Kilker Projects Ltd v Purton (trading as Richwood Interiors) [2016] EWHC 2616 (TCC)
Lanes Group plc v Galliford Try Infrastructure Ltd (trading as Galliford Try Rail) [2011] EWCA Civ 1617; [2012] BLR 121
Leander Construction Ltd v Mulalley and Company Ltd [2011] EWHC 3449 (TCC); [2012] BLR 152
Lulu Construction Ltd v Mulalley & Co Ltd [2016] EWHC 1852 (TCC)
Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Another [2015] UKSC 72
Matthew Harding (trading as M J Harding Contractors) v Paice and Another [2015] EWCA Civ 1231; [2016] BLR 85
Maxi Construction Management Ltd v Mortons Rolls Ltd [2001] ScotCS 199
Melville Dundas Ltd (in receivership) and Others v George Wimpey UK Ltd and Another [2007] UKHL 18; [2007] BLR 257
Merton LBC v High Stanley Leach (1986) 32 BLR 51
Midland Expressway Ltd and Another v Carillion Construction Ltd and Others [2006] EWHC 1505; [2006] BLR 325
MSC Mediterranean Shipping Company SA v Cottonex Anstalt [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494
Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC); [2007] BLR 195
Quietfield Ltd v Vascroft Construction Ltd [2006] EWCA Civ 1373; [2007] BLR 67
Rainy Sky SA and Others v Kookmin Bank [2011] UKSC 50; [2012] BLR 132
Rupert Morgan Building Services (LLC) Ltd v Jervis and Another [2003] EWCA Civ 1563; [2004] BLR 18
Saga Cruises BDF Ltd and Another v Fincantieri SpA (Formerly Fincantieri Cantieri Navali Italiana SpA (The Saga Sapphire) [2016] EWHC 1875 (Comm); [2017] Lloyd's Rep Plus 2
Swainland Builders Ltd v Freehold Properties Ltd [2002] EWCA Civ 560
Taylor Woodrow Holdings Ltd and Another v Barnes & Elliott Ltd [2004] EWHC 3319 (TCC)
Walter Lilly & Co Ltd v Mackay and Another (No 2) [2012] EWHC 1773 (TCC); [2012] BLR 503
Wes Futures Ltd v Allen Wilson Construction Ltd [2016] EWHC 2863 (TCC)
Yam Seng PTE Ltd (A Company Registered in Singapore) v International Trade Corporation Ltd [2013] EWHC 111 (QB); [2013] BLR 147

Our Construction Law subscription package

i-law.com
Business intelligence | informa

The Construction package on i-law.com is the premium digital collection of publications for construction lawyers. We help our customers meet the demands of their clients anywhere in the world with our combination of intuitive technology and user-friendly functionality. Our customers rely on i-law to provide them with the answers they need at the right time to be able to make business-critical decisions, minimise risk and win more cases.



Interact with the definitive construction law database

- Get access to all the key construction judgments in one place
- Fully searchable and mobile-friendly interface
- Save time trawling through irrelevant information
- Selection of user tools, including alerts

Key: Online Email

High Frequency (when courts are in session)

Building Law Reports Plus
Building Law Reports Plus provides early access to the latest fully citable law reports before they appear in print.
Included in the package collection

Bi-weekly

Construction Law Reporter
Court reporting service of important new judgments. Construction Law Reporter is available online and for email delivery, and includes "early headnotes" on key decisions from recent weeks.
Included in the package collection

*except January and August

Monthly

Building Law Reports*
Published continuously since 1976, Building Law Reports is the most established and authoritative set of construction law reports available. The full archive of over 40 years of reports on key decisions is digitised in our i-law service. The publication is edited by a group of distinguished members of Atkin Chambers, including Sir Robert Akenhead QC, the former Judge in Charge of the Technology and Construction Court.

Building Law Monthly
Building Law Monthly provides you with accurate and incisive commentary broken down into key points raised in cases from the Technology and Construction Court, Supreme Court and Court of Appeal, to ensure you are fully appraised on how the latest developments in case law affect your practice.

Construction Industry Law Letter (CILL)*
CILL provides a digest of current law and regulation within the industry, as well as judgment analysis, so that you can rest assured that you are always fully informed of the issues you need to know about on a day-to-day basis.

Commercial Leases*
Commercial Leases brings you comprehensive legal briefings and expert comment on the very latest industrial and commercial property disputes, ensuring that you are fully aware of the issues surrounding your industry.

Quarterly

International Construction Law Review
The International Construction Law Review is the leading authority on multi-jurisdictional construction law, with each issue examining important developments worldwide. Articles often take a comparative approach, and are informed by an international board of contributors. Our editors are based in the UK and Australia and have an international client base and caseload.

"Having regularly used the construction law resources on i-law for research in my practice, I can safely say that practitioners would struggle to find a more comprehensive and up-to-date wealth of knowledge elsewhere. i-law combines the most well-respected publications in the field (eg Building Law Reports, Building Law Monthly, Construction Law, International Construction Law Review) with excellent searching and cross-referencing tools, which are particularly invaluable to practitioners who are tracing the development of a growing area of law."

Find out more about our best-value bespoke subscription packages, or to supplement your collection with print editions:

about.i-law.com lawsales@informa.com
+44 20 7017 7565 (EMEA) or +65 6508 2428 (APAC)