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Construction law in 2018: a review of key legal and industry developments

By Mathias Cheung

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Registered in England and Wales No 1072954.

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By Mathias Cheung

INTRODUCTION

This article summarises some of the most significant developments in construction law in 2018, both in the UK and abroad. Legal practitioners and construction professionals will see that the ever-moving landscape of the law continues in a trend which finds its roots in the events of 2017.[1]

At the 4 New Square Conference on Construction Law in May 2018, Sir Rupert Jackson (who has recently retired from the Court of Appeal) referred to the unenviable task of the "luckless lawyer" called upon to advise on the meaning and effect of complex contractual provisions, and he described the root of the difficulty as follows:

"The trouble is that every generation of judges, especially those on loftier perches, feel an irresistible urge to state or re-state the principles in their own words. Every time they do so, different aspects of those principles receive emphasis. Every formulation of the rules or principles is coloured by the case which is then before the court. The judge has a sense of what the right answer is in that case and tends to slant his/her general propositions towards reaching that answer."[2]

Sir Rupert's observations apply equally to the many facets of construction law which the courts must consider and rule on every day – from the scope of the prevention principle to the interplay between insolvency and adjudication. It is no easy task for any legal practitioner or construction professional to keep abreast of the proliferation of authorities and navigate the developing landscape of construction law.

The year 2018 was a particularly interesting one, with a number of much-anticipated judgments handed down by the courts, whilst the collapse of Carillion Group and the Grenfell Tower incident continued to cast a shadow over the industry. This overview of the key legal developments across different jurisdictions (spanning the UK, Australia, Singapore, Hong Kong and the Middle East) will provide a helpful roadmap for all stakeholders in the construction and infrastructure industry to stay up-to-date.

1 See Cheung, M, *Construction law in 2017: a review of key legal and industry developments*, Informa Law, 2018.

2 Sir Rupert Jackson and Tim Chelmick, "The Construction of Contracts", 4 New Square Conference on Construction Law, 1 May 2018, at para 7.3.

CONSTRUCTION ADJUDICATIONS

The statutory stage payment and adjudication regime ushered in by the Housing Grant, Construction and Regeneration Act 1996 (HGCRA) has provided fertile ground for new case law over the years. In 2018, the courts had the opportunity to lay down various important principles in this ever-growing body of judicial precedents, covering the threshold question of the existence of a construction contract, payment disputes, and grounds for challenging the enforcement of an adjudication decision. These topics will be considered in turn below.

"Contract/no-contract" disputes

When a notice of adjudication or referral notice lands on the desk of a responding party, it is not uncommon at all to challenge the adjudicator's jurisdiction by arguing that there is no construction contract – especially when the parties have proceeded with the works on the basis of an oral agreement or a simple letter of intent. The lawyers for the referring party would then face the rather gargantuan task of piecing together the various pre-contractual correspondence, memoranda and/or draft agreements which are said to have crystallised the parties' consensus ad idem, in an attempt to repel the jurisdictional challenge.

Readers may recall the 2016 decision of Coulson J (as he then was) in *Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v Amec (BSC) Ltd (formerly called CV Buchan Ltd),*[3] which was described by the judge as "a relatively straightforward 'contract/no-contract' case with something of a sting in its tail". In that case, AMEC (previously known as Buchan) engaged Arcadis (previously known as Hyder) to carry out certain design works in connection with the Wellcome Building and Castlepoint Car Park, in anticipation of a wider agreement which ultimately did not materialise. The question was whether there was a binding contract between the parties based on the correspondence exchanged, and if so what were the terms and conditions incorporated therein. This was important because Arcadis/Hyder relied on the incorporation of the limitation of liability clause.

Coulson J held that there was a binding, simple contract between the parties, but none of the competing versions of the terms and conditions exchanged between the parties were incorporated into this simple contract, "given that these terms and conditions were continually being amended and were never ultimately agreed" and "it is impossible to stop the music at any stage and construe an unequivocal and binding agreement in respect of any one of the three competing versions of the terms and conditions".

However, there remained a sting in the tail. Arcadis/Hyder appealed against Coulson J's judgment, and this culminated in the Court of Appeal's recent decision in *Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BSC) Ltd (formerly called CV Buchan Ltd)*,[4] which unanimously reversed Coulson J's findings on the competing versions of the terms and conditions.

Gloster LJ agreed that there was a binding contract, noting that "the best evidence that Hyder had indeed accepted was its conduct in undertaking the work". Nevertheless, and parting company with Coulson J, Gloster LJ concluded that the interim contract applied to all of the projects in question and incorporated the terms and conditions (including the limitation clause) accepted at the time, even though a conclusive protocol agreement was yet to be finalised. In reaching this conclusion, Gloster LJ observed that "the harshness of the result [ie the non-incorporation of the limitation clause] is another reason why the judge should have reached a different conclusion". It seems that this case, like many "contract/no-contract" disputes, was not so "straightforward" after all.

Two other judgments in 2018 have thrown the difficulties with oral contracts and contract/no-contract disputes into sharp relief.

[3] [2016] EWHC 2509 (TCC).

[4] [2018] EWCA Civ 2222; [2019] BLR 27.

In *Dacy Building Services Ltd v IDM Properties LLP*,[5] IDM attempted to challenge the enforcement of an adjudicator's decision by arguing that there was no contract with Dacy, on the rather unusual basis that Dacy contracted with a different entity which is now insolvent. This was another rare case (like *Arcadis*) where a full trial was ordered by the court,[6] because the contract was allegedly agreed at a meeting and the issue turned on the oral evidence of the individuals involved. Fraser J was ultimately persuaded that a contract was indeed orally agreed between Dacy and IDM, but the process of reaching that conclusion meant that it took some 14 months to enforce the adjudicator's decision – not so much because a trial could not be listed earlier by the Technology and Construction Court (TCC), but because of (amongst other things) counsel's availability.[7]

The second case was *M Hart Construction Ltd and Another v Ideal Response Group Ltd*,[8] which arose from a dispute over works carried out at the old Olympic Athletes Village. In *M Hart*, the facts took a slightly different spin on the usual "contract/no-contract" argument, as the contract at issue was an alleged "implied" novation of the initial oral contracts from Mr Hart (as a sole trader) to his company, M Hart Construction Ltd. Jefford J refused to grant summary judgment to enforce the adjudication decisions which hinged on the implied novation, in the light of the conflicting witness evidence placed before the court,[9] and a full trial of the issue would probably be necessary, as in *Arcadis* and *Dacy*.

More often than not during an adjudication involving a contract/no-contract dispute, the adjudicator would dismiss a "no-contract" argument when determining his or her own jurisdiction. This is hardly surprising – as Coulson J observed in *Arcadis*, "the court should always strive to find a concluded contract in circumstances where work has been performed".[10] Fraser J similarly stressed in *Dacy* that "[t]he courts will be reluctant to find that there was no concluded contract if the subject matter of the putative contract has been performed".[11]

However, as the cases discussed above abundantly demonstrate, the risks do not stop there, as it remains a challenging task to accurately identify the precise terms of a wholly or partially oral agreement, and experienced judges can reasonably differ on the construction of the alleged contract. Moreover, unless the parties agree otherwise, the adjudicator's determination of his or her own jurisdiction is non-binding, meaning that it can be opened up in court during an enforcement action. This invariably results in protracted litigation on the true terms and effect of an oral contract after an adjudication has run its course, bringing with it both time and cost consequences for the parties.

Another practical difficulty associated with oral contracts is the issue of proof – proof of an oral contract inevitably depends on parol evidence from witnesses involved in the pre-contractual negotiations, often based on memory with very limited contemporaneous documents (if any). This poses a significant challenge to tribunals, and it also creates an inherent risk in relying on the recollection of a handful of witnesses to record the parties' agreement (or lack thereof).

This latter issue was picked up in *Dacy*, where Fraser J recalled the well-known observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse UK Ltd*[12] regarding the limitations of recollection of events due to the lapse of time and subjective factors, and then cautioned that:

> "The degree of confidence with which any particular witness has in his or her own recollection can, indeed, sometimes be in inverse proportion to the accuracy of that recollection. **Confidence in delivery does not equate to**

5 [2018] EWHC 178 (TCC).
6 See Jefford J's decision in *Dacy Building Services Ltd v IDM Properties LLP* [2016] EWHC 3007 (TCC); [2017] BLR 114.
7 *Dacy*, at para 6.
8 [2018] EWHC 314 (TCC).
9 *Ibid*, at paras 28 to 52.
10 *Arcadis*, at para 48.
11 *Dacy*, at para 3.
12 [2013] EWHC 3560 (Comm).

veracity. It all depends, as so much does, on the particular circumstances of the witness, the lapse of time, the case and the nature of the issues. [...]"[13] (Emphasis added.)

The above difficulties explain why the TCC has repeatedly expressed its misgivings about the expansion of statutory adjudication to cover oral contracts.[14] This was most recently echoed by Fraser J's postscript in *Dacy* that "this case is a good example of such difficulties that may occasionally arise where a contract is purely oral and one party to it flatly denies that such an agreement was made", and the judge was at pains to emphasise that a "trial, with contested evidence given orally, will only in my judgment very rarely be justified, even on the question of whether there was a contract at all".[15]

It is perhaps time for this aspect of statutory adjudication to be reconsidered by Parliament, especially in the light of the ongoing consultation regarding HGCRA reform (which will be discussed further below). In the meantime, however, parties should not think of a no-contract argument as a trump card for defeating any undesirable adjudication decision – the courts are likely to take a generous view of the scope of an adjudicator's jurisdiction, and will take into account the potential harshness of a "no-contract" scenario on a party who has performed a substantial amount of works.

Above all, the take-home message is that parties should use their very best endeavours to record their agreement in writing before embarking on any substantial works, in order to minimise the risk of costly disputes down the line. As Coulson J (as he then was) rightly pointed out, it is a "commercial truism that it is usually better for a party to reach a full agreement [...] through a process of negotiation and give-and-take, rather than to delay and then fail to reach any detailed agreement at all".[16]

Interim payments and final accounts

In *Construction law in 2017: a review of key legal and industry developments* a number of cases which considered the validity of payment applications and the consequences of an employer's failure to serve a valid pay less notice were discussed at length, including the seminal decision of Coulson J (as he then was) in *Grove Developments Ltd v S&T (UK) Ltd*.[17]

Readers will recall that in *Grove*, Coulson J took the unusual step of refusing to follow Edward-Stuart J's decisions in *ISG Construction Ltd v Seevic College*[18] and *Galliford Try Building Ltd v Estura Ltd,*[19] and held that an "employer who has failed to serve its own payment notice or pay less notice has to pay the amount claimed by the contractor because that is 'the sum stated as due'. But the employer is then free to commence its own adjudication proceedings in which the dispute as to the 'true' value of the application can be determined".

One point which was not entirely free from doubt after *Grove* was the timing for a second adjudication to determine the true value of an interim application – when can an employer refer a dispute about the true value of the application to adjudication, assuming that no valid pay less notice has been given?

This issue took centre stage in *DSVG Facade Ltd v Conneely Facades Ltd*,[20] regarding an application by DSVG to enforce a "smash and grab" adjudication decision. Conneely sought to resist enforcement on the basis that (amongst other things) DSVG's referral included the dispute on the true value of the application, and that Conneely's response has further relied on the true value of the application based on *Grove*, such that the adjudicator has failed to exhaust his jurisdiction in deciding that DSVG is entitled to immediate payment of the notified sum in the absence of a valid pay less notice.

13 *Dacy*, at para 39.
14 See eg *Penten Group Ltd v Spartafield Ltd* [2016] EWHC 317 (TCC), at paras 27 to 28; *Dacy*, at para 35.
15 *Dacy*, at paras 85 to 86.
16 *Arcadis*, at para 108.
17 [2018] EWHC 123 (TCC); [2018] BLR 173.
18 [2014] EWHC 4007 (TCC); [2015] BLR 233.
19 [2015] EWHC 412 (TCC); [2015] BLR 321.
20 [2018] 6 WLUK 235.

After a half-day hearing in June 2018, Deputy High Court Judge Joanna Smith QC rejected Conneely's arguments. She reasoned that in the absence of an express agreement to refer two disputes to the same adjudicator, only a single dispute was referred as per the notice of adjudication,[21] namely DSVG's entitlement to immediate payment of the notified sum. Having decided that dispute, the adjudicator did not have any residual jurisdiction to decide the separate and different dispute about the true value of the claim. Reliance was placed on Coulson J's observation in *Grove* that:

> "[...] the dispute which the employer would wish to raise in the second adjudication is **a different dispute to that which was determined in the first**. In the first adjudication, the issue would be whether or not the employer's payment notice and/or pay less notice was deficient or out of time. If the adjudicator in the first adjudication found that the employer's notice(s) was deficient or out of time, then the contractor would have an unanswerable right to be paid the sum stated in its own application or payment notice."[22] (Emphasis added.)

