

Construction law in 2019: a review of key legal and industry developments

By Mathias Cheung



**Breach of natural justice – Contractual interpretation – Delay claims –
Developments in adjudication – Dispute resolution clauses – Fraud –
HGCRA – Impact of insolvency – Injunctive relief – International dispute
resolution – Liquidated damages – Loss and expense claims**

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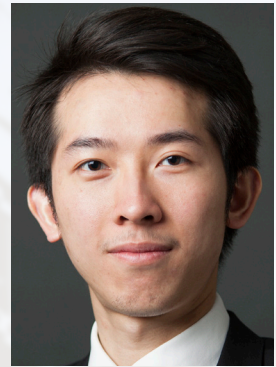
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Construction law in 2019: a review of key legal and industry developments

By Mathias Cheung

This article summarises some of the key legal and industry developments in construction law in 2019, both in the UK and abroad, with various cases building on important themes and principles which were previously covered in 2017 and 2018.¹

Over the years, this annual review of construction law developments has featured an evolving narrative which builds on familiar and recurring themes and issues, however, the continuity in the developing case law over the past few years is not by the author's design and more through felicitous happenstance.

In a *Building Magazine* article in August 2019, Sir Robert Akenhead observed that “[w]hile lawyers might be tempted to groan every time another authority is added to the mass of judicial guidance on the interpretation of provisions in a contract, decisions that consider the meaning of commonly used or well-known provisions are to be welcomed by practitioners and the industry alike”.² This sentiment aptly applies to new construction law cases in general.

This vibrant sense of organic growth in an ever-changing body of case law is part of what makes English law a focal point for anyone wishing to find the solution to a particular construction law problem both here and abroad. It is also what makes comparison of the differing approaches across various jurisdictions a particularly engaging exercise.

In this regard, 2019 has been a very interesting year in terms of both Technology and Construction Court (TCC) and appellate decisions on construction law, and there is no shortage of materials to cover in the limited space of this article. It is hoped that this overview of the key legal developments across different jurisdictions will be a helpful (although by no means exhaustive) point of reference for all stakeholders in the construction and infrastructure industry in the year ahead.

DEVELOPMENTS IN ADJUDICATION

The statutory payment and adjudication regime under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) continues to give rise to disputes which ultimately come before the courts. In 2019, the courts handed down a number of important decisions in relation to payment adjudications, the scope of “construction operations” under the HGCRA, adjudicators’ jurisdiction, breach of natural justice, challenges against enforcement based on alleged fraud, and reservation of rights as to jurisdictional challenges. These topics will be considered in turn below.

Smash and grab adjudications

When it comes to interim payments, the “gold standard” since 2018 has been the Court of Appeal’s decision in *S&T (UK) Ltd v Grove Developments Ltd*,³ which not only upheld the decision of Coulson J (as he then was) that a successful smash and grab adjudication based on a failure to serve a valid and timeous pay less notice does not preclude a further adjudication requiring the later adjudicator to determine the true valuation of the same interim payment application, but also clarified that “... 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”.⁴

The latter observations were strictly obiter, but the Court of Appeal had the benefit of a full and detailed argument on that point and the conclusion reached was generally considered to be correct as a matter of law and policy. Given that the parties subsequently settled before the case reached the Supreme Court, the Court of Appeal’s decision will remain as the most authoritative pronouncement of the law for the time being.

¹ See Cheung, M, *Construction law in 2017: a review of key legal and industry developments* (Informa Law, 2018); and Cheung, M, *Construction law in 2018: a review of key legal and industry developments* (Informa Law, 2019).

² Akenhead, R, “A contract means what it says” (*Building Magazine*, 22 August 2019).

³ [2018] EWCA Civ 2448; [2019] BLR 1.

⁴ *Ibid*, at para 107.

Interestingly, however, the point about the timing of a true value adjudication was re-opened in *M Davenport Builders Ltd v Greer and Another*,⁵ where a party sought to resist the enforcement of a smash and grab adjudication decision on the basis of a subsequent true value adjudication.

Stuart-Smith J identified what he described as “an unresolved area of latent ambiguity in the decision of the Court of Appeal in *Harding* [2016] 1 WLR 4068”.⁶ In *Harding*⁷ the Court of Appeal implied that the earlier immediate payment obligation need not be discharged before launching the later true value adjudication, but in *S&T*, Jackson LJ assumed that the true value adjudication in *Harding* was commenced after full payment was made when that was not in fact the case.⁸ The judge had no difficulty following *S&T* on policy grounds:

“In answer to the question whether a person who has not discharged his immediate obligation should be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation. *I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the payment or pay less notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision.*”⁹ (Emphasis added.)

The judge further held that this principle applies to both interim and final payment applications, as he was “unable to discern any material difference in policy as it affects the enforcement of an employer’s immediate obligation to pay, whether that arises in relation to interim or final applications”,¹⁰ and accordingly, he granted summary judgment to the claimant. This conclusion accords with both common sense and the legislative intent of the HGCR – otherwise, the strict timeframes for payment and pay less notices would be rendered otiose, and the intended protection of contractors’ cash flow (which Lord Denning famously described as the “very lifeblood of the enterprise”¹¹) would be significantly watered down.

⁵ [2019] EWHC 318 (TCC); [2019] BLR 241.

⁶ *Ibid*, at para 19.

⁷ *Matthew Harding (trading as MJ Harding Contractors) v Paice and Another* [2015] EWCA Civ 1231; [2016] BLR 85.

⁸ *S&T*, at para 75.

⁹ *M Davenport*, at para 21.

¹⁰ *Ibid*, at para 33.

¹¹ *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162, at para 167.

Does this mean that a true value adjudication can never be commenced without first discharging the immediate obligation to pay the notified sum? Stuart-Smith J hinted that the court may not always restrain the commencement or progress of a true value adjudication before an employer has discharged its immediate payment obligation, but stopped short of saying when that will or will not happen.¹² This leaves a sting in the tail, which will most likely end up before the courts at another time.

Given the important policy considerations expressly recognised by the courts, the court is clearly reluctant to allow a subsequent true valuation adjudication to prevent the enforcement of an employer’s immediate obligation to pay the notified sum, whereas a late but complete discharge of that obligation after a true value adjudication has been commenced is unlikely to be a persuasive ground for challenge at the enforcement stage. Readers should keep an eye out for any further judicial guidance on this issue in the year ahead.

Interpretation of contractual payment mechanisms

Another perennial issue encountered by legal practitioners and construction professionals is the interplay between an ambiguous or inadequate contractual payment mechanism and the statutory payment regime under Part II of the Scheme for Construction Contracts (Scheme) – a point on which there has been very little judicial guidance.