The predicament in *DSVG* would not have arisen had there been an unequivocal and authoritative statement that the true value of the application can only be the subject of a *separate* second adjudication after the notified sum has been paid by the employer. This issue was conclusively resolved six months later, when the Court of Appeal handed down its decision in *S&T (UK) Ltd v Grove Developments Ltd*[23] in November 2018, with Jackson LJ returning from retirement to deliver a much-anticipated judgment.

As many in the industry had predicted, the Court of Appeal unanimously affirmed Coulson J's decision. Jackson LJ held that:

> "[But] section 111 [of the HGCRA] is not the philosopher's stone. It does not transmute the sum notified by one or other of those three documents into a true valuation of the work done under clause 4.7. Subsequently, the adjudication provisions of the Act or (if correctly drafted) of the contract come into play. Either party can challenge the correctness of the notified sum by adjudication [...]."[24]

Jackson LJ went a little further than Coulson J to expressly consider the mechanism and timing for the recovery of an alleged overpayment. Jackson LJ concluded that "[i]f an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from the adjudicator's re-evaluation", without having to resort to any implied term or doctrine of restitution. In terms of timing, the matter was finally put beyond doubt – an employer cannot circumvent its statutory obligation to pay the notified sum immediately by disputing the true value of the interim application:

> "[...] Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. **Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation**."[25] (Emphasis added.)

The timing for a second adjudication to determine the true value of an interim application is an important one in practice. To the extent that Coulson J's judgment was not entirely clear on this point and led to arguments such as those raised in *DSVG*, Jackson LJ has now confirmed what many had suspected to be the correct legal position under the statutory payment regime laid down by the HGCRA.

Although some may argue that the obligation to "pay first, argue later" can lead to harsh results where a contractor is at risk of imminent insolvency, Jackson LJ observed in *S&T* that "in any case where

21 See *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2000) 75 Con LR 71, at para 21.
22 See *Grove*, at para 77.
23 [2018] EWCA Civ 2448; [2019] BLR 1.
24 *Ibid*, at para 92.
25 *Ibid*, at para 107.

there is a perceived risk of insolvency the employer would (or at least should) be scrupulous to protect itself by serving timeous Payment Notices or Pay Less Notices".[26] This is faithful to the balance struck by Parliament in the HGCRA, as a carte blanche to adjudicate on the true valuation at any time would render the requirement to serve a valid and timeous pay less notice otiose.

It is worth bearing in mind that the provisions of section 111 of the HGCRA in relation to the payment of the notified sum applies to both interim applications and final accounts,[27] and *S&T* has now homogenised the position. As far as section 111 of the HGCRA is concerned, a notified interim/final application sum must be paid in the absence of a valid pay less notice, but it is open to the employer to subsequently challenge the true valuation whether the application/certificate is interim or final. As Jackson LJ put it, "it would be strange if that same form of words [in section 111] has a conclusive effect in relation to interim certificates which it does not have in relation to final certificates".[28]

> The provisions of section 111 of the Housing Grant, Construction and Regeneration Act 1996 in relation to the payment of the notified sum applies to both interim applications and final accounts, and *S&T* has now homogenised the position

Assuming that an employer does start a second adjudication (or legal proceedings) to dispute the true value of an interim payment or final account valuation and to recover an alleged overpayment, to what extent is an employer entitled to reopen previously agreed figures? This issue was considered most recently in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*.[29]

The disputes between ICI and Merit have come before the TCC on numerous occasions – the latest quantum decision relates to, amongst other things, the valuation of the final account and ICI's alleged entitlement to recover overpayments, based on the findings in the earlier liability trial which was covered in last year's review.[30] In the latest *ICI* judgment, Fraser J laid down two important principles relevant to any employer who seeks to dispute the true value of a contractor's interim/final application.

First, the burden is on the party seeking to demonstrate an entitlement to be repaid money to prove and make good its case.[31] The converse position was considered to be "a rather strange procedural position" because:

> "MMT would effectively have to obtain a decision from the court justifying that it could keep the sums which the adjudicator has decided it should have been paid. [...] The lack of a payless or payment notice would not be of any particular advantage to such a contractor. Immediate service of a claim form by the employer would instantly put the burden on the receiving party. I do not consider that this is how the legislation can be interpreted in any respect, whether literally, or by a purposive construction."[32]

Fraser J was clearly influenced by the statutory regime of the HGCRA and the intention of requiring a pay less notice, and in his view, the default position was that a contractor who has been paid the notified sum under section 111 of the HGCRA was entitled to keep it unless an employer could prove that there was an overpayment. There is much to be said for this approach, both in terms of upholding the intent of the HGCRA and doctrinal simplicity.

On the other hand, this does not sit easily with the usual burden of a contractor to establish and substantiate the monies applied for, and the

26 *Ibid*, at para 109.
27 See *Adam Architecture Ltd v Halsbury Homes Ltd* [2017] EWCA Civ 1735, [2018] BLR 1, at para 53.
28 *S&T*, at para 98.
29 [2018] EWHC 1577 (TCC) (quantum).
30 *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC) (liability).
31 *ICI* (quantum), at para 80.
32 *Ibid*, at para 80.

employer may effectively be asked to prove the negative whilst the contractor simply sits on the payments received. This is not an entirely satisfactory state of affairs, and more consideration may need to be given to the appropriate burden of proof in future cases in order not to impose an impossible onus on employers.

Secondly, Fraser J considered whether the assessments of the project manager during the course of the works could be reopened as a matter of principle. The judge held that the employer was entitled to do so because those assessments were not conclusive under the NEC 3 form of contract, but "[t]here has to be some evidential basis for the court deciding to depart from the assessments reached at the time by Mr Barton (who was fairly balancing the interests of both MMT and ICI). MMT has an unanswerable evidential case in this respect. Accordingly, although the assessments reached at the time do not conclusively determine ICI's rights in this respect, **they are of powerful evidential weight**".[33] (Emphasis added.)

In a similar vein, Fraser J observed that "a great deal of time was spent attempting to reach agreement between ICI and MMT as to the final valuation of MMT's works. Many agreements were reached during this period, on many minutely detailed elements of MMT's works",[34] and he was not prepared to depart from the agreed figures:

> "[...] There is simply no good reason, and practically no evidence of fact submitted by ICI in this trial, that could lead to a conclusion that those at ICI tasked at the time with reaching such agreements, and who did agree so many detailed items with MMT, came to a figure that ought to be re-valued at all, re-valued differently, or re-valued in a lower figure."

Therefore, employers seeking to recover overpaid monies by disputing the true value of an interim application or final account have a heavy burden to discharge where the employer or its representatives have previously assessed or agreed figures for certain items of work. Generally, care must be taken to properly substantiate and justify the contended valuation, as tribunals would not be impressed by a failure to explain why the agreed figures are said to be unreliable, why there are said to be duplications, or why a figure of nil is advanced for works actually done – evidential faults which led Fraser J to reject much of ICI's case.[35]

Grounds for challenging enforcement

The use of contract/no-contract arguments to challenge enforcement of an adjudicator's decision, and the increasing number of full trials required to deal with conflicting witness evidence on the existence and scope of an alleged contract, have been discussed earlier in this commentary.

Putting the above scenarios to one side, it remains an uphill struggle to challenge enforcement on jurisdictional or natural justice grounds, and the TCC's policy is firmly in favour of enforcing an adjudicator's decision. As Chadwick LJ observed in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*:[36]

> "In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. [...] **To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense** [...]."[37] (Emphasis added.)

Three cases in 2018 demonstrate this consistent approach. In *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd*,[38] Bester sought to challenge enforcement on the basis that the contract included excluded operations falling within section 105(2)(c) of the HGCRA ie "assembly, installation or demolition of plant or machinery, or erection or demolition of

33 *Ibid*, at para 69.
34 *Ibid*, at para 71.
35 *Ibid*, at para 352.
36 [2005] EWCA Civ 1358; [2006] BLR 15.
37 *Ibid*, at para 87.
38 [2018] EWHC 177 (TCC); [2018] BLR 281.

steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is [...] power generation [...]".

Coulson J (as he then was) stressed that the real issue was not the scope of the overall contract, but what works were carried out by Equitix which formed the subject of the disputed interim account.[39] The judge rejected the argument that the preparation of bonds or drawings or business plans were excluded operations, as "[i]t would make a nonsense of the Act if every preparatory/ancillary operation not expressly identified in section 105(1) became an excluded operation. That would require section 105(1) to list everything that might ever be preparatory or ancillary, making it absurdly long".[40] This is a clear example of the TCC robustly rejecting a party's contrived attempt to avoid complying with an adjudicator's decision.

Equitix is also a timely reminder of the need to make a clear and open reservation as to the adjudicator's jurisdiction in each and every adjudication. In *Equitix*, Coulson J considered that the general reservation was not about jurisdiction,and was only confined to the first adjudication as it was not raised in the second adjudication.[41] This provided yet another ground for dismissing Bester's purported challenge. Therefore, parties would be well-advised to include a clear and unequivocal reservation as to jurisdiction in all correspondence/submissions in every adjudication.

The temptation for a disgruntled party to challenge an adjudicator's reasoning in an enforcement action is a perennial issue, despite the TCC's repeated admonitions. In *Breyer Group plc v Adam Michael Scaffolding Services Ltd*,[42] which concerned an adjudicator's decision ordering a subcontractor to repay the contractor monies which were overpaid, the subcontractor sought to challenge enforcement on the basis (amongst other things) that the adjudicator did not have the jurisdiction to order repayment, and the decision was one which no reasonable adjudicator could have reached in the light of the evidence.

DHCJ Joanna Smith QC rejected the above contentions, holding that the notice of adjudication was wide enough to confer jurisdiction on the adjudicator to determine the value of the final account and order the refund of any overpayment. Above all, the judge held that the reasonableness of the decision was irrelevant on enforcement unless it could be said to be outrageously irrational, and the criticisms of the evidence were no defence to enforcement.

The approach in *Breyer* is very much in line with previous authorities – the TCC has always emphasised that a losing party should not attempt to "rerun the entirety of the issues in the adjudication" and turn the adjudication into "the first part of a two-stage process, with everything coming back to the court for review prior to enforcement".[43] More often than not, arguments that the adjudicator's decision is "unreasonable" or "lacking in reasons" are nothing more than a veiled attempt to ask the court to rule on the merits of the dispute, which is simply not the function of the TCC in an enforcement action.

That the TCC is unlikely to go through the reasoning of an adjudicator with a fine toothcomb is demonstrated once again by the decision of *Vinci Construction UK Ltd v Beumer Group UK Ltd*,[44] in which the author acted for the claimant, Vinci. Readers will recall from last year's review that this ongoing dispute concerns the new baggage handling system at the South Terminal of Gatwick Airport, and O'Farrell J has previously ruled on the validity of the liquidated damages provisions in Part 8 proceedings.[45] This latest episode arises out of an adjudication before Mr Brian Eggleston, in which Vinci claimed liquidated damages against Beumer on the back of O'Farrell J's judgment.

Beumer sought to challenge Mr Eggleston's decision on the basis of an alleged breach of natural justice. Beumer contended that Mr Eggleston failed to give adequate reasons for a finding that its claims for extensions of time were all time-barred under the NEC 3 form of contract. Further, Beumer alleged

39 *Ibid*, at paras 28 to 29.
40 *Ibid*, at para 32.
41 *Ibid*, at paras 47 to 53.
42 [2018] 6 WLUK 194.
43 *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] BLR 344 at paras 34 and 37.
44 [2018] EWHC 1874 (TCC); [2018] BLR 575.
45 *Vinci Construction UK Ltd v Beumer Group UK Ltd* [2017] EWHC 2196 (TCC); [2017] BLR 547.

that Mr Eggleston failed to disclose or order Vinci to disclose materials from a previous adjudication before Mr Eggleston between Vinci and another subcontractor (Balfour Beatty Engineering Services Ltd, or BBESL), or failing that, did not resign.

The latter argument was an artificial attempt to recycle a challenge successfully made by Vinci against Beumer and the decision of a previous adjudicator, Dr Cyril Chern. In that previous case, Beumer was claiming compensation events against Vinci in an adjudication before Dr Chern, whilst running an entirely inconsistent delay case against its own sub-subcontractor in a concurrent adjudication before Dr Chern.[46] This was a world apart from the circumstances in the adjudications before Mr Eggleston, as Vinci's previous claim against BBESL did not have any necessary connection with Beumer's works and was not inconsistent with the liquidated damages claim advanced against Beumer. In any event, unlike Vinci's position in Dr Chern's adjudications, Beumer was well aware of the BBESL adjudication.

DHCJ Jonathan Acton Davis QC had little difficulty rejecting Beumer's contentions. The judge held that "[w]ith the full knowledge of the identity of the adjudicator in the BBESL adjudication, the terms and content of the decision in the BBESL adjudication and the fact that Vinci had declined to provide copies of the BBESL adjudication documentation, Beumer referred three disputes to Mr Eggleston as adjudicator without raising any concern about his ability to fairly decide those disputes or that a breach of natural justice might occur". Above all, "[t]here is no evidence that 'the disputes were so closely connected and the issues so similar'".[47] It is therefore clear that a challenge premised on an alleged breach of natural justice must be the plainest of cases on the evidence if it were to succeed.

DHCJ Acton Davis QC gave short shrift to the argument of inadequate reasons – he concluded that "[t]here is no difficulty in discerning the Adjudicator's reasoning", and '[w]hether that decision be right or wrong is not a matter for the Court on an enforcement application".[48] The judge relied, amongst other things, on the observations of Jackson J (as he then was) in *Carillion Construction Ltd v Devonport Royal Dockyard* that the "complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice".[49] The facts in *Vinci* fell far short of this very high threshold.

These recent decisions make it abundantly clear that whatever criticisms may be levelled against the adjudication process, the TCC has not wavered from its policy of enforcing adjudication decisions save in the plainest of cases where there is a lack of jurisdiction or a material breach of natural justice. In particular, the TCC is ever vigilant about attempts by a losing party to dispute the substance of the adjudicator's decision under the guise of a jurisdictional or natural justice argument. It is worth bearing in mind that parties who are perceived as advancing frivolous or unarguable challenges may be ordered to bear the cost of the proceedings on an indemnity basis.[50]

That said, an enforcement action must be brought in the correct jurisdiction, and it is important to consider this carefully before commencing any enforcement proceedings. This is fully illustrated in the interesting Scottish case of *BN Rendering Ltd v Everwarm Ltd*,[51] where the Outer House of the Court of Session refused to enforce an adjudicator's decision for want of jurisdiction. In *BN Rendering*, the contract contained a clause providing for the exclusive jurisdiction of the English courts in respect of all disputes arising out of the contract. Lord Bannatyne held that the general wording of the clause was broad enough to cover enforcement actions,[52] and the fact that the contract was not signed did not affect the validity of the exclusive jurisdiction clause.[53]

46 *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC); [2017] BLR 53.
47 *Vinci*, at para 56, citing Fraser J in *Beumer*, at paras 33 and 47.
48 *Ibid*, at paras 43 to 44.
49 [2005] EWHC 778 (TCC); [2005] BLR 310, at para 81.
50 *See Pochin Construction Ltd v Liberty Property (GP) Ltd* [2014] EWHC 2919 (TCC).
51 [2018] CSOH 45.
52 *Ibid*, at paras 65 to 82.
53 *Ibid*, at paras 51 to 62.

Part 8 claims and enforcement

Before leaving the topic of adjudication, it is worth briefly mentioning the growing use of Part 8 proceedings to challenge an adjudicator's decision. This was discussed at length in last year's review – in particular, the decision of Coulson J (as he then was) in *Hutton Construction Ltd v Wilson Properties (London) Ltd* reiterated that 99 cases out of 100 would not be appropriate for a reconsideration of the adjudicator's decision during enforcement proceedings, and that it is important for the court to be aware of a Part 8 claim at the outset so that a longer hearing can be listed.[54]

Two decisions by DHCJ Joanna Smith QC in 2018 are of interest. In *Victory House General Partner Ltd v RGB P&C Ltd*,[55] Victory House sought to challenge enforcement based on (amongst other things) a proposed Part 8 claim for substantive declarations, but that was roundly rejected by the judge at the very beginning, as there were matters of disputed facts which had to be dealt with under the Part 7 procedure and cannot be addressed on an application to enforce an adjudication decision:

> "In my judgment, **the matters raised on the Part 8 Claim, which include matters of disputed fact, are not suitable for resolution under the Part 8 procedure which is only to be used where the claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact.** [...] Not only is it unlikely to be consistent with the Overriding Objective, but it also risks prejudice to one or other of the parties in the presentation of their case. [...]"[56] (Emphasis added.)

The decision in *Victory House* was shortly followed by *DSVG Facade Ltd v Conneely Facades Ltd*,[57] which was discussed above in the context of the implications of *Grove*. In *DSVG*, Conneely purported to make a "counterclaim" for substantive declarations as to the validity of DSVG's payment applications without starting Part 8 proceedings, and this was done late in the day after a two-hour hearing had already been listed by the TCC.

The circumstances epitomised the practical importance of making a Part 8 claim at the very outset, as emphasised by Coulson J (as he then was) in *Hutton*.[58] Accordingly, DSVG's position was that the use of a counterclaim to shoehorn substantive disputes into an enforcement hearing was inappropriate and impermissible, and this was accepted by the judge at the start of the enforcement hearing. The judge very properly directed that the substantive declarations sought would have to be dealt with in separate proceedings after the application for summary judgment has been determined.

The above cases are instructive of the TCC's firm reluctance to allow substantive disputes to be sneaked into enforcement proceedings through the back door, and in 99 cases out of 100, parties would do well to comply with an adjudicator's decision and argue another day. The use of Part 8 proceedings to challenge enforcement as canvassed by *Caledonian Modular Ltd v Mar City Developments Ltd*[59] is, therefore, the exception rather than the rule.

From a procedural perspective, whilst Coulson J (as he then was) suggested that a defendant may, "at the very least, indicate in a detailed defence and counterclaim to the enforcement claim what it seeks by way of final declarations",[60] it is difficult to conceive of circumstances where a counterclaim can be a sufficient means to give the court an opportunity to make appropriate directions, especially since the claim form and particulars of claim are typically served on the defendant after the TCC has listed a two-hour hearing and directed a timetable for the exchange of evidence. In this regard, the *DSVG* case is a cautionary tale, and there seems to be no real substitute for a prompt Part 8 claim by the losing party as soon as an enforcement action has been intimated.

54 [2017] EWHC 517 (TCC); [2017] BLR 344, at paras 12 and 18.
55 [2018] EWHC 102 (TCC); [2018] BLR 133 (adjudication enforcement).
56 *Ibid*, at para 6.
57 See *DSVG*.
58 *Hutton*, at paras 12 and 18.
59 [2015] EWHC 1855 (TCC); [2015] BLR 694.
60 *Hutton*, at para 15.

INSOLVENCY IN CONSTRUCTION PROJECTS

Joint inquiry into the collapse of Carillion Group

In the immediate aftermath of the collapse of Carillion Group in January 2018, the House of Commons Business, Energy and Industrial Strategy (BEIS) and Work and Pensions Committees launched a joint inquiry into the circumstances and failings which led to Carillion's sudden liquidation, with liabilities of nearly £7 billion and just £29 million in cash.

The second joint report was published on 16 May 2018,[61] after hearing oral evidence and written representations from Carillion, the Government and other interested parties. The report presented a scathing attack on Carillion's board of directors and its management practices, calling for careful consideration of potential director disqualifications:[62]

> "Carillion's rise and spectacular fall was **a story of recklessness, hubris and greed**. Its business model was a relentless dash for cash, driven by acquisitions, rising debt, expansion into new markets and exploitation of suppliers. It presented accounts that misrepresented the reality of the business, and increased its dividend every year, come what may. [...] **Carillion was unsustainable. The mystery is not that it collapsed, but that it lasted so long**."[63] (Emphasis added.)

The joint report also acknowledged the lamentable consequences of Carillion's sudden demise on numerous stakeholders and the general public, whilst noting that the only winners are Carillion's directors and auditors who have been richly compensated:

> "The company's employees, its suppliers, and their employees face at best an uncertain future. Pension scheme members will see their entitlements cut, their reduced pensions subsidised by levies on other pension schemes. Shareholders, deceived by public pronouncements of health, have lost their investments. The faltering reputation of business in the eyes of the public has taken another hit, to the dismay of business leaders. Meanwhile, the taxpayer is footing the bill for ensuring that essential public services continue to operate."[64]

Going forward, the joint report made wide-ranging recommendations to the Government, including an immediate review of the role and responsibilities of the Crown Representatives, a revised Stewardship Code with more teeth, a review of the roles and powers of the financial and pensions regulators, and an investigation of the statutory audit market by the Competition and Markets Authority,[65] amongst other much-needed work.

> Carillion's rise and spectacular fall was a story of recklessness, hubris and greed. Its business model was a relentless dash for cash, driven by acquisitions, rising debt, expansion into new markets and exploitation of suppliers

It is noteworthy that the joint report criticised the Government's responses as "cautious, largely technical, and characterised by seemingly endless consultation", and lacking "the decisiveness or bravery to pursue measures that could make a significant difference".[66] This was notwithstanding the fact that successive governments have "nurtured a business environment and pursued a model of service delivery which made such a collapse, if not inevitable, then at least a distinct possibility".[67]

61 House of Commons BEIS and Work and Pensions Committees, "Carillion – Second Joint Report from the Business, Energy and Industrial Strategy and Work and Pensions Committees of Session 2017–19" (HC 769, 16 May 2018).
62 *Ibid*, at para 166.
63 *Ibid*, at page 3 (Summary).
64 *Ibid*, at para 167.
65 *Ibid*, at paras 169 to 217.
66 *Ibid*, at para 215.
67 *Ibid*, at para 216.

Strikingly, the Government's response in July 2018 only ran to a little over four pages,[68] stating that the Financial Reporting Council, Insolvency Service and Financial Conduct Authority have already been improving their collaborative practices to ensure the effective use of existing sanctioning powers, and that a consultation will be carried out on the Stewardship Code. In the meantime, the Competition and Markets Authority is independently considering the need for any market investigations.

It is therefore unsurprising that in a letter to the Cabinet Office in September 2018, the joint chairs of the BEIS and Work and Pensions Committees criticised the Government's response as lacking in commitment to take action to resolve the issues identified. It is clear that there is no quick fix for the problems within the construction and infrastructure industry, and a wider cultural change is essential in terms of management, innovation and collaboration.[69]

Above all, contractors will have to learn from the lessons of Carillion's collapse and review their existing business model in order not to follow in Carillion's footsteps, while the Government has to carefully consider the viability of the PFI/PF2 procurement model to closely monitor existing projects and encourage a better approach to tendering for new projects. These changes will not happen overnight, and the spectre of similar insolvency events is likely to linger within the foreseeable future.

In this context, it is pertinent to consider a few 2018 cases which illustrate the issues faced by the courts when grappling with construction disputes involving an insolvent party.

Insolvency and construction disputes

It is not uncommon for a winning party with the benefit of an adjudicator's decision to make a winding-up petition in the face of an intransigent party who refuses to pay up. There is a risk, of course, that there may be a genuine dispute regarding the correct balance due between the parties which would effectively be stifled by the petition, and the court would have to carefully balance the interests at stake in those circumstances.

In the winding-up proceedings of *Victory House General Partner Ltd v RGB P&C Ltd*[70] (which arose out of the summary judgment granted in the enforcement proceedings discussed above), RGB issued a winding-up petition based on Victory House's failure to pay the judgment debt in accordance with the order of DHCJ Joanna Smith QC.[71] However, there was a twist in the story – Victory House and RGB embarked on a second adjudication, where the interim account was valued at a sum considerably less than the monies previously paid out by Victory House. Victory House therefore argued that there was a nascent cross-claim which made a winding up order inappropriate in the circumstances.

Morgan J, relying on Coulson J's earlier decision in *Grove*,[72] found that the second adjudication decision gave rise to a bona fide cross-claim based on substantial grounds, and the fact that RGB had received a substantial sum in excess of the correct valuation fortified this conclusion.[73] The judge did not deal with the second alleged cross-claim based on liquidated damages, as it involved complex matters of evidence and law which could not be dealt with at a hearing of a winding-up petition.[74]

The *Victory House* case makes it plain that the court would be reluctant to wind up a company where there is a genuine dispute between the parties the value of which is likely to exceed the petition debt, and this should be borne in mind when

68 House of Commons BEIS and Work and Pensions Committees, "Carillion – Government Response to the Tenth Report of the Business, Energy and Industrial Strategy Committee and the Twelfth Report of the Work and Pensions Committee of Session 2017–19" (HC 1456, 20 July 2018).

69 See eg Farmer, M, "Farmer Review of the UK Construction Labour Model: Modernise or Die", (October 2016).

70 [2018] EWHC 1143 (Ch) (winding up).

71 See *Victory House* (adjudication enforcement).

72 *Victory House* (winding up), at paras 22 to 23.

73 *Ibid*, at paras 32 to 33.

74 *Ibid*, at para 25.

considering the use of a winding-up petition as a strategic device. It is also clear that the court will need to be positively satisfied based on clear and cogent evidence that there is a bona fide claim, and it would not be sufficient to present convoluted grounds for the court simply to defer to another day by dismissing the petition.

In fact, the author acted for an employer in a similar hearing last year, where the contractor issued a winding-up petition on the back of an adjudication award in its favour, but the employer had what was undoubtedly a genuine cross-claim based on defective design and workmanship. In that case, an arbitration was on foot, but the difficulty was that the quantum of the cross-claim was not completely free from doubt, such that the cross-claim may or may not exceed the petition debt. The clear factual and expert evidence of the defects carried a lot of weight, as were the steps taken in commencing the arbitration, and HHJ Davies struck a balance by dismissing the petition on the condition that the company repaid an amount representing the portion of the cross-claim which was considered unlikely to succeed.