This lacuna in the authorities has now been filled by the Court of Appeal’s decision in *Bennett (Construction) Ltd v CIMC MBS Ltd (formerly Verbus Systems Ltd)*.¹³ Although the court considered that the contractual milestone payment mechanism in that case was adequate, Coulson LJ provided some helpful obiter guidance for the benefit of future parties. The judge noted that the Scheme, although “badly drafted”, can be applied in a manner which achieves “a commonsense result” which “does no significant violence to the parties’ original agreement”.¹⁴

Coulson LJ identified four types of payments dealt with by the Scheme: paragraph 4 of the Scheme identifies “payments of a kind mentioned in paragraph 2” (ie payment based on “the value of any work performed”); paragraph 5 refers to final payments; paragraph 6 refers to excepted contracts; and paragraph 7 addresses

¹² *Ibid*, at para 37.

¹³ [2019] EWCA Civ 1515; [2019] BLR 587.

¹⁴ *Ibid*, at para 57.

“other payments”.¹⁵ Importantly, the judge described paragraph 7 of the Scheme as a “catch all” for payments (such as the milestone payments in question) which do not fall within the other three categories:

“Accordingly, it seems to me that, in a case where the parties did not agree a payment arrangement by reference to interim valuations of the work done, Part II of the Scheme did not impose such a regime. On the assumption that the mechanism in respect of both date and criteria for payment was inadequate in some way, both can be resolved in straightforward fashion by the implication of paragraph 7. In that way, the payment in respect of Milestone 2 would be seven days following the completion of the prototype in accordance with the contract. For Milestone 3, it would be seven days following the completion of the units in accordance with the contract. Milestones 1, 4 and 5 would remain wholly unaffected.”¹⁶

There is a lot to be said for the commercial approach adopted by Coulson LJ. The key point is that the Scheme “was not designed to delete a workable payment regime which the parties had agreed, and replace it with an entirely different payment regime based on a radically changed set of parameters”, save where a contractual regime is so deficient that it necessitates wholesale replacement.¹⁷

Another perennial issue is the interplay between an ambiguous or inadequate contractual payment mechanism and the statutory payment regime under Part II of the Scheme for Construction Contracts – a point on which there has been very little judicial guidance

It will be interesting to see how this approach is applied in future cases to informal contractual arrangements which do not provide for periodic payments or payment based on the value of the works but simply contemplate payment against invoices as and when they are rendered. There may well be an argument for the implication of paragraph 7 of the Scheme as a catch-all, such that

payment becomes due seven days after the completion of the work or the making of a claim (ie the issuance of the invoice), whichever is the later. In any case, the *Bennett* decision is essential reading for anyone dealing with an ambiguous contractual payment mechanism.

A related but slightly different issue concerns the way in which a particular contractual payment mechanism should be construed in order to be consistent with the mandatory provisions of the HGCR. This arose in *C Spencer Ltd v MW High Tech Projects UK Ltd*,¹⁸ where the court had to consider, in a Part 8 claim, whether a payment notice was invalid because it did not separately identify sums in respect of construction operations and non-construction operations respectively and was contrary to section 111 of the HGCR (which only applied to construction operations).

O’Farrell J rejected the claimant’s argument and held that in a hybrid contract, it is not necessary to construe a contractual payment scheme in a way which requires a payment notice to separately state the sums due in respect of the construction operations. This is because sections 110A and 111 of the HGCR refer to a “notified sum” without limiting it to sums in respect of construction operations, and more generally, “it is open to the parties to agree a payment scheme that sits alongside the statutory provisions, such that it complies with the statutory provisions in respect of construction operations and mirrors those provisions in respect of other operations”.¹⁹ In effect, the parties have, by contract, extended the statutory cash flow benefits to the non-construction operations.²⁰

Although the decisions in *Bennett* and *C Spencer* raised rather different issues, the common theme running through both is this: the court is at pains to stress that the statutory regime imposed by the HGCR and the default provisions of the Scheme are not intended to preclude the parties from agreeing their own contractual payment mechanisms, and the court will strive to uphold the parties’ contractual bargain, with limited gap-filling measures based on the minimum requirements set by the HGCR and/or the Scheme where necessary. This approach gives parties to construction contracts certainty, and careful consideration needs to be given to these decisions before a party seeks to avoid the effects of a contractual payment provision by relying on the HGCR and/or the Scheme.

¹⁵ Ibid, at paras 60 to 62.

¹⁶ Ibid, at para 65.

¹⁷ Ibid, at para 67.

¹⁸ [2019] EWHC 2547 (TCC); [2019] BLR 643.

¹⁹ Ibid, at paras 57 to 58.

²⁰ Ibid, at para 60.

Construction operations/contracts under the HGCRA

A threshold jurisdictional question in adjudication is whether the contract in question is a construction contract for the carrying out of construction operations which do not fall within the exclusions in sections 105(2) and 106 of the HGCRA. Cases on this issue come before the court perhaps once every five years, but like London buses, three cases arrived at once in 2019.

First, in *Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd*,²¹ Fabricom (which was engaged to design and construct a gasification plant system) obtained an adjudication decision against MW. However, MW sought to challenge enforcement on the basis that the primary activity at the site (Energy Works Hull) was power generation, which falls within the exclusion in section 105(2)(c) of the HGCRA. Fabricom, on the other hand, maintained that the primary activity of the site was the disposal and thermal treatment of waste.

Deputy High Court Judge Jonathan Acton Davis QC refused to grant summary judgment in the circumstances, noting that this was being pursued as a summary judgment application and not as a Part 8 claim. The judge took the view that MW's argument has a real prospect of success, and "the court does not have before it all the evidence necessary for a proper determination of the issues",²² such that it was appropriate to give directions for trial.

At the time of writing, the trial of this issue has already taken place. It is noteworthy that on the eve of the trial, MW made a late non-party disclosure application against its employer, Energy Works Hull, for certain documents relating to the supply of refuse-derived fuel and power generation – the court rejected the application in the end. It will be interesting to see what the court ultimately decides based on the evidence available.

This is a cautionary tale for parties involved in construction contracts which may involve one of the excluded operations in section 105(2) of the HGCRA. The question is not necessarily a straightforward one to deal with at an enforcement hearing, and in an appropriate case of some complexity, it may be preferable for the parties to pursue a Part 8 determination (or an expedited Part 7 claim if there are issues of fact) before embarking on an adjudication and incurring the costs thereof.

²¹ [2019] EWHC 1876 (TCC); [2019] BLR 514.