The above scenarios involve winding-up petitions after adjudication decisions have been obtained and/or enforced. A different question arises if, prior to the referral of a dispute to adjudication, a referring party is already insolvent. Does an adjudicator have the necessary jurisdiction to determine the dispute in those circumstances?

In the well-known judgment in *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd,*[75] Coulson J relied on the House of Lords decision in *Stein v Blake,*[76] and held that "Rule 4.90 [of the Insolvency Rules 1986] envisages that the account will be taken and the balance decided in one set of proceedings where the result would be final and binding",[77] and the "only claim now extant between the parties is the claim by Utilities as assignees for the net balance under Rule 4.90. That is not a claim which could be referred to adjudication and it is not the claim that has been purportedly referred to this adjudicator".[78]

A similar question came before the TCC in *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd,*[79] where Lonsdale brought a Part 8 claim to injunct Bresco (in liquidation) from referring a claim to adjudication. Fraser J considered that the reasoning in *Enterprise* was correct and equally applicable under the new Insolvency Rules 2016 (SI 2016 No 187),[80] and he expressly disapproved[81] of the dicta of HHJ Purle QC in *Philpott v Lycee Francais Charles de Gaulle School.*[82] The judge concluded that a dispute in relation to the taking of an Insolvency Rules' account is not "a dispute arising under the contract" within the meaning of the HGCRA, such that a company in liquidation cannot refer that dispute to adjudication.[83]

Bresco appealed against Fraser J's decision, and the Court of Appeal took a rather different approach in its judgment in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd,*[84] which was handed down in January 2019. Interestingly, it was again Coulson LJ (who was also the judge in *Enterprise*) who had to consider this issue and give the judgment of the court. This time, however, Coulson LJ appears to have backtracked from his position in *Enterprise* and held that the underlying claim in fact continues to exist:

> "[...] If the contractual right to refer the claim to arbitration is not extinguished by the liquidation, then the underlying claim must continue to exist. **Moreover, it must continue to exist for all purposes. The fact that a reference to adjudication may not result in a final and binding decision cannot mean that the underlying claim is somehow extinguished.** As a matter of principle, the choice of forum cannot dictate whether or not the claim exists or has been extinguished."[85] (Emphasis added.)

75 [2009] EWHC 3222 (TCC); [2010] BLR 89.
76 [1996] 1 AC 243.
77 *Enterprise*, at para 64.
78 *Ibid*, at para 79.
79 [2018] EWHC 2043 (TCC); [2018] BLR 593.
80 *Ibid*, at paras 45 to 46.
81 *Ibid*, at paras 50 to 51.
82 [2015] EWHC 1065 (Ch) at para 30.
83 *Lonsdale*, at paras 67 and 76.
84 [2019] EWCA Civ 27; [2019] BLR Plus 20.
85 *Ibid*, at para 31.

Coulson LJ confirmed that HHJ Purle QC was correct in *Philpott*, and to the extent that he himself suggested in *Enterprise* that the Insolvency Rules gave rise to a jurisdictional bar, he was wrong to do so.[86] It is not every day that you see a Lord Justice of Appeal disapprove of his own previous judgment as a High Court Judge in such stark terms.

That was not the end of the story though. Coulson LJ went on to consider the utility of adjudication for the determination of the net balance, and pointed out that "in the ordinary case, even though the adjudicator may technically have the necessary jurisdiction, it is not a jurisdiction which can lead to a meaningful result", as such an adjudication decision would only be enforced in exceptional circumstances.[87] Accordingly, Coulson LJ upheld the injunction granted by Fraser J, on the basis that the adjudication would be a futile exercise:

> "[...] In circumstances where the liquidator would be unlikely to use litigation or arbitration for this exercise, because of the costs exposure, and/or in circumstances where the responding party would otherwise let its cross-claim lie because of the claiming party's insolvency, **it would be an abuse of the cost-neutral adjudication regime to use it as a cheap assessment service, knowing that enforcement could never happen**."[88] (Emphasis added.)

Finally, it is noteworthy that in the *Cannon Corporate Ltd v Primus Build Ltd* appeal which was heard together with *Bresco*, the Court of Appeal considered that the adjudication decision remained enforceable where the referring party was subject to a company voluntary arrangement (CVA), because a CVA "is designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties".[89]

The *Bresco* appeal has arguably muddied what was previously a clear and straightforward position under *Enterprise*. Coulson LJ placed heavy reliance on Bresco's concession that the underlying contractual claim could still be referred to arbitration,[90] but that concession is itself open to doubt – Lord Hoffmann's reasoning in *Stein v Blake* was that the cross-claims would be considered separately when ascertaining the net balance "as if they continued to exist", but "the only chose in action which continued to exist [...] was the claim to a net balance".

It is unclear how Lord Hoffmann's unambiguous "ratio" in *Stein v Blake* can be reconciled with Coulson LJ's latest reasoning in *Bresco* that the underlying cross-claims have not been extinguished upon liquidation. The position adopted in *Enterprise* is arguably a more elegant solution, and one may question why the more convoluted route in *Bresco* was necessary when the result was the same and the injunction upheld in the end.

It would be interesting to see whether *Bresco* would survive a further consideration of the question by the Supreme Court. For now, the position remains tolerably clear – the courts are most unlikely to enforce an adjudication decision if the dispute referred relates to the taking of the net balance under the Insolvency Rules, and a responding party is likely to be able to obtain an injunction against such an adjudication.

That, of course, does not prevent parties from embarking on an adjudication by consent, and this author has dealt with such an adjudication in the past year with the support of third-party funding for the company in liquidation. However, neither party would be able to enforce the adjudicator's decision if the other party refuses to comply, and that risk must be taken into account when deciding whether it is commercially sensible to refer the net balance under the Insolvency Rules to adjudication and incur costs in that regard.

86 *Ibid*, at para 35.
87 *Ibid*, at para 54.
88 *Ibid*, at para 59.
89 *Ibid*, at para 108.
90 *Ibid*, at paras 23 to 24.

DELAY CLAIMS

Delay claims continue to form a pervasive aspect of construction projects and disputes both in the UK and abroad. Last year's review covered a number of interesting case law concerning, amongst other things, the prevention principle, concurrent delay and liquidated damages, and there were further judicial developments in these areas during 2018 which merit closer examination.

Prevention principle and concurrent delay

The prevention principle attracted renewed interest in 2017 due to Fraser J's decision in *North Midland Building Ltd v Cyden Homes Ltd,*[91] where the contractor relied on the prevention principle to argue that it should be entitled to an extension of time even if there are concurrent causes of delay, in an attempt to override a contractual provision that concurrent delays shall be at the contractor's risk. This was roundly rejected by Fraser J, who held that the prevention principle does not prevent parties from contractually agreeing to allocate the risk of concurrent delays in a particular way.[92]

Fraser J also made some obiter observations on the meaning of concurrency, and he expressly approved[93] of the reasoning in a number of previous authorities[94] that there is no entitlement to an extension of time if a contractor is responsible for some concurrent delay and the employer did not actually cause any delay to the date of completion. As pointed out in last year's review, this recent trend appears to depart from the broader approach previously adopted in *Malmaison*[95] and *Walter Lilly*,[96] and it would certainly be helpful if the issue could be revisited and clarified by an appellate court.

It was hoped that the *North Midland* appeal would be the perfect occasion to do so. However, the Court of Appeal in *North Midland Building Ltd v Cyden Homes Ltd*[97] refrained – Coulson LJ confined himself to putting down a marker that:

> "[...] other than to note that **there are differences of view expressed in both the first instance cases and the textbooks, it seems to me that it would be unwise to decide the issue without full argument**. There may well be cases which will turn on this point, but the instant appeal is not one of them."[98] (Emphasis added.)

Although this may have been something of a missed opportunity for an area in urgent need of clarity and consistency (especially since 99 out of 100 construction disputes involve elements of delay), the Court of Appeal's decision in *North Midland* is still important for its confirmation of Fraser J's judgment in the TCC in respect of the effect of the prevention principle. Coulson LJ observed that "the prevention principle is not an overriding rule of public or legal policy" and has an entirely different legal provenance from the doctrine of penalties.[99] Above all, there is nothing in the authorities to suggest that parties cannot contract out of some or all of the effects of the prevention principle.[100]

In their heyday, the prevention principle and the concept of "time at large" acted as a safety valve to avoid a contractor being unfairly prejudiced by an employer's acts of prevention where there was no contractual mechanism for extending time for completion. It appears that the *North Midland* line of decisions has confined the prevention principle to a concept which has little practical application in modern day construction contracts, most (if not all) of which now contain detailed provisions for extensions of time.

91 [2017] EWHC 2414 (TCC); [2017] BLR 605.
92 *Ibid*, at paras 18 to 19.
93 *Ibid*, at para 29.
94 *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.
95 *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32 (TCC), at para 13.
96 *Walter Lilly & Co Ltd v Mackay and Another (No 2)* [2012] EWHC 1773 (TCC); [2012] BLR 503, at para 370.
97 [2018] EWCA Civ 1744; [2018] BLR 565.
98 *Ibid*, at para 50.
99 *Ibid*, at para 30.
100 *Ibid*, at para 36.

There are different schools of thought as to whether the prevention principle should be given a new lease of life as a legal doctrine which safeguards a contractor's entitlement to an extension of time whenever there is an employer's risk event in play (whether it is a sole or concurrent cause of delay). The courts in *North Midland* have clearly refused to legislate such an interventionist principle, instead giving primacy to freedom of contract and the parties' negotiated bargain, and this can be seen as part of a wider judicial trend in recent years, for example in the context of contractual interpretation[101] and the doctrine of penalties.[102]

> The *North Midland* line of decisions has confined the prevention principle to a concept which has little practical application in modern day construction contracts, most (if not all) of which now contain detailed provisions for extensions of time

On the other hand, there is something to be said for levelling the playing field and fashioning the law in a way which allows the courts to take cognisance of the fact that employers have committed acts of prevention, even if the impact of those acts cannot be neatly disentangled from the effects of the contractor's own concurrent delay. Indeed, the author has come across such an approach in arbitrations governed by civil codes which provide for the equitable reduction of liquidated damages,[103] and this finds some expression in the apportionment approach endorsed by the Court of Session in *City Inn Ltd v Shepherd Construction Ltd.*[104]

The apportionment approach (or any other approach which gives some effect to the prevention principle) may serve an important cautionary and regulatory function, in that it may discourage opportunistic practices found in some construction projects where variations are strategically timed to coincide with a contractor's delay event, in order to avoid compensating the contractor for any time-related costs. These are legitimate considerations which merit a wider debate about the role of the prevention principle and the legal characterisation of concurrency, and it is perhaps a debate which is better had outside the four walls of a courtroom.

Liquidated damages and doctrine of penalties

Three years on from the Supreme Court decision in *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis,*[105] the lower courts have now had the occasion to grapple with the new test for penalty clauses – a tribunal must now ask itself "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".[106]

In *GPP Big Field LLP v Solar EPC Solutions SL*,[107] the dispute related to the construction of five solar power plants and involved (amongst other things) a claim for liquidated damages due to the failure to achieve the agreed commissioning date. The contractor argued that the liquidated damages were penal and therefore unenforceable, on the basis that the same penalty was applicable to all plants even though the extent of the loss likely to

101 See eg *Arnold v Britton* [2015] UKSC 36, *Persimmon Homes Ltd and Others v Ove Arup and Partners Ltd and Another* [2017] EWCA Civ 373; [2017] BLR 417.

102 *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67; [2016] BLR 1.

103 See eg article 812 of the Portuguese Civil Code, which has substantially been transposed into article 802 of the Macau Civil Code (equitable reduction of a penalty clause): "upon request of the debtor, a contractual penalty may be equitably reduced by the Court if such penalty is manifestly excessive, even if such excess is due to any supervening circumstances; any contravening contractual provision set by the parties shall be null and void".

104 [2007] CSOH 190; [2008] BLR 269 (Outer House), at paras 18 to 19 – affirmed by the Inner House in [2010] CSIH 68; [2010] BLR 473, at para 42.

105 See *Makdessi*.

106 *Ibid*, at para 32.

107 [2018] EWHC 2866 (Comm).

be suffered would be dependent upon the output of each plant and the prevailing electricity price.

Applying the test in *Makdessi*, DHCJ Richard Salter QC rejected the contractor's arguments. The judge noted that "delay damages provisions of this kind are common in construction contracts, and the first claimant and the Contractor were experienced and sophisticated commercial parties, of equal bargaining power, who were well able to assess the commercial implications".[108] In concluding that the liquidated damages were not extravagant or unconscionable, the judge reasoned as follows:

> "[...] it is in the nature of liquidated damages clauses that **they are often used (as here) in cases where precise prediction of the likely loss is difficult**, and are therefore often expressed in round figures. [...] the fact that the loss resulting from that breach may vary in amount depending on the actual circumstances at the time does not of itself give rise to any inference that the sum agreed to be paid is a penalty, **provided that it is not extravagant and unconscionable in amount in comparison with the greatest loss that might have been expected when the contract was made to be likely to follow from the breach**."[109] (Emphasis added.)

It is noteworthy that DHCJ Salter QC's reasoning, whilst formulated in the context of the new *Makdessi* test, is very much reminiscent of the principles previously laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[110] to determine whether a stipulated sum is a genuine pre-estimate of loss – in particular, the passage cited above corresponds to the principle that a clause is penal "if the sum stipulated for is extravagant and unconscionable **in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach**".[111] (Emphasis added.)

Therefore, where the legitimate interest under consideration is financial, it appears that the courts' approach under the *Makdessi* test does not materially differ from its previous thought-process under the old *Dunlop* test, and to that extent, the courts' application of the new *Makdessi* test is not as unpredictable as some might have feared. In fact, the *GPP* decision is consistent with the observation of Lord Neuberger and Lord Sumption in *Makdessi* that "[i]n the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity".[112]

Further afield in the Singaporean courts, there has also been a proliferation of authorities on the doctrine of penalties in recent years. Save in one case where the court considered the distinction between primary and secondary obligations in the light of *Makdessi,*[113] the Singapore High Court felt bound to apply the *Dunlop* test and not the new *Makdessi* test.[114] In the past year, the position remains that the Singapore Court of Appeal has not had the opportunity to rule on the applicability of *Makdessi*, but three further Singaporean High Court decisions are of interest.

In *Leiman, Ricardo and Another v Noble Resources Ltd and Another*,[115] the Singapore High Court considered whether a provision within a settlement agreement was penal. Wei J considered that the *Makdessi* test was the most appropriate guidance in that context, and he applied the test accordingly in concluding that the provision in question was not penal.[116]

Further, in *Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and Others*,[117] which concerned the enforceability of provisions in call option agreements, Mavis Chionh Sze Chyi JC noted that *Makdessi* has been applied by the Singapore High Court in relation to the distinction between primary and secondary obligations, and held that the

108 *Ibid*, at para 67.
109 *Ibid*, at para 69.
110 [1915] AC 79, at pages 87 to 88.
111 *Ibid*, at 87 (proposition 4(a)).
112 *Makdessi*, at para 32.
113 *iTronic Holdings Pte Ltd v Tan Swee Leon and Another* [2016] 3 SLR 663.
114 *Allplus Holdings Pte Ltd and Others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144, *Hon Chin Kong v Yip Fook Mun and Another* [2017] SGHC 286, *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and Others* [2017] SGHC 22.
115 [2018] SGHC 166.
116 *Ibid*, at para 197.
117 [2018] SGHC 263.

provisions in question where primary obligations and therefore not penalties.[118]

Finally, in *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and Another,*[119] the Singapore High Court considered the enforceability of the liquidated damages provisions under three electricity retail agreements. Woo Bih Li J felt bound to apply *Dunlop* and not *Makdessi,*[120] but for the sake of completeness, the judge considered the *Makdessi* test and concluded that it would not assist the claimant, as there was no evidence of any legitimate interest other than financial loss.[121] Therefore, the judge held that the liquidated damages were primarily intended to be a deterrent and were penal.

From the above Singaporean cases, it appears that there is no consistency of approach in the proper test to be applied, but the courts are still predisposed to give effect to liquidated damages clauses whether under the *Dunlop* test or the *Makdessi* test. Clarification from the Singapore Court of Appeal as to the correct test would be welcome.

The *Seraya Energy* decision is interesting in that the Singapore High Court struck down the liquidated damages provisions as penal, on the basis that the figure was plucked out of thin air and there was no evidence of any legitimate interest other than financial loss. This is a helpful reminder for parties both in the UK and abroad – it should not be taken for granted that the *Makdessi* test would invariably lead to a presumption in favour of enforcing liquidated damages provisions, and parties relying on such provisions should be ready to justify the rationale behind the stipulated damages and provide evidence of any wider legitimate interests which have to be weighed up by the courts.

Before leaving the topic of liquidated damages, it is worth briefly considering the case of *University of Warwick v Balfour Beatty Group Ltd*,[122] where Balfour Beatty contended that the sectional liquidated damages were unenforceable, not so much because they were penal, but because, as a matter of contractual construction of the JCT 2011 Design and Build form of contract, practical completion of any one section could only be achieved if all sections (ie the whole of the works) have been completed, and this rendered the sectional liquidated damages inoperable.

This argument was somewhat innovative, and seeks to build on previous authorities to the effect that sectional liquidated damages without a proper definition of sectional completion could be too uncertain to enforce. However, HHJ McKenna had little difficulty rejecting Balfour Beatty's arguments:

> "[...] properly construed, the ordinary meaning of the words used in clause 2.27 both when considered in isolation and in the context of the Contract as a whole is that a Section attains Practical Completion if it is sufficiently complete that it would permit or allow the use and occupation of the Property and sub paragraphs (a) to (f) of the definition are satisfied in so far as they are related to or impact upon the Works connected with the particular Section under consideration and it is not necessary for the Works as a whole to be complete or the Property as a whole to be ready for occupation."

This case illustrates the futility of relying on strained interpretation of a contract to render liquidated damages unenforceable, especially where the sectional completion provisions under the JCT 2011 form of contract have been operated adequately in other projects over the years.

That said, the author has conducted a number of adjudications in the past year involving successful challenges to liquidated damages provisions, on the more conventional basis that the scope of the works in each section has not been sufficiently defined. In those circumstances, it would be impossible to determine with any certainty whether a given section has been completed, such that the sectional liquidated damages are inoperable. The *Balfour Beatty* decision does not seem to impugn this line of argument, and parties should always take care to define sectional completion criteria which are clear and unambiguous.

118 *Ibid*, at paras 121 to 125.
119 [2019] SGHC 2.
120 *Ibid*, at para 178.
121 *Ibid*, at para 192.
122 [2018] EWHC 3230 (TCC); [2019] BLR 138.

INTERPRETATION OF CONTRACTS

No consideration of construction law developments would be complete without a discussion of the court's approach in interpreting complex contractual provisions, and as mentioned at the beginning, Sir Rupert Jackson aptly described the task of contractual interpretation as an often "unenviable" and "luckless" one. Although 2018 has not seen any further restatement of the general principles of interpretation from the highest judicial echelons, those principles have played an important role in a number of widely discussed decisions.

"No oral modification" and "entire agreement" clauses

The Supreme Court's decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[123] was hotly anticipated by legal practitioners and academics, with the expectation that the Supreme Court would make an authoritative statement on the doctrine of consideration and its role in modern contract law. They were probably disappointed to find that the decision glossed over the admittedly difficult issue, save for Lord Sumption's observation as follows:

> "In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer* (1884) 9 App Cas 605: see in particular para 622 per Lord Blackburn. [...] The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer*. **It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.**"[124] (Emphasis added.)

Nevertheless, *MWB* is an important decision from a practical industry perspective, for its resounding affirmation of the validity and effect of "no oral modification" (NOM) clauses. The question in *MWB* was whether, on the facts, the oral variation could amount to an oral agreement to dispense with an express NOM clause. The Court of Appeal answered that question in the affirmative, but the Supreme Court disagreed.

> *Rock Advertising* has wide-ranging implications for the construction industry, as it is not at all uncommon to find disputes regarding oral agreements and oral instructions to vary the works. Parties are often able to rely on principles of estoppel or waiver when additional works have been carried out for the benefit of the employer

Lord Sumption (with whom the majority of the court agreed) considered that there was no inconsistency between the general freedom to make contracts informally and a NOM clause, because "[w]hat the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies".[125] Therefore, an oral agreement to vary the contract does not, without more, dispense with a NOM clause, and the oral variation would simply be invalid.

This is a sweeping decision which has wide-ranging practical implications for the construction industry, as it is not at all uncommon to find disputes regarding oral agreements and oral instructions to vary the works. When these circumstances arise, parties are often able to rely on principles of estoppel or waiver when additional works have clearly been carried out for the benefit of the employer. What would be the position after *MWB*?

123 [2018] UKSC 24; [2018] BLR 479.
124 *Ibid*, at para 18.
125 *Ibid*, at para 15.

Recognising that there may be cases where an oral variation has been acted on, it seems that Lord Sumption has left a very small window for exceptional cases:

> "In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. [...] I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. **At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself** [...]."[126] (Emphasis added.)

Those within the construction industry may find this exception a difficult one to apply to real-life projects. Indeed, if the parties were content to proceed on the basis of an orally agreed variation, it would be unlikely to find words or conduct which specifically go to dispensing with the NOM clause. This may potentially lead to one of two scenarios – either contractors which have been working on the basis of oral variations will more frequently find themselves between a rock and a hard place, or the courts would attempt to achieve a fair result and veer away from Lord Sumption's dicta. Either way, it is not at all straightforward to advise stakeholders on what a tribunal is likely to decide in the light of *MWB*.

It is therefore interesting to note that Lord Briggs, whilst agreeing with the result, dissented from Lord Sumption's reasoning. Lord Briggs considered that it is possible to reflect the autonomy of the parties to bind themselves (by a NOM clause) as to their future conduct, while preserving their autonomy to agree to release themselves from that inhibition.[127] He therefore preferred a "more cautious recognition of the effect of a NOM clause, namely that it continues to bind until the parties have expressly (or by strictly necessary implication) agreed to do away with it", which would leave "those cases **where the subject matter of the variation was to be, and was, immediately implemented, where estoppel and release of the NOM clause by necessary implication are likely to go hand in hand**".[128] (Emphasis added.)

Lord Briggs' reasoning is arguably clearer, and expressly recognises that oral variations which have been immediately implemented should probably be given effect on the basis of an implied agreement to dispense with a NOM clause and/or estoppel. It would therefore be interesting to see in the coming years whether the courts would be persuaded to go down the route of implied terms and estoppel, in order to avoid unfair results which would allow an enriched employer to keep the benefit without properly compensating the contractor.

Another related debate would be the role (if any) which the civil law concepts of good faith and abuse of rights may play in this context – would good faith or abuse of rights provide a more certain solution for parties who have acted on oral variations made contrary to a NOM clause? From experience, concepts of good faith and abuse of rights are often umbrella terms which depend heavily on specific doctrines for their practical application, such as the doctrine of venire contra factum proprium (ie no one may set himself in contradiction to his own previous conduct), which is analogous (albeit not equivalent) to estoppel. Instead of developing completely novel principles, a more fruitful exercise may well be for the courts to flesh out the precise scope and limits of estoppel in the context of dispensing with NOM clauses.

In *MWB*, Lord Sumption also acknowledged obiter the similarity between NOM clauses and "entire agreement" clauses, and he observed that:

> "[...] The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent its enforcement. [...] But if the clause is relied upon

126 *Ibid*, at para 16.
127 *Ibid*, at para 25.
128 *Ibid*, at para 31.

> as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement. [...]"[129]

The subject of entire agreement clauses was specifically considered in the case of *Al-Hasawi v Nottingham Forest Football Club Ltd*,[130] and although the courts are inclined to give effect to such clauses, *Al-Hasawi* illustrates the importance of careful drafting to ensure that the clause achieves its intended scope. The case involved the sale of shares in the Nottingham Forest Football Club, and there was a misrepresentation by the seller of the liabilities of the club. The seller sought to rely on the entire agreement clause to resist a claim based on negligent misrepresentation.

> Parties should ensure that contractual language fully and clearly reflects the intended effect, and they can expect the courts to hold them to the agreed terms (be they NOM clauses, entire agreement clauses or otherwise) even if the result may be considered by some to be harsh or unfortunate

However, unlike the standard wording adopted by most parties, the clause in question did not include any wording to the effect that the buyer did not rely on the seller's representation,[131] which is intended to clearly state the exclusion of liability for misrepresentation. HHJ David Cooke observed as follows regarding the approach to contractual interpretation, very much in line with previous authorities:

> "21. I do not doubt that, in principle, the court is entitled to have regard to all the provisions of an agreement in construing any of them. As is often said, the agreement must be construed as a whole, or construction may be described as 'a unitary exercise'. [...]
>
> 22. [...] the court would have to be careful to ensure that it was not going beyond the proper bounds of construction and improving the bargain the parties had actually made by inserting provisions that would make commercial sense but were not actually contained in the written agreement they had made."

Although the seller contended that the entire agreement clause excluded claims for misrepresentation because such claims were duplicative of the specific contractual indemnities against excess liabilities, HHJ Cooke rejected that argument on the basis that an express provision is required to make the specific indemnities an exhaustive claim or remedy, and "an agreement to that effect cannot be inferred simply from the fact that express provision is made for one or more particular claims".[132] The judge therefore concluded that the reference to "representations" in the entire agreement clause only referred to representations that might acquire contractual force as a collateral agreement, but does not embrace matters which might give rise to a claim for misrepresentation.[133]

The above cases are a continuation of the courts' recent tendency to closely adhere and give effect to the express wording of the parties, and their reluctance to improve the parties' bargain on the basis of considerations of commercial common sense.[134] The moral of these judgments is that parties should take care to ensure that the contractual language fully and clearly reflects the intended effect, and they can expect the courts to hold them to the agreed terms (be they NOM clauses, entire agreement clauses or otherwise) even if the result may be considered by some to be harsh or unfortunate.