²² Ibid, at paras 46 to 47.

Enforcement was refused in *Universal Sealants (UK) Ltd v Sanders Plant and Waste Management Ltd*,²³ where Sanders contended (amongst other things) that the contract in question was for the supply of concrete and fell within the exclusion under section 105(2)(d) of the HGCRA. The issue was whether the contract in question also included the installation of the materials supplied, which would bring the contract within the scope of the HGCRA.

Considering the particular nature of concrete which almost necessarily involved pouring when it was delivered as mixed wet concrete, Jefford J held that the supply contract did not also include an element of installation:

"Section 105(2)(d) draws a clear distinction between delivery of materials and the contract 'also' – and I emphasise that word again – providing for installation. In this case, the act of delivery and pouring amount to the same thing. That, in my view, means that *the pouring is, in these circumstances, part of the delivery and not an additional act of installation involving some work on, or related to, the materials. There is nothing in this contract which also provides for installation. It is simply the case that in order for the materials to be delivered to site in the normal way the concrete will be poured where it is required, rather than, as would be unusual, placed into some sort of storage facility until it could be poured by someone else.*"²⁴ (Emphasis added.)

The conclusion reached by the judge is an interesting one, as a lot of emphasis is placed on the need for a contract which "also provides for their installation", even though the judge acknowledged that it is not necessary for a contract to expressly refer to "installation". If one focuses on the substance of the arrangement, it is at least arguable that installation connotes any act of incorporating the materials into the works which goes beyond delivering the materials site for storage or further handling. Indeed, it is difficult to imagine what installation work remains once the concrete has been poured, except for waiting for it to cure and undertaking any necessary concrete strength tests thereafter. If parties wish to avail themselves of the statutory adjudication provisions in similar circumstances, it would be prudent to expressly refer to the installation/incorporation of the materials on site.

Finally, the court had the occasion in 2019 to consider the exclusion of construction contracts involving residential occupiers under section 106 of the HGCRA. In *ICCT Ltd v*

²³ [2019] EWHC 2360 (TCC).

²⁴ Ibid, at para 33.

Pinto,²⁵ Mr Pinto engaged ICCT to remedy leakages in his basement, and ICCT sought to enforce an adjudication decision in its favour for outstanding payment. Mr Pinto argued, amongst other things, that the statutory adjudication provisions did not apply by virtue of section 106 of the HGCRA.

Waksman J observed, however, that even where section 106 HGCRA applied, an ad hoc jurisdiction can – and did – arise where both sides engage fully in the adjudication process on the merits thereof unless there has been a sufficient reservation of rights. The judge observed as follows regarding the waiver of jurisdictional points:

“It is right to say that in relation to the party who is said to have waived the jurisdictional point, one has to look at what the party did or did not do objectively. *In this particular context, what that means is that the jurisdictional point is capable of being waived and will be waived where it is one that was in the actual or constructive knowledge of the parties seeking to invoke the jurisdictional point, ie Mr Pinto.* Mr Pinto says, subjectively, he was not, in fact, aware of the residential dwellings exception, as it were, prior to entering into the adjudication. I rather suspect that the claimant was in the same position since it appears to be the first time it has used this process and did so on the basis of the suggestion from somebody else, but I am afraid the fact that Mr Pinto was not aware of it himself does not help him. *The general principle is that ignorance of the law is no excuse.*”²⁶ (Emphasis added.)

Waksman J’s conclusion on waiver follows the Court of Appeal’s guidance in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*²⁷ earlier in the year, which held that a “reservation of position was so vague – perhaps deliberately so – as to be ineffective”, because it was simply waiting to unleash an objection at the enforcement stage in a way which is discouraged by the courts.²⁸

If there was any residual doubt as to the ineffectiveness of a general reservation of rights, the court’s decision in *Ove Arup and Partners International Ltd v Coleman Bennett International Consultancy plc*²⁹ again makes the position abundantly clear. The defendant sought to challenge enforcement on the basis that the contract was not a construction contract within the meaning of

section 104 of the HGCRA, but O’Farrell J held that an unparticularised assertion that the adjudication did not fall within the HGCRA was insufficient,³⁰ and given that the defendant did raise two other very specific jurisdictional points, it is not open to the defendant to raise a new form of challenge on the basis of a general reservation:

“Having identified a potential challenge based on the application of Part 2 of the Act, CBI must be taken to have recognised that it had that potential objection and yet it failed to put forward a detailed and specific objection in that regard. Further, the wording of the general response is intended to effectively cover everything. I specifically refer to the fact that it identifies ‘further jurisdictional issues that we have not yet had the opportunity to investigate’. Clearly, this was an inappropriate attempt to keep open to the defendant all lines of jurisdictional challenge, regardless of whether they were specifically raised or not.”³¹

The courts have made it clear that a party should not hold cards up its sleeve and “wait and see”, in the hope that it may deploy new jurisdictional arguments at a later date

The moral of the story is that there are significant risks with engaging in an adjudication without obtaining any proper legal advice (whilst recognising that legal cost is often an inhibiting factor), especially since a proper reservation of rights at the beginning of a proposed adjudication can be crucial in a given case when it comes to the enforcement stage. The courts have made it clear that a party should not hold cards up its sleeve and “wait and see”, in the hope that it may deploy new jurisdictional arguments at a later date.

Crystallisation of dispute under one contract

Another threshold jurisdictional question in adjudication is the crystallisation of the dispute referred, and it is trite that a dispute or difference has to exist before a notice of adjudication can be served. From experience, this is

²⁵ [2019] EWHC 2134 (TCC).

²⁶ Ibid, at para 38.

²⁷ [2019] EWCA Civ 27; [2019] BLR Plus 20, at paras 91 to 100.

²⁸ Ibid, at para 94.

²⁹ [2019] EWHC 413 (TCC).

³⁰ Ibid, at paras 24 to 25.

³¹ Ibid, at para 30.

often seen by a responding party as a convenient basis for challenging an adjudicator's jurisdiction (or indeed just to buy time at the beginning of the process), but it is one that rarely succeeds.

The decision of the Scottish Court of Session (Outer House) in *Dickie & Moore Ltd v Trustees of the Lauren McLeish Discretionary Trust*³² provides an interesting example of a successful challenge based on the crystallisation of the dispute. In that case, the defender contended that the pursuer's criticisms of the final statement and certificate materially differed from the extension of time and loss and expense claims in the notice of adjudication.

Lord Doherty emphasised at the outset that "the court should adopt a robust, practical approach, analysing the circumstances prior to the notice of adjudication 'with a commercial eye' (cf *Coulson on Construction Adjudication*, supra, para 7.111). An over legalistic analysis should be avoided", and the court should "discourage it picking comparison between the dispute described in the notice and the controversy which pre-dated the notice".³³ This much was uncontroversial.

If only out of an abundance of caution, it is always prudent to send a final letter essentially based on an intended notice of adjudication before actually commencing the process, even if it means holding fire for a few extra days

That said, the pre-adjudication extension of time claim of an additional four weeks and loss and expense claim of £46,682.46 were markedly different from the extension of time claim of over 46 weeks and loss and expense claim of £290,000 in the notice of adjudication. Lord Doherty therefore took the view that the adjudication claims were of a "different nature and order of magnitude to the previous disagreements", such that the dispute referred had not been crystallised in those terms.³⁴

Therefore, although the court would generally be reluctant to refuse enforcement on the basis that no dispute has been crystallised, parties should be careful to ensure that the dispute canvassed in the pre-adjudication correspondence is sufficiently similar in nature and

magnitude to the dispute ultimately referred, having regard in particular to the heads of claim and quantum. If only out of an abundance of caution, it is always prudent to send a final letter essentially based on an intended notice of adjudication before actually commencing the process, even if it means holding fire for a few extra days. Otherwise, a referring party would run the risk of incurring the costs of the adjudication without obtaining the benefit of an enforceable decision at the end of the day.

The decision in *Dickie* can be contrasted with the case of *LJH Paving Ltd v Meeres Civil Engineering Ltd*,³⁵ where the defendant contended that the final payment claim was "nebulous" and "ill-defined", as demonstrated by the various requests for supporting information which were made to the claimant. Deputy High Court Judge Adam Constable QC was quick to reject this argument:

"It is not for a court upon an application for enforcement to engage with the detailed merits of each sides' stated position as to what substantiation was or was not provided or relevant. *It is simply enough to conclude, as I do, that there was unarguably a clear dispute between the parties, part of which centred (and had done through 2018) over the need for and existence of supporting documents.*"³⁶ (Emphasis added.)

It would plainly take a most exceptional case for a claim to be considered as too nebulous or ill-defined to give rise to any crystallised dispute. One may conceivably see that a fanciful and legally unrecognisable claim which is analogous to the territory for strike out in litigation may be sufficient to found such an argument, but short of anything that extreme, lack of substantiation alone does not equate to lack of crystallisation of a dispute.

In *LJH*, the defendant also contended that the disputes may have arisen under two different contracts. However, this issue was never raised during the adjudication, and any general reservation of rights was too vague to be effective, such that the defendant was no longer entitled to take this point.³⁷ In any event, the court could have deducted the relevant sum from the decision by way of severance in order to preserve the balance of the award which arose under the contract relied on by the claimant.³⁸

Readers will note that this is yet another example in recent cases where a general reservation of rights was held to be insufficient to preserve a jurisdictional challenge

³² [2019] CSOH 71; (2019) 36 BLM 09 7.

³³ Ibid, at para 43.

³⁴ Ibid, at paras 46 to 47.

³⁵ [2019] EWHC 2601 (TCC); [2020] BLR 57.

³⁶ Ibid, at para 22.

³⁷ Ibid, at para 33.

³⁸ Ibid, at para 35.

which could and should have been raised at the start of an adjudication. As with contracts involving residential occupiers which have been discussed above, it is important to take proper legal advice at the earliest stage if a party is on the receiving end of a notice of adjudication, so as to avoid taking steps in the adjudication which would amount to a waiver of jurisdictional objections in the absence of an appropriate and effective reservation of rights. In this regard, the crystallisation of a dispute and disputes arising from more than one contract are grounds which ought to be raised specifically at the earliest opportunity, as a general reservation is, depending on the circumstances, unlikely to suffice.

Construction contracts not governed by English law

It is not very often that a contract in respect of construction operations in the UK contains a choice of jurisdiction clause in favour of a foreign jurisdiction, and that may give rise to an interesting jurisdictional question when it comes to adjudication enforcement.

In *Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd*,³⁹ the TCC in London had to consider, in a comparable but slightly different context, whether it had the requisite jurisdiction to enforce an adjudication decision arising from a contract with a Scottish choice of court clause.

O'Farrell J started by noting that the HGCRA does not prevent parties to construction contracts relating to projects in the UK from agreeing foreign jurisdiction clauses, and any implied terms as to adjudication by virtue of the HGCRA must be interpreted according to the proper law of the contract. The judge held that the Scottish choice of court provision was valid, and that Scotland would be the most appropriate forum,⁴⁰ and she observed that “[a]n interesting issue may arise where there is a tension between the statutory right to adjudicate a dispute under the 1996 Act and a conflicting regime imposed by choice of law or jurisdiction provisions agreed by the parties. However, that does not arise in this case”.⁴¹

The court did not have to reach any conclusion as to the interplay between a foreign choice of court clause and an adjudication enforcement action in the UK. It is noteworthy that in *Comsite Projects Ltd v Andritz AG*,⁴² HHJ Kirkham held that the English courts have jurisdiction to enforce

an adjudication decision despite the existence of an Austrian jurisdiction clause, on the basis that it was only a temporary decision which did not impinge on the Austrian court's jurisdiction to finally determine the substantive disputes. This decision, however, does not sit comfortably with the nature of an adjudication enforcement action, which is essentially a breach of contract claim and ought to be subject to the choice of court clause.

The choice of court clause applies to adjudication enforcement in principle, but there may be grounds for arguing that England is the forum conveniens in light of the HGCRA regime and the absence of any analogous enforcement procedure in a foreign court

This issue therefore remains unresolved in light of the current state of the authorities, and it would be interesting to see if the courts would have the occasion to provide further judicial guidance in the near future. The author has recently come across a construction contract in a UK project which is governed by Italian law and subject to the jurisdiction of the Italian courts, and it is not straightforward at all to decide whether it is worth embarking on an adjudication in the UK. One possible answer may be that the choice of court clause applies to adjudication enforcement in principle, but there may be grounds for arguing that England is the forum conveniens in light of the HGCRA regime and the absence of any analogous enforcement procedure in a foreign court.

Breach of natural justice

Apart from jurisdictional challenges, another often argued but rarely successful ground for resisting enforcement is breach of natural justice. It is trite that the courts tend to discourage such challenges (other than in the plainest of cases) simply because a disgruntled party is dissatisfied with the substantive decision – as Chadwick LJ emphasised in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*, “[t]o 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”.⁴³

³⁹ [2019] EWHC 1659 (TCC); [2019] BLR 495.

⁴⁰ *Ibid*, at paras 74 and 79.