129 *Ibid*, at para 14.
130 [2018] EWHC 2884 (Ch).
131 See the guidance in *Axa Sun Life Services plc v Campbell Martin Ltd and Others* [2011] EWCA Civ 133; [2011] 2 Lloyd's Rep 1, at para 94.
132 *Al-Hasawi*, at para 24.
133 *Ibid*, at para 25.
134 See eg the decisions cited above in note 101.

Exclusion/limitation clauses

The courts' reluctance to interfere with the contractual bargain between two parties of broadly equal bargaining power stretches to the province of exclusion/limitation clauses – a trend which has already been pointed out in the 2017 review. In particular, the judgment of HHJ Stephen Davies[135] which was discussed last year has now been considered by the Court of Appeal in *Goodlife Foods Ltd v Hall Fire Protection Ltd*.[136]

As readers will recall, the dispute revolved around the validity of clause 11, which excluded "all liability, loss, damage or expense consequential or otherwise caused [...] persons or the like" arising from the supply of a fire suppression system. Unsurprisingly, the Court of Appeal affirmed HHJ Davies' judgment, stressing that "it is certainly right, as the commentators have noted, that the trend in the UCTA cases decided in recent years has been towards upholding terms freely agreed, particularly if the other party could have contracted elsewhere and has, or was warned to obtain, effective insurance cover",[137] and that "[a]n important pillar of English common and commercial law is party autonomy. Parties are free to contract on terms they choose, to allocate risks as they see fit – and the Court will enforce their bargains".[138]

In a comprehensive judgment, Coulson LJ held that "it was neither particularly unusual nor onerous for Hall Fire fully to protect themselves against the possibility of unlimited liability arising from future events",[139] and reasonable notice was given because the clause "was one of the standard conditions which were expressly referred to on the front of the quotation and which were printed in clear type".[140]

Coulson LJ further held that clause 11 was reasonable for the purposes of the Unfair Contract Terms Act 1977 (UCTA), given that the parties were of broadly equal bargaining power, and "a party such as Goodlife, conducting (as part of its regular business) a potentially hazardous operation, and with its own unique knowledge of its property and the precise effect on its business if there was a fire which stopped the factory working, was plainly in the best position to place its own insurance to cover those risks in the way most suited to that business".[141]

A particularly important consideration in this case was the offer in clause 11 that if Goodlife wanted liability to be reinstated, it would cost Goodlife more, but would give rise to insurance and therefore protection for losses which would otherwise be excluded.[142] This should have focused Goodlife's mind on its insurance position, and represented an entirely reasonable allocation of risks freely agreed between the parties.[143]

The Court of Appeal's decision in *Goodlife* thoroughly demonstrates the court's modern approach towards exclusion/limitation clauses – gone are the days of suspicious scrutiny of such clauses and strict construction.[144] Even applying the provisions of UCTA, the threshold for establishing reasonableness is a high one, and parties should certainly think twice before appealing a trial judge's determination of the reasonableness of an exclusion/limitation clause. As Gross LJ pointed out:

> "[...] a reluctance to interfere with bargains made by commercial parties is **accentuated in an Appellate Court by the consideration that this Court '... should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong'**: Lord Bridge of Harwich, in *George Mitchell (Chesterfield) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, at para 816."[145] (Emphasis added.)

135 [2017] EWHC 767 (TCC); [2017] BLR 389.
136 [2018] EWCA Civ 1371; [2018] BLR 491.
137 *Ibid*, at para 93.
138 *Ibid*, at para 99.
139 *Ibid*, at para 46.
140 *Ibid*, at para 53.
141 *Ibid*, at para 77.
142 *Ibid*, at para 79.
143 *Ibid*, at para 88.
144 *Ibid*, at para 100.
145 *Ibid*, at para 105.

An interesting aspect of the decision in *Goodlife* is the heavy reliance placed on other similar exclusion/limitation clauses in the market.[146] Taken to its logical end, one may end up in a peculiar situation where the more unreasonable and extensive exclusion/limitation clauses generally are in the market, the less likely they are going to be impugned by the courts, even though it becomes more and more unrealistic for a party to be able to go elsewhere and contract with another supplier without a similar term. There is thus an argument for saying that the court has to be extra cautious when comparing other clauses in the market, so as not to strip UCTA of all meaningful effect.

Coulson LJ specifically observed that UCTA has a valuable role to play in that it protects against unconscionable behaviour.[147] Given that the concept of unconscionability is not particularly perspicuous, and is distinctly not the statutory language adopted by Parliament, the introduction of "unconscionable behaviour" as a touchstone of liability could give rise to uncertainty and value judgments which are not readily reconcilable with other authorities. It would be prudent for stakeholders within the construction industry to keep an eye out for the direction of travel in future judicial decisions, whilst giving careful thought to any proposed exclusion/limitation clauses before signing up to a contract.

Fitness for purpose

The 2017 review considered the Supreme Court's decision in *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd,*[148] which illustrated the challenges of construing contractual specifications with various references to different design standards. This is a recurrent theme in construction and engineering disputes, and given that tender and contractual documents tend to be voluminous, it is hardly surprising that not all inconsistencies could be ironed out by the parties pre-contract.

In the more recent case of *Williams Tarr Construction Ltd v Anthony Roylance Ltd and Anthony Roylance*,[149] the court had to grapple with a similar predicament – the lack of a clear specification of the scope of the civil engineering services provided to a contractor. The project in question involved, amongst other things, the construction of a retaining wall, during which a band of running sand was encountered and there were more water flows behind the wall than previously anticipated. Mr Roylance designed a further drain to the south of the wall, and the issue was whether Mr Roylance warranted that the retaining wall would thus be fit for purpose.

The claimant contractor accepted that the engagement of Mr Roylance was "a bit of a rushed job",[150] and this made the court's task a difficult one. There was extensive cross-examination of factual witnesses as to their recollection and understanding of correspondence, conversations and meetings back in 2010, and HHJ Eyre QC observed (akin to Leggatt J in *Gestmin*) that:

> "[...] I am satisfied that each man believed that what he was saying in his evidence was correct. However, in assessing their evidence and their presentation in the witness box I have to be very conscious of the fact that **both men were inevitably recollecting matters from a particular viewpoint and also to be conscious of the common human inclination to recollect**

146 *Ibid*, at paras 36 to 38 (Coulson LJ) and 109(iii) (Gross LJ).
147 *Ibid*, at para 93.
148 [2017] UKSC 59; [2017] BLR 477.
149 [2018] EWHC 2339 (TCC).
150 *Ibid*, at para 82.

> **past events as having actually happened in the way in which the person recalling them believes they would, or indeed should, have happened**."[151] (Emphasis added.)

Therefore, HHJ Eyre QC attached a lot more weight to the available contemporaneous documents, and "[t]o the extent that the contemporaneous documents show a picture different from that depicted by either witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened".[152] Insofar as the written records are contradictory or equivocal as to an alleged contractual obligation, the court would understandably be slow to impose an onerous obligation, and this is a risk inherent to any reliance on oral conversations (and nothing more) to agree the precise scope and standard of the professional services to be rendered by a designer or consultant.

Consistent with the courts' recent approach to contractual interpretation, HHJ Eyre QC was cautious to ascertain the meaning of Mr Roylance's engagement based on "the natural meaning of the words used together with their context",[153] and he made it clear that "[i]f the engagement was limited to the design of the further drain then there is no scope for implying a term whereby the second defendant warranted that the Retaining Wall would be fit for purpose".[154] On the evidence, the judge concluded that the drawings and the correspondence leading up to the engagement showed that the design of the various essential components of the retaining wall were not carried out by Mr Roylance, and on balance, Mr Roylance's engagement was limited to the design of the drain.[155]

It is also noteworthy that HHJ Eyre QC held that the claimant engaged Mr Roylance personally (and not his company), because the fact that he was operating through the company "was not explained to the claimant or to the other persons with whom [Mr Roylance] dealt. The company was not referred to on the letterheads which were used nor was it otherwise mentioned in correspondence".[156]

> Parties should always ensure that the identity of both contracting parties are clear beyond doubt in the contractual documentation and in subsequent correspondence. *Williams Tarr Construction* is a cautionary tale for contractors and construction professionals alike

Once again, this is a crystal-clear example of the courts' focus on express indications and written records at the time of contract, and parties should always ensure that the identity of both contracting parties are clear beyond doubt in the contractual documentation and in subsequent correspondence. Indeed, had Mr Roylance been found to have warranted the fitness for purpose of the retaining wall, he would have been personally liable to the claimant, despite the fact that he had set up a company to protect himself from such liabilities. This case is therefore a cautionary tale for contractors and construction professionals alike.

151 *Ibid*, at para 17.
152 *Ibid*, at para 19.
153 *Ibid*, at para 60 (citing *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2018] Lloyd's Rep Plus 14).
154 *Ibid*, at para 58 (citing *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Another* [2015] UKSC 72).
155 *Ibid*, at paras 86 to 89.
156 *Ibid*, at para 53.

TORTIOUS LIABILITY OF CONSTRUCTION PROFESSIONALS

Having considered the contractual liability of a designer above, another topic dear to the heart of the construction industry is the tortious liability of construction professionals. Last year's review discussed the Court of Appeal's decision in *Lejonvarn v Burgess and Another,*[157] where the court held that Ms Lejonvarn, who assisted a friend and former neighbour in designing and supervising landscaping works, owed a duty of care in tort. That case has since returned to the TCC, giving rise to the latest (and probably final) instalment in *Burgess and Another v Lejonvarn*.[158]

In the latest proceedings, Burgess sought to establish on the back of the Court of Appeal's decision that Ms Lejonvarn was in breach of her tortious duty of care. DHCJ Martin Bowdery QC started by stressing that "the Court of Appeal made it clear that a professional providing gratuitous services was liable for what he or she does but not for what they fail to do",[159] and he observed that:

> "20. The Claimants in certain cases go too far in their expectations as to what the Defendant was obliged to do and what she should have discovered whilst providing a service of inspection. [...]
>
> 21. I consider that this goes too far. The Defendant is simply obliged to exercise reasonable skill and care in providing the professional service acting as an architect and project manager of project managing the Garden Project and directing, inspecting and supervising the contractors' work, its timing and progress."[160]

DHCJ Bowdery QC's observations are consistent with well-established principles as to the scope of an architect's duties of supervision and inspection, as summarised by HHJ Coulson QC (as he then was) in *Ian McGlinn v Waltham Contractors Ltd and Others*[161] – importantly, it bears emphasis that an architect does not guarantee that his/her inspection will reveal or prevent all defective work, and it is not appropriate to judge an architect's performance by the result achieved.

Overall, DHCJ Bowdery QC was not impressed with the evidence and allegations put forward by the claimants, and he criticised their "scattergun approach" as unhelpful particularly because the witnesses' recollections "can be influenced by the dispute and the hardening of attitudes caused by somewhat protracted litigation"[162] – *a theme which has come up repeatedly in other cases which were discussed earlier in this article.* Accordingly, the judge found that Ms Lejonvarn was not negligent in carrying out her inspection, design, budgetary, or payment valuation duties.

The key lesson from the *Burgess* saga is that construction professionals should be wary of being exposed to potential tortious liability, even when providing assistance socially without a formal contract. However, the fact that services were provided gratuitously would limit the professional consultant's liability to negligence in acts done (and not omissions), and it is likely that the courts would require particularly clear and cogent evidence of the breach and the associated loss before acceding to such a claim.

A contrasting example is the decision of the Hong Kong Court of First Instance in *So Kai Hau v YSK2 Engineering Company Ltd and Others*,[163] which concerned the liability of (amongst others) a building surveyor appointed as a statutory "Authorised Person" (AP) to a demolition contractor and its workers. That case concerned a bromotrifluoromethane (BTM) cylinder left on site which resulted in an accident during the demolition works, causing serious injuries to a site foreman, and the question was whether the AP was liable to contribute to the compensation payable to the injured foreman.

Under section 4 of the Hong Kong Buildings Ordinance (Cap 123), an AP is required to supervise the carrying

157 [2017] EWCA Civ 254; [2017] BLR 277.
158 [2018] EWHC 3166 (TCC).
159 *Ibid*, at para 15.
160 *Ibid*, at paras 20 to 21.
161 [2007] EWHC 149 (TCC); [2007] BLR 188, at para 218.
162 *Burgess*, at para 24.
163 [2018] HKCFI 1803.

out of the works for compliance with the Ordinance and notify the Building Authority of any contravention of the building regulations. Bharwaney J held that it was reasonably foreseeable that workers would be endangered by the BTM cylinder, and it was fair, just and reasonable to impose a duty of care on the AP to take reasonable steps to protect workers from obvious dangers.[164] The AP was found to be in breach of his duty of care because he failed to engage a specialist contractor to assess the potential hazard, even though the AP himself made a genuine (albeit mistaken) assessment.[165]

It is important to note that *So Kai Hau* was decided in the particular context of personal injury and the seriousness of the hazard posed by the BTM cylinder. It is not immediately obvious why the AP, the consulting engineer and the specialist demolition contractor were all contributorily negligent,[166] as it is arguable that the latter two parties most closely oversaw the demolition works (after the AP departed from the project) and were independent intervening acts/omissions which broke the chain of causation.

Nevertheless, the *So Kai Hau* decision is a timely reminder of the potential tortious liability of professional consultants (and indeed Health and Safety Inspectors) in respect of health and safety matters, especially where there is a serious risk of personal injury. In the UK, this is also relevant in the context of duties owed by Clients, Principal Designers and Principal Contractors under the Construction (Design and Management) Regulations 2015, a breach of which may amount to a breach of contract and/or negligence.

TERMINATION AND REPUDIATION

The vexed question of what remedies flow from termination should not be unfamiliar to those within the construction industry. Although many standard form construction contracts expressly provide for the consequences upon termination, the answer at common law where the contract is silent is often not straightforward.

This issue arose in the case of *Phones 4U Ltd (in Administration) v EE Ltd*,[167] which, although not related to a construction project, is an instructive case on entitlement to damages on termination. By a termination letter, EE terminated its trading agreement with Phones 4U based on a contractual right of termination upon Phones 4U's insolvency. The letter included a general reservation of all rights and remedies which EE may have under the trading agreement. EE's liabilities to Phones 4U survived termination and continued to fall due, but EE sought to counterclaim for loss of bargain as a result of termination. The claim was premised on a breach by Phones 4U's contractual obligations to market and sell EE's products and services and to procure customers for EE.

Andrew Baker J undertook a detailed review of the authorities,[168] and held that as a matter of first principle, "[t]he loss of bargain damages claim requires EE to show that the termination of the contract, which created the loss of bargain, resulted from the repudiatory breach or renunciation by Phones 4U that it is presently to be assumed EE might prove at trial. That in turn requires EE to show that the contract was terminated by its exercise of its common law right to terminate for that breach, respectively that renunciation".[169] Importantly, the termination letter based on a contractual right of termination cannot be re-characterised ex post facto simply because the contract could have been terminated at common law for repudiation.

The judge noted that, unlike the circumstances considered in some previous cases, this case did not concern a termination of a contract expressed to

164 *Ibid*, at paras 120 to 122.
165 *Ibid*, at paras 123 to 127.
166 *Ibid*, at para 131.
167 [2018] EWHC 49 (Comm); [2018] BLR 255.
168 *Ibid*, at paras 91 to 115.
169 *Ibid*, at para 117.

be for a repudiatory breach or renunciation which also gave rise to a contractual right of termination, nor did it concern a termination of a contract for an alleged repudiation A where the facts actually show a different repudiation B.[170] Therefore, construing the terms of the termination letter, the reservation of rights was not an exercise of the common law right to terminate the trading agreement, and so EE was not entitled to claim any loss of bargain.[171]

The difficulty of the question considered in *Phones 4U* is apparent from Andrew Baker J's recognition that his decision may lead to an appeal,[172] and it would be interesting to see whether an appellate court would affirm Andrew Baker J's reasoning. As a matter of practice, however, it seems that this decision would make it very difficult for a party to exercise a right of contractual termination whilst also accepting repudiation and claiming common law remedies. If a general reservation of rights was insufficient, would it suffice for the letter to refer to contractual termination and, on a further or alternative basis, an acceptance of repudiation? There is at least an argument for saying that this would suffice as an exercise of a common law right of termination, and it is something which parties and their legal advisors may wish to consider in the light of the *Phones 4U* decision.

Turning to a slightly different scenario, if a contract has been wrongfully terminated, it does not necessarily follow that the innocent party is entitled to damages. In the case of *Radbourn Group Ltd v Fairgate Developments Ltd*,[173] Radbourn was appointed as a project manager but was found to be wrongfully terminated by Fairgate's notice of default.[174] The issue before the TCC was therefore the quantum of the damages (if any) for the wrongful termination.

DHCJ Andrew Bartlett QC relied on an express contractual provision that Radbourn's fees was subject to the granting of planning consent, the planning application having first been approved by Fairgate. The judge construed this as a discretion to discontinue the appointment if the commercial viability of the project was called into question, and this did arise on the facts:

> "The critical point is that it became apparent over time that the project as originally envisaged in RGL's appointment was not a realistic project to pursue. To get good value out of the planning potential of Fairgate's land, it was going to be necessary to pursue some differently constituted project. If RGL had continued to be engaged after February 2016, this might have been discovered a little earlier than it was. But the dates make no difference, since, whether the decision were made in November 2016, in May 2017, or in July 2017, or at any earlier or later date, no additional remuneration would have become due to RGL under the contract."[175]

A broadly worded discretion not to proceed with a project, even if not exactly a termination for convenience provision, can absolve a developer from liability for damages for wrongful termination. The importance of considering the implications of similar discretions in future professional appointments cannot be understated

Accordingly, Fairgate would have been entitled in any event to terminate Radbourn's appointment before Radbourn became entitled to any further stage payments, and as a matter of causation, the claim for damages arising from wrongful termination (as well as the alternative claim for loss of a chance) failed.[176] This case demonstrates how a broadly worded discretion not to proceed with a project,

170 *Ibid*, at paras 125 to 129.
171 *Ibid*, at paras 131 to 132.
172 *Ibid*, at para 63.
173 [2018] EWHC 658 (TCC); [2018] BLR 802 (quantum).
174 See *Radbourn Group Ltd v Fairgate Development Ltd* [2017] EWHC 1223 (TCC), which refused Fairgate's application to set aside a default judgment but allowed a quantum hearing.
175 *Radbourn* (quantum), at para 81.
176 *Ibid*, at paras 82 to 83.

even if not exactly a termination for convenience provision, can absolve a developer from liability for damages for wrongful termination. The importance of considering the implications of similar discretions in future professional appointments cannot be understated.

The above cases involved claims for damages based on a loss of the contractual bargain as a result of repudiation, and the quantum claimed was firmly based on the parties' negotiated agreements. It is noteworthy that the position is slightly different in Australia, where a restitutionary claim of quantum meruit is also available in the event of wrongful repudiation by an employer, despite the existence of a contractual arrangement between the parties.

This has most recently been confirmed by the Victorian Court of Appeal in *Mann v Paterson Constructions Pty Ltd*,[177] and contractors are entitled to elect to pursue a claim in *quantum meruit* as the fair and reasonable value of the works may well exceed the agreed contract price. This approach has always been controversial within the industry, and the Victorian Court of Appeal has previously acknowledged the "very powerful" criticisms of this approach,[178] as it tends to allow contractors to improve on their contractual bargain and obtain a windfall. This is ripe for reconsideration by the High Court of Australia, and it is worth watching this space to see if the debate would finally be put to bed in the not-so-distant future.

INTERNATIONAL TRENDS IN CONSTRUCTION DISPUTE RESOLUTION

Over the course of 2018, Brexit has continued to cast a shadow over the construction and infrastructure industry, and according to the Markit/Cips UK Construction Purchasing Managers' Index, the UK construction sector ended 2018 on a weaker footing than expected, due to fading local demand for commercial projects and the looming risk of a no-deal Brexit. It is perhaps no surprise that developers, contractors and construction professionals have variously been turning to other jurisdictions for opportunities, and it is expected that this trend will continue in the year ahead.

The growth of construction and infrastructure projects involving international parties and stakeholders has led to a continuing increase in the demand for cross-border dispute resolution, particularly in Southeast Asia and the Middle East. International arbitration remains an indispensable part of a UK construction lawyer's diet, and it is just as important to stay up-to-date with legal and industry developments in other jurisdictions. A number of recent developments in Hong Kong and the UAE are particularly worth mentioning.

Hong Kong

The Hong Kong International Arbitration Centre (HKIAC) has always been a popular choice for institutional arbitration in the region and on 1 November 2018, the new HKIAC Administered Arbitration Rules (HKIAC Rules 2018) came into effect. The HKIAC Rules 2018 made a number of key changes, including:

- A procedure for an application for emergency relief up to seven days prior to the service of a Notice of Arbitration (or a longer period as permitted by an emergency arbitrator);[179]

177 [2018] VSCA 231.

178 See *Sopov (Cole) and Norma Walker v Kane Construction Pty Ltd (No 2)* [2009] VSCA 141; [2009] BLR 468, at paras 9 to 12.

179 Article 23.1 and Schedule 4 of the HKIAC Rules 2018.

- An early determination procedure which is akin to an application for strike out or summary judgment in court;[180]
- A requirement for parties to disclose the existence of third-party funding arrangements, and a power conferred on arbitrators to take into account such arrangements when determining costs of the arbitration,[181] bringing the rules in line with the amendments introduced by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in 2017;
- A streamlined procedure for consolidated, concurrent or consecutive arbitral proceedings before the same tribunal, even in circumstances involving separate arbitration agreements between various parties. This is of particular relevance to complex construction disputes with both upstream and downstream aspects;[182] and
- A requirement for a tribunal to provide a date for the delivery of the award which must be within three months of the close of proceedings, subject to any extension agreed between the parties or granted by the HKIAC.[183]

A related development is the issuance of the Code of Practice for Third Party Funding of Arbitration on 7 December 2018, following the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance of 2017. The Code of Practice sets out core practices and standards for third-party funding of arbitration, including capital adequacy requirements, careful management of conflicts of interest, confirmation that the funded party has taken independent legal advice, and non-interference with the conduct of the arbitration by the funded party and its legal representatives.

Whilst Hong Kong has always maintained a clear pro-arbitration policy, the Hong Kong Court of First Instance has handed down a few interesting decisions in 2018 refusing to enforce arbitral awards. In *Z v Y*,[184] the respondent sought to challenge the enforceability of a Chinese arbitral award, based on a number of grounds provided by section 95 of the Arbitration Ordinance (Cap 609). In particular, the respondent contended that the award was contrary to public policy, due to the illegality of the guarantee in question under PRC and Hong Kong law.

Mimmie Chan J considered that on a careful review of the award, it is unclear whether the tribunal had thoroughly considered the issue of illegality, and she had serious reservations as to the reasons given by the tribunal.[185] The judge noted that no reference was made to the credible evidence relied on by the respondent, and the tribunal therefore failed to give adequate reasons as to its conclusion.[186] Accordingly:

> "[...] it would offend our Court's notions of fairness and justice to enforce the Award when it might be tainted by illegality, and when a significant issue brought before the tribunal for determination has not been seen to be properly considered and determined, contrary to the parties' legitimate and reasonable expectations."[187]

Whilst the judge's sentiments are understandable given the way that the tribunal dealt with the issue of illegality, the test for "contrary to public policy" is a strict one and is meant to be applied sparingly in cases which shock the court's conscience. The reasoning in *Z v Y* sails dangerously close to a review of the substantive evidence and merits of the arbitral award, when the focus should arguably be on the nature of illegality as a matter of public policy. Nevertheless, this case serves as a cautionary tale for tribunals dealing with matters such as illegality, and it is critical to give adequate reasoning in the final award.

Another interesting decision in 2018 was *P v M*,[188] arising from an arbitration concerning a loss and expense claim which was allegedly time-barred. The tribunal's award concluded that notice of the claim was given, but that was never pleaded or argued by the claimant. The respondent therefore sought to challenge the award on the ground of serious irregularity, within the meaning of section 4(2) of Schedule 2 to the Arbitration Ordinance (Cap 609).

180 Article 43 of the HKIAC Rules 2018.
181 Articles 44 and 45 of the HKIAC Rules 2018.
182 Articles 29 and 30 of the HKIAC Rules 2018.
183 Article 31.2 of the HKIAC Rules 2018.
184 [2018] HKCFI 2342.
185 *Ibid*, at para 10.
186 *Ibid*, at paras 11 to 12.
187 *Ibid*, at para 14.
188 [2018] HKCFI 2280.

The challenge was again heard by Mimmie Chan J, who remitted the award back to the tribunal for reconsideration. The judge considered that the claimant never pleaded any facts to support its denial of the non-compliance with the notice requirements, and the respondent was deprived of a fair opportunity to present its case, such that there was a serious error which affected due process and the structural integrity of the arbitral proceedings.[189]

The recent cases suggest that, despite Hong Kong's pro-arbitration policy, the courts are ready to refuse enforcement and/or remit an award to the tribunal if there is considered to be a failure to give adequate reasons on a serious issue of public policy or fails to give all parties a fair opportunity to present their case on an issue which is critical to the tribunal's findings and conclusions. This is especially important for those who are seeking to enforce arbitral awards in the Hong Kong courts.

Finally, it is worth mentioning the ongoing commission of inquiry (CoI), led by ex-Court of Final Appeal judge Michael Hartmann. The inquiry has taken the local media by storm, and concerns alleged defective steelwork and project management issues in respect of the construction of Hung Hom Station in the new Shatin Central Link for Hong Kong's Mass Transit Railway (MTR). The hearing for the first part of the CoI ran from October 2018 up to the end of January 2019, covering the factual evidence of eight involved parties and expert evidence on project management and structural engineering in relation to the East West Line and North South Line track slabs.