⁴¹ *Ibid*, at para 66.

⁴² [2003] EWHC 958 (TCC).

⁴³ [2005] EWCA Civ 1358; [2006] BLR 15, at para 87.

Out of the different permutations of allegations of breach of natural justice, an all-time favourite for losing parties is the contention that an adjudicator has failed to deal with all the issues. This was the issue in *J J Rhatigan & Co (UK) Ltd v Rosemary Lodge Developments Ltd*,⁴⁴ where the defendant contended that the adjudicator had failed to deal with a potentially determinative matter and the process was therefore materially unfair.

Jefford J noted that there were cases where the court had declined to enforce an adjudication decision because the adjudicator had deliberately failed to deal with a significant issue (for example, because he/she regarded the matter as outside his/her jurisdiction), but observed that an inadvertent failure is more likely to be an error within the adjudicator's jurisdiction:

"In my view, such an inadvertent failure is far more likely to be an error within the adjudicator's jurisdiction and not a matter that amounts to a breach of natural justice. A comparison may be made with the position where a judge makes such an error. That might be a ground of appeal but it would not normally amount to a breach of natural justice in the conduct of the proceedings. It is, however, unnecessary to determine the point of principle because this is not a case in which the adjudicator has made such an error."⁴⁵

On the facts, Jefford J considered that the adjudicator may well have had in mind the evidence regarding the defendant's lack of intention to create legal relations, but "[e]ven if the adjudicator did not have this explanation or element of the evidence in mind, that would amount to no more than failing to take into account an element of the evidence rather than a crucial defence".⁴⁶

Interestingly, the defendant also argued that the adjudicator did not really consider all the materials despite a "pro forma" paragraph which stated that he had done so. Jefford J observed that "the fact that a paragraph is a standard paragraph does not mean that it is not true and accurate",⁴⁷ although there may be evidence in a particular case to contradict that statement. However, the judge maintained the view that there was no or no material breach of natural justice in that case.

Jefford J's decision is the latest example in a long line of cases where the courts have refused to find a breach of natural justice simply because an adjudicator may

not have dealt with every argument or every piece of evidence in their decision. This is very much similar to the courts' approach to allegations of a failure to give reasons in an adjudicator's decision, and is sensible as a matter of policy given the time pressures that adjudicators have to operate under.

A similar challenge based on an alleged breach of natural justice was rejected, again by Jefford J, in *RGB P&C Ltd v Victory House General Partner Ltd*.⁴⁸ There were two facets to Victory House's challenge in that case. First, Victory House contended that the adjudicator failed to deal with its case that RGB's claims were fraudulent. Jefford J considered the materials at length and found that Victory House's case fell far short of an allegation of fraud, but in any event, a failure to consider every sub-issue would not amount to any or any material breach of natural justice:

"The adjudicator clearly considered the merits of each claim and the specific matters that Victory House relies upon are elements of that case. *The failure to consider every sub-issue, if there was such a failure, does not render the decision one reached in breach of the rules of natural justice.*"⁴⁹ (Emphasis added.)

Secondly, Victory House contended that the adjudicator reached a conclusion on an extension of time claim through his own analysis of delay, which he did not share with the parties or on which he did not give them an opportunity to make submissions.

Having considered the expert evidence in the adjudication in some detail, Jefford J concluded that the adjudicator did not substitute his own views, but his decision "was rather the product of his decision as to the changes to the baseline programme that Ms Turner has made, and which he rejected, and the subsequent re-running of the programme".⁵⁰ The fact that the adjudicator asked for the programmes in native format to interrogate the logic links made it clear that he was seeking to assess the validity of the adjusted baseline programme, which was effectively what he was asked by the parties to do,⁵¹ and it would not be appropriate to constrain the scope of the adjudicator's decision making:

"*Victory House's case amounts to saying that the scope of the adjudicator's legitimate decision making, in this respect, was severely constrained. For example, if he had decided that even a single*

⁴⁴ [2019] EWHC 1152 (TCC).

⁴⁵ Ibid, at para 47.

⁴⁶ Ibid, at para 58.

⁴⁷ Ibid, at para 55.

⁴⁸ [2019] EWHC 1188 (TCC); [2019] BLR 465.

⁴⁹ Ibid, at para 74.

⁵⁰ Ibid, at para 38.

⁵¹ Ibid, at paras 41 to 43.

Turner logic link was invalid, he would either have had to reject the baseline programme and the RGB claim in its entirety or go through a process of notifying the parties of the view he had formed and seeking further submissions. *The adjudicator went somewhat further in imposing his own logic link but that, in my view, was within the bounds of what he had been asked to do and what, it followed from the criticisms levelled at the Turner report, it would have been anticipated he would do.*⁵² (Emphasis added.)

It is clear that the court will take a pragmatic approach when considering whether an adjudicator has overstepped the bounds of his or her decision-making powers and gone on a frolic of their own. While a novel legal or factual argument which has not been ventilated by either party would very likely justify an invitation to the parties to make further submissions, an adjudicator has a wide margin of discretion to assess the evidence and reach a conclusion.

Indeed, as with arbitration, part of the attraction of adjudication is the availability of adjudicators with expertise in delay or quantum analysis which would assist with a proper consideration of technically complex disputes. It would be undesirable to confine an adjudicator to a binary determination between accepting or rejecting the claimant's case en masse, when the reality is that the answer more often than not lies somewhere in between. Readers may recall that an adjudicator usually has "considerable latitude" to provide their own valuation of the quantum based on the materials (stopping short of making good gaps/deficiencies in a party's case without warning),⁵³ and the RGB decision simply extends this approach to delay analysis and assessment of extensions of time.

It is clear that the court will take a pragmatic approach when considering whether an adjudicator has overstepped the bounds of his or her decision-making powers and gone on a frolic of their own

Quite apart from an adjudicator's treatment of the parties' arguments and evidence, a frequent complaint by parties (which at times escalates into an allegation of breach of

natural justice) is that the adjudication timetable was too tight for the parties to have a reasonable opportunity to address the issues in dispute. This was the argument raised in *Willow Corp SARL v MTD Contractors Ltd*,⁵⁴ which involved a Part 8 claim for declarations and a Part 7 cross-claim for the enforcement of an adjudication decision.