The CoI's interim report was published on 26 March 2019, but the Hong Kong Government has now expanded the terms of reference of the CoI to cover further issues, with a corresponding extension to the deadline for the CoI's final report until August 2019. The final report of the CoI will be of interest not only to the general public from a public safety perspective, but also to the construction industry from the point of view of recommendations for project management practices and for the Government's current regulatory regime. This is certainly something to look out for in the third quarter of 2019.

UAE

The Dubai International Financial Centre (DIFC) Courts have taken active steps in 2018 to cement its role in China's Belt and Road Initiative (BRI).

In May 2018, the DIFC Courts signed a memorandum with the University of Oxford's China Centre, which paves the way to joint research and reports to raise awareness about the legal and regulatory challenges which stakeholders would face in the BRI's construction and infrastructure projects. This is intended to facilitate effective dispute resolution for BRI projects and mutual recognition of court judgments in the future.

Further, in August 2018, the DIFC Courts signed a Memorandum of Guidance with the Hong Kong High Court to enhance enforcement of cross-border judgments. The Memorandum is intended to serve as a technical guide for the international legal and business communities on recognition and collection of money judgments in DIFC and Hong Kong, and this would in turn promote legal certainty and investor confidence.

> The Abu Dhabi Global Market Arbitration Centre directly incorporates English common law and certain English statutes, providing yet another choice as a seat of arbitration in the UAE

Together with the memoranda previously signed with the Shanghai High People's Court in 2016 and with the Hangzhou Arbitration Commission in 2017, the latest memoranda testify to the growing importance of cross-border dispute resolution and legal dialogue in the DIFC, China and Hong Kong. For those within the UK construction industry involved in international projects, this market is not to be neglected in the coming years.

The above was coupled with the official opening of the Abu Dhabi Global Market (ADGM) Arbitration Centre on 17 October 2018. Similar to the DIFC, the

189 *Ibid*, at paras 15 to 19.

ADGM operates its own self-contained common law legal system with the independent ADGM Courts, but unlike the DIFC, the ADGM directly incorporates English common law and certain English statutes. The ADGM Arbitration Centre is a new arbitration institution with state-of-the-art facilities, and provides yet another choice as a seat of arbitration in the UAE. This is a highly positive development in line with the UAE's pro-arbitration policy.

On the legislative front, Federal Law No 6 of 2018 was promulgated on 3 May 2018 as the UAE's new federal arbitration law. This is heavily based on the UNCITRAL Model Law on International Commercial Arbitration, and applies to any arbitration conducted in the UAE unless the parties agree otherwise (including arbitrations commenced before the promulgation of the new law). This is certainly a positive development, and there are likely to be more developments as the parties familiarise themselves with the new law, so this is something to watch in the year ahead for those who operate in the UAE.

Last but not least, arbitrators and experts who operate in the UAE will take comfort in the fact that article 257 of the UAE Penal Code (which provided for the temporary imprisonment of unfair or biased arbitrators, experts and translators) was amended by Federal Decree Law No 24 of 2018 to exclude arbitrators. Although experts and translators are still caught by article 257, the touchstone of liability is now based on dishonesty rather than lack of impartiality.

Together with the new federal arbitration law, the latest amendment of article 257 of the UAE Penal Code brings the UAE's arbitral landscape in line with international standards, and is a welcome development in the pro-arbitration direction of travel. It is likely that the UAE (including the DIFC and the ADGM) would become more and more popular as a seat of arbitration in the region, particularly for disputes arising from BRI projects.

CONCLUDING OBSERVATIONS

After an eventful year in 2018, those within the construction and infrastructure industry have much to watch out for in 2019, not least the ongoing Brexit negotiations. Before there is any certainty on the final position, all that the industry can do is to take steps to protect itself from the risks of Brexit in new and existing contracts, hoping for the best while preparing for the worst.

On a more positive note, the industry should stay tuned for a number of new standard form contracts, including FIDIC's Emerald Book, the Royal Institute of Chartered Surveyors' new consultant appointment forms, and the new public sector Option Z clauses which will form part of the NEC 4 suite of contracts launched in 2017.

Coming to Building Information Modelling (BIM) which has quickly been gathering pace in recent years, following the publication of ISO 19650-1 and 19650-2 in January 2019 to facilitate the introduction of BIM into projects, further additions are expected to cover the management of the operation phase of assets, security-minded BIM, digital built environments and smart asset management. For those closely involved in contract administration and project management, this is certainly something to look out for.

In terms of legislation, the Construction (Retention Deposit Schemes) Bill (commonly known as the "Aldous Bill") was published in April 2018, setting out the proposed introduction of mandatory retention deposit schemes to safeguard cash retentions. The second reading debate of the bill in the House of Commons has been pushed back repeatedly, and at the time of writing, it is expected to take place in late March 2019. With the collapse of Carillion still fresh in the industry's memory, the progress of the Aldous Bill will no doubt be keenly watched for the remainder of 2019.

On a related note, as mentioned in the 2017 review, the Department for Business, Energy and Industrial Strategy ran a consultation on the implementation of Part 2 of the HGCRA (as amended in 2011). The consultation concluded on 19 January 2018, but the

results and recommendations are still pending. It is hoped that the outcome will be published in 2019, and as with the Aldous Bill, this will no doubt be of great interest to the industry, especially in the light of the *S&T* decision and the recent spotlight on the statutory payment regime.

The 2017 review discussed the independent review and public inquiry which arose from the Grenfell Tower fire in 2017. The Independent Review of the Building Regulations and Fire Safety led by Dame Judith Hackitt culminated in a final report in May 2018,[190] which called for "a radical rethink of the whole system and how it works". The report recommended (amongst other things) a new regulatory framework for higher-risk residential buildings, revisions to the Building Regulations and Approved Documents on fire safety, and greater Building Control oversight and enforcement.

Following Dame Judith's final report, the Building (Amendment) Regulations (SI 2018 No 1230) came into force on 21 December 2018, implementing a ban on the use of combustible materials in external walls of high-rise buildings. The Government has ordered further research into the fire performance of external wall systems, on the basis of which previous advice as to the safety of existing building external wall systems will be reviewed. Developers and contractors alike should follow this closely to take into account the latest advice in ongoing construction projects.

The Grenfell Tower Inquiry led by Sir Martin Moore-Bick has now concluded its first phase of hearings, which examined the evidence surrounding what happened when the fire broke out on 14 June 2017. The next phase is set to resume in 2019, and this is again something to watch out for in the year ahead.

Lastly, for those active in construction litigation, the new Disclosure Pilot Scheme came into force on 1 January 2019 for a period of two years, introducing five new disclosure models to encourage a move away from standard disclosure, with a particular focus on phased and issues-based disclosure. It will be interesting to see how well the scheme works in construction disputes over the coming year.

With the above in mind, there is little doubt that 2019 will be yet another year of activity, and may even bring (with any luck) more clarity on issues like Brexit, the Aldous Bill, and HGCRA reform. There is much to look forward to in the next annual review, amid the ever-changing landscape of the construction and infrastructure industry both in the UK and abroad.

[190] Dame Judith Hackitt, "Building a Safer Future" (Cm 9607, May 2018).

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2018 judgments analysed

Al-Hasawi v Nottingham Forest Football Club Ltd [2018] EWHC 2884 (Ch)

Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly called CV Buchan Ltd) [2018] EWCA Civ 2222; [2019] BLR 27

BN Rendering Ltd v Everwarm Ltd [2018] CSOH 45

Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27; [2019] BLR Plus 20

Burgess and Another v Lejonvarn [2018] EWHC 3166 (TCC)

Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd [2018] EWHC 177 (TCC); [2018] BLR 281

Dacy Building Services Ltd v IDM Properties LLP [2018] EWHC 178 (TCC)

DSVG Facade Ltd v Conneely Facades Ltd [2018] 6 WLUK 235

Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371; [2018] BLR 491

GPP Big Field LLP v Solar EPC Solutions SL [2018] EWHC 2866 (Comm)

Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC); [2018] BLR 173

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

Leiman, Ricardo and Another v Noble Resources Ltd and Another [2018] SGHC 166

Mann v Paterson Constructions Pty Ltd [2018] VSCA 231

M Hart Construction Ltd and Another v Ideal Response Group Ltd [2018] EWHC 314 (TCC)

Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd [2018] EWHC 2043 (TCC); [2018] BLR 593

Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and Others [2018] SGHC 263.

North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744; [2018] BLR 565

P v M [2018] HKCFI 2280

Phones 4U Ltd (in Administration) v EE Ltd [2018] EWHC 49 (Comm); [2018] BLR 255

Radbourn Group Ltd v Fairgate Developments Ltd [2018] EWHC 658 (TCC); [2018] BLR 802

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24; [2018] BLR 479

S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448; [2019] BLR 1

Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and Another [2019] SGHC 2

So Kai Hau v YSK2 Engineering Company Ltd and Others [2018] HKCFI 1803

University of Warwick v Balfour Beatty Group Ltd [2018] EWHC 3230 (TCC); [2019] BLR 138

Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 102 (TCC); [2018] BLR 133

Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 1143 (Ch)

Vinci Construction UK Ltd v Beumer Group UK Ltd [2018] EWHC 1874 (TCC); [2018] BLR 575

Williams Tarr Construction Ltd v Anthony Roylance Ltd and Anthony Roylance [2018] EWHC 2339 (TCC)

Z v Y [2018] HKCFI 2342

Judgments considered

Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735; [2018] BLR 1

Allplus Holdings Pte Ltd and Others v Phoon Wui Nyen (Pan Weiyuan) [2016] SGHC 144

Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v Amec (BSC) Ltd (formerly called CV Buchan Ltd) [2016] EWHC 2509 (TCC)

Arnold v Britton [2015] UKSC 36

Axa Sun Life Services plc v Campbell Martin Ltd and Others [2011] EWCA Civ 133; [2011] 2 Lloyd's Rep 1

Beumer Group UK Ltd v Vinci Construction UK Ltd [2016] EWHC 2283 (TCC); [2017] BLR 53

Breyer Group plc v Adam Michael Scaffolding Services Ltd [2018] 6 WLUK 194

Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 (TCC); [2015] BLR 694

Carillion Construction Ltd v Devonport Royal Dockyard [2005] EWHC 778 (TCC); [2005] BLR 310

Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358; [2006] BLR 15

Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67; [2016] BLR 1

City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190; [2008] BLR 269

City Inn Ltd v Shepherd Construction Ltd [2010] CSIH 68; [2010] BLR 473

CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and Others [2017] SGHC 22

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79

Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd [2009] EWHC 3222 (TCC); [2010] BLR 89

Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC); [2015] BLR 321

Gestmin SGPS SA v Credit Suisse UK Ltd [2013] EWHC 3560 (Comm)

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 32 (TCC)

Hon Chin Kong v Yip Fook Mun and Another [2017] SGHC 286

Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] BLR 344

Ian McGlinn v Waltham Contractors Ltd and Others [2007] EWHC 149 (TCC); [2007] BLR 188

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)

ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC); [2015] BLR 233

iTronic Holdings Pte Ltd v Tan Swee Leon and Another [2016] 3 SLR 663

KNS Industrial Services (Birmingham) Ltd v Sindall Ltd (2000) 75 Con LR 71

Lejonvarn v Burgess and Another [2017] EWCA Civ 254; [2017] BLR 277

Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Another [2015] UKSC 72; [2015] 3 WLR 1843

MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd [2017] UKSC 59; [2017] BLR 477

North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC); [2017] BLR 605

Penten Group Ltd v Spartafield Ltd [2016] EWHC 317 (TCC)

Persimmon Homes Ltd and Others v Ove Arup and Partners Ltd and Another [2017] EWCA Civ 373; [2017] BLR 417

Pochin Construction Ltd v Liberty Property (GP) Ltd [2014] EWHC 2919 (TCC)

Radbourn Group Ltd v Fairgate Development Ltd [2017] EWHC 1223 (TCC)

Sopov (Cole) and Norma Walker v Kane Construction Pty Ltd (No 2) [2009] VSCA 141; [2009] BLR 468

Stein v Blake [1996] 1 AC 243

Vinci Construction UK Ltd v Beumer Group UK Ltd [2017] EWHC 2196 (TCC); [2017] BLR 547

Walter Lilly & Co Ltd v Mackay and Another (No 2) [2012] EWHC 1773 (TCC); [2012] BLR 503

Wood v Capita Insurance Services Ltd [2017] UKSC 24); [2018] Lloyd's Rep Plus 13

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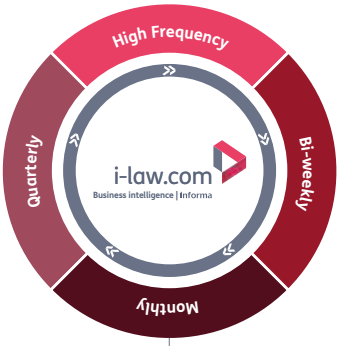

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