Pepperall J considered the authorities in some detail and emphasised that "adjudication is not intended to provide all of the refinements of a High Court trial. It requires an impartial and reasoned provisional decision within a very compressed timetable".⁵⁵ Although Willow sought to argue that the timetable was too tight and the adjudicator should not have allowed a surrejoinder and further evidence and/or confined Willow's final response to limited matters, Pepperall J had little difficulty rejecting the argument, especially in circumstances where Willow did have the last word:

"It will, however, be a rare case where the court will decline to enforce an adjudication on the basis of the adequacy of the time allowed. I fully accept that time was very tight in this adjudication and that both the parties and the adjudicator will have been under pressure throughout the compressed timetable. That is, however, the nature of adjudication."⁵⁶

This case again illustrates the uphill struggle which a losing party would face in trying to resist enforcement on the basis of an alleged breach of natural justice. The reality is that the adjudication process is, by its very nature, rough and ready and no more than a temporary fix, such that the court will rarely be impressed by criticisms of the tight timetable. In this regard, Chadwick LJ's admonition in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* still remains sound – "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".⁵⁷

Fraud

Yet another basis for challenging enforcement, although not one which is very often raised, is fraud or deceit. The general principles were previously summarised by Akenhead J in *SG South Ltd v King's Head Cirencester LLP*,⁵⁸ and it is uncontroversial that a party has to adduce clear

⁵⁴ [2019] EWHC 1591 (TCC); (2019) 36 BLM 07 5.

⁵⁵ Ibid, at para 56.

⁵⁶ Ibid, at para 63.

⁵⁷ *Carillion*, at para 87.

⁵⁸ [2009] EWHC 2645 (TCC); [2010] BLR 47, at para 20.

⁵² Ibid, at para 44.

⁵³ See eg *Wycombe Demolition Ltd v Topevent Ltd* [2015] EWHC 2692 (TCC); [2015] BLR 765, at paras 28 to 31.

and unambiguous evidence of the alleged fraud, and the alleged fraud could not have been raised as a defence in the adjudication because it only emerged afterwards.

In *Grandlane Developments Ltd v Skymist Holdings Ltd*,⁵⁹ Skymist contended that the adjudication decision was tainted by fraud because the significant increase in the architect's fees claimed between October 2017 and August 2018 was due to collusion and secret commissions. The suspicion, however, arose during the adjudication and was not something which only emerged afterwards.

Jefford J analysed the evidence in detail, including materials which were provided in pre-action disclosure, and took the view that there was nothing suspicious because the architect had indicated that there were more invoices to come, and it made commercial sense for Grandlane to mitigate its exposure and wrap everything up into one adjudication.⁶⁰ The agreement between Grandlane and the architect as to the payment of legal costs is not evidence of fraud, and in any event, this was something which could have been raised during the adjudication:

“Indeed, disclosure was asked for by solicitors [during the adjudication] for that reason and the fact that disclosure was not given fuelled her suspicions. Those were all matters that could have been raised in the adjudication. It may be that, absent any further evidence, the adjudicator would not have found fraud but, in that case, it may have been open to Skymist to raise the issue on enforcement, if, as it submits has happened here, it had found further evidence of fraud (which was not available in the adjudication). As it is, it is not.”⁶¹

Jefford J further refused to adjourn the summary judgment application pending a renewed application for pre-action disclosure, as there was nothing which led the court to believe that there was anything else to be disclosed which would amount to clear and unambiguous evidence of fraud.⁶² It is plain that a party alleging fraud cannot pray in aid of a combination of speculation and mud-slinging, in the hope that some of the mud will stick and lead the court to accede to the argument – there is a high threshold to be met by an allegation of fraud, and anything short of clear evidence of dishonesty or recklessness as to the truth (for example, where a party advances mutually inconsistent claims or assertions in respect of the same subject matter) will face an uphill struggle.

⁵⁹ [2019] EWHC 747 (TCC); [2019] BLR 363.

⁶⁰ Ibid, at para 85.

⁶¹ Ibid, at para 93.

⁶² Ibid, at para 103.

The above can be contrasted with *PBS Energo AS v Bester Generacion UK Ltd*,⁶³ where the fraud alleged by Bester consisted of the false representation by PBS that the bespoke equipment had been fully manufactured (and for which payment was being claimed). Whilst the court has to be astute and cautious when faced with an allegation of fraud, Pepperall J observed that “such policy consideration must, however, yield to the well-established principle that the court will not allow its procedures to be used as a vehicle to facilitate fraud”.⁶⁴

The judge concluded that there was credible evidence that PBS made those representations knowing them to be false, or at least recklessly, especially since PBS had not explained any discrepancies openly and fully.⁶⁵ The documents relied on by Bester were only disclosed in the main TCC litigation, such that Bester could not have argued its fraud allegation during the adjudication. On this basis, the judge held that “this is one of those rare adjudication cases where there is a properly arguable defence that the decision was obtained by fraud”, and “severance is not available and an adjudicator's decision on a single dispute is either valid and enforceable or invalid and not enforceable” – enforcement of the entire decision was therefore refused.⁶⁶

A comparison of the facts in *Grandlane* and *PBS* is instructive. Whereas the former challenge was based on inferences and ongoing suspicions which ultimately proved to be overstated, the latter was based on clear evidence of a binary matter of fact which emerged after the adjudication (ie whether the equipment was fully manufactured and available as alleged). *PBS* is currently under appeal, so it will be interesting to see what the final judicial word is, but this much is clear in the meantime – any party seeking to allege fraud at the enforcement stage will need to carefully consider the strength of the evidence, bearing in mind that such an argument would only succeed in rare cases.

On the other hand, parties to an adjudication should not be under any illusion that a cavalier approach to the evidence would (because of the absence of oral cross-examination and the limited time for the adjudicator's consideration of the evidence) necessarily carry no consequences. While there may be a temptation to play fast and loose with the facts, an adjudication does not operate in an ethical vacuum, and demonstrable dishonesty or recklessness as to the truth of a representation is likely to come under scrutiny at the enforcement stage. To use Lord Denning's words, fraud unravels everything.

⁶³ [2019] EWHC 996 (TCC); [2019] BLR 350.

⁶⁴ Ibid, at para 21.

⁶⁵ Ibid, at paras 47 to 52.

⁶⁶ Ibid, at para 71.

IMPACT OF INSOLVENCY ON ADJUDICATION

Readers of last year's review will recall its discussion of the Court of Appeal's decision in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd*,⁶⁷ which was handed down back in January 2019. In that case, Coulson LJ granted an injunction against an adjudication where the referring party was in liquidation, on the basis 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" because the decision would only be enforced in exceptional circumstances.⁶⁸ Coulson LJ further observed that the position may be different when it comes to a company subject to a company voluntary arrangement (CVA):

"In addition, it seems to me that the general position relating to a CVA may, depending on the facts, be very different to a situation where the claimant company is in insolvent liquidation. [...] A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In these 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. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cash flow."⁶⁹ (Emphasis added.)

Coulson LJ's general statement of principle was no doubt premised on the difference between liquidation and a CVA, but that may be an overgeneralisation as a lot may depend on the precise nature and wording of the CVA in question. The court was faced with this issue in *Indigo Projects London Ltd v Razin and Another*.⁷⁰ Under the CVA in that case, payments made by a creditor before the CVA would be applied to the net account to be taken between the claimant and the creditor, whereas payments made after the CVA would go into a general fund available for distribution amongst other creditors.

Sir Anthony Edwards-Stuart observed that "since the adjudicator's decision was not a decision that determined the value of Indigo's claims or the value of any particular

claim, but was in effect an order for an interim payment, it would have had no effect on the supervisors' setting-off exercise unless it had been complied with prior to the CVA",⁷¹ and for this reason, enforcement should be refused and at any rate a stay of execution would have been appropriate:

"To order the defendants to pay, after the CVA has been entered into, the sum determined by the adjudicator would, in my judgment, *distort the process of accounting that is required under the CVA because the money would not be applied for the sole benefit of the defendants but instead for the benefit of the creditors generally.*"⁷² (Emphasis added.)

The conclusion reached by the judge strikes a sensible balance and rightly accounts for the nuances in the different insolvency processes – in circumstances where money paid out under an adjudication decision does not account for potential cross-claims and set-offs between the parties, and the money would go into a pot under the CVA for general distribution to the creditors, it would be similar to the situation where an enforcing party is in liquidation and the adjudication decision undermines the statutory exercise of drawing up a net balance between the parties.

The other lingering question post-*Bresco* is under what, if any, exceptional circumstances would an adjudication decision be enforceable despite the fact that the enforcing party is in insolvent liquidation. The court had the occasion to provide some helpful guidance in *Meadowside Building Developments Ltd (In Liquidation) v 12-18 Hill Street Management Co Ltd*,⁷³ which involved an adjudicator's decision determining the net balance between the parties under a final account.

Deputy High Court Judge Adam Constable QC observed that a case is likely to be an exception to ordinary position where: (i) the adjudication decision determines the final net position between the parties under the contract; (ii) satisfactory security is provided in respect of any sum awarded and any adverse cost order in respect of any unsuccessful enforcement action and any subsequent litigation to overturn the adjudication decision; and (iii) the agreement to provide funding or security cannot amount to an abuse of process.⁷⁴

An interesting question arose in *Meadowside* as to whether the financial assistance provided by a third-

⁶⁷ [2019] EWCA Civ 27; [2019] BLR Plus 20.

⁶⁸ Ibid, at para 54.

⁶⁹ Ibid, at para 108.

⁷⁰ [2019] EWHC 1205 (TCC); [2019] BLR 454.

⁷¹ Ibid, at para 54.

⁷² Ibid, at para 55.

⁷³ [2019] EWHC 2651 (TCC); [2020] BLR 65.

⁷⁴ Ibid, at para 87.

party funder to the liquidator's claim under a funding agreement was champertous. The judge held that the funding agreement was regulated by the Damages-Based Agreements Regulations 2013 (DBAR 2013), and because the funder's agreed percentage recovery exceeded 50 per cent of the sums awarded (contrary to the 2013 Regulations), the agreement was likely to be champertous and thus unenforceable:

"Indeed, on the basis of *Awwad* it would seem that it is not open to this Court to conclude that an agreement caught by the DBAR 2013 and which is non-compliant with those Regulations is nevertheless enforceable, in circumstances where parliament has legislated that it is unenforceable. It is not for the court to supplant parliament's view of what public policy dictates in this arena with any view of its own. The only logical conclusion to be derived from its unenforceability is that it is contrary to public policy and, in the eyes of the common law insofar as it must reflect public policy as developed, champertous."⁷⁵

This practical approach seeks to strike a balance between preserving the statutory insolvency process and allowing liquidators to avail themselves of a quick and less costly determination of outstanding disputes by means of adjudication

In the event, there was insufficient evidence to dispose of the issue of abuse of process due to the non-disclosure of the terms of the funding agreement, and the guarantee

⁷⁵ Ibid, at para 113.

provided by the funder was also inadequate because it did not provide the court with any real degree of certainty, such that summary judgment was refused by the judge.

The judicial guidance provided in *Meadowside* is to be welcomed. The author has previously been asked to advise on the feasibility and utility of commencing an adjudication on behalf of a liquidator and litigation funder pre-*Bresco*, and the current position gives rise to the curious situation where the insolvent party would technically be entitled to refer the dispute to adjudication, but the adjudication would very likely be futile as the decision is unlikely to be enforceable.

The position now seems to be that an adjudication decision which determines the final net position between the parties may well be enforceable if appropriate security can be offered (for example, an undertaking to ringfence any sums awarded and/or a bank guarantee or bond) – this should preferably be offered at the outset of the adjudication and not just at the enforcement stage, which may well be a bit too little too late.

This practical approach seeks to strike a balance between preserving the statutory insolvency process and allowing liquidators to avail themselves of a quick and less costly determination of outstanding disputes by means of adjudication, and it would be interesting to see if the courts will set the precedent for a successfully enforced decision in the coming year. At the same time, it is worth noting that the *Bresco* decision is itself on its way to the Supreme Court, so readers should certainly watch this space as the position may not be set in stone.

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INJUNCTIVE RELIEF IN CONSTRUCTION PROJECTS

The seeking of injunctive relief in a construction context has become increasingly popular in recent years, and the relief sought often relates to one of three scenarios: the prevention of an adjudication which is thought to be improperly commenced; the prevention of a wrongful suspension or termination of the works; and the prevention of an improper call on a performance bond or other similar forms of security. Fortuitously, there have been helpful examples of each of those scenarios over the past year.

First, in *Billingford Holdings Ltd and BFL Trade Ltd v SMC Building Solutions Ltd and Another*,⁷⁶ the applicants applied for an urgent interim injunction in respect of an ongoing adjudication on the basis of an alleged lack of jurisdiction, including an allegation that the nominating body which appointed the adjudicator was incorrect.

In a concise judgment, Fraser J considered the authorities and emphasised that “[i]t is *only in extremely rare cases* that the TCC will interfere by way of injunctive relief, or the grant of declarations under CPR Part 8 that are akin to injunctions, in ongoing adjudications”⁷⁷ (emphasis added), and as a matter of general policy, “[a]djudication has to be allowed to continue, so far as possible, free from the interference of the court, and quibbles or challenges to an adjudicator’s jurisdiction should, in a conventional case, be taken upon enforcement”.⁷⁸

This approach is plainly correct if one considers, as stressed by Fraser J, the tightness of the adjudication timetable, in which there is “simply no time within that duration to factor in applications to the court, with contested points on jurisdiction, without causing serious disruption and delay to the timetable set to down by Parliament for an adjudicator to reach a decision”.⁷⁹ It would also not be appropriate to suspend the adjudication and interfere with the timetable pending a substantive application hearing on a return date.⁸⁰

The message being sent is crystal clear – save in the most exceptional circumstances, parties should not waste the court’s limited time and resources with injunction applications where jurisdictional challenges

can properly be made at the enforcement stage. The risk of ending up with an adverse cost order from the court even before the adjudicator reaches a decision should be sufficient cause for parties to pause and consider the best way forward.

The message being sent is crystal clear – save in the most exceptional circumstances, parties should not waste the court’s limited time and resources with injunction applications where jurisdictional challenges can properly be made at the enforcement stage

In a completely different context, the applicant sub-contractor (Flexidig) in *Flexidig Ltd v A Coupland (Surfacing) Ltd*⁸¹ sought to restrain a third-party contractor (Coupland) from performing remedial civil engineering works which fell under a subcontract between Flexidig and the main contractor, M&M Contractors Europe Ltd.

This was a somewhat innovative if not unusual application, as the more natural recourse would have been to make an application against M&M to restrain it from wrongfully suspending Flexidig’s works and/or from instructing a third party to carry out the works in breach of contract. Instead, Flexidig’s application was based on an allegation that Coupland had committed the economic tort of procuring a breach of contract, the breach being a failure to offer Flexidig the opportunity to remedy the defects.

Not surprisingly, Deputy High Court Judge Simon Lofthouse QC took the view that Coupland did not induce or persuade M&M to act in a way which was in breach of contract, and facilitating and inducing did not mean the same thing.⁸² It was also dubious that the contract gave rise to a right in Flexidig to be offered the opportunity to remedy the defects, especially since M&M was entitled to terminate for convenience at any time.⁸³ In any event, the balance of convenience was firmly against the granting of an injunction:

“Flexidig are not, in reality, seeking damages. Rather, they are seeking to avoid a claim for damages from

⁷⁶ [2019] EWHC 711 (TCC); [2019] BLR 310.

⁷⁷ Ibid, at para 5.

⁷⁸ Ibid, at para 9.

⁷⁹ Ibid, at para 10.

⁸⁰ Ibid, at para 16.

⁸¹ [2019] EWHC 2578 (TCC).

⁸² Ibid, at para 14.

⁸³ Ibid, at para 20.

M&M said to result from the cost of employing others to remedy the alleged defects. In defending any such claim, Flexidig can advance its arguments under the contract and to the extent that any costs advanced are excessive or insufficiently evidenced, Flexidig would doubtless say so.”⁸⁴

It is noteworthy that the subcontract between Flexidig and M&M was governed by the law of Northern Ireland. The application was brought against Coupland in the English courts because there were concerns that the Northern Irish courts would not have acted sufficiently promptly (especially during the summer vacation). It would have been interesting to see whether the Northern Irish courts would have granted relief against M&M, but the result may not be that different considering that damages are probably an adequate remedy and M&M could have simply terminated Flexidig and circumvented any injunctive relief.

Finally, an interesting injunction application was heard by the Singapore High Court in *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and Another*,⁸⁵ where the plaintiff sought to restrain the defendant from calling on all four performance bonds under four subcontracts where there was a dispute under one of the subcontracts only. Specifically, the plaintiff relied on grounds of fraud or unconscionability.

Kannan Ramesh J considered whether, on a true construction of the performance bonds, the defendant was entitled to call on each of them for the consolidated liabilities in respect of the various projects. Save for the performance bond relating to the subcontract under which there was a genuine dispute between the parties, the judge held that the remaining performance bonds were each tied to a specific subcontract/project:

“Not only were there repeated references to the specific subcontract and project to which each performance bond related, there was also clearly no mention of any right of the first defendant to call on the bond in satisfaction of sums due under other subcontracts. [...] in the present case, clear words would have to be used if the performance bonds were intended to extend to liability arising from other subcontracts.”⁸⁶

In the circumstances, the judge considered that the calls on the three performance bonds were made without reason to believe that the corresponding subcontract

had been breached, and on any view, the calls on the performance bonds were “unconscionable because the first defendant was in essence attempting to dip into the security of other projects when it only had the belief that it had legitimate claims in respect of the Chestnut project”.⁸⁷ It was irrelevant that the defendant genuinely believed that it could rely on its contractual right of set-off to call on the three performance bonds.

The *Ryobi* case illustrates the utility of an injunctive relief when a party is faced with an improper call on a performance or on-demand bond. Whilst the applicant will always bear the significant burden of establishing a serious issue to be tried and the balance of convenience, the authorities show that the court will not be shy to step in and prevent an abusive call on a performance bond which is fraudulent or not compliant with the terms of the bond (for example, a premature call on a bond requiring a loss or a debt which has been established or ascertained in accordance with the underlying contract).

⁸⁴ Ibid, at para 27.

⁸⁵ [2019] SGHC 11.

⁸⁶ Ibid, at para 28.

⁸⁷ Ibid, at paras 36 to 37.

PARTICULAR ISSUES OF CONTRACTUAL INTERPRETATION

The past year has seen a number of interesting decisions on contractual interpretation, covering a wide variety of situations ranging from the interpretation of collateral warranties to the interpretation of dispute resolution clauses. Readers will find that there is a sliding scale between textual and context interpretation in these various decisions, and they should be read with this persistent tension in judicial approach firmly in mind.

Textualism versus contextualism

Readers may well recall from the 2017 and 2018 reviews that the courts have shown an increasing reluctance to displace the natural and ordinary meaning of the contractual language on the basis of commercial common sense. This can be traced back to the Supreme Court's decision in *Arnold v Britton*,⁸⁸ even though in the subsequent decision of *Wood v Capita Insurance Services Ltd*, the Supreme Court was at pains to stress that it "[does] not accept the proposition that *Arnold* involved a recalibration of the approach summarised in *Rainy Sky*".⁸⁹

This consistent trend can be seen in the court's decision in *Network Rail Infrastructure Ltd v ABC Electrification Ltd*.⁹⁰ This was a Part 8 claim concerning the interpretation of the term "disallowed cost", which was defined in an amended ICE form of target cost contract as (amongst other things) "any cost due to negligence or default on the part of the contractor in his compliance with any of his obligations under the contract and/or due to any negligence/default on the part of the contractor's employees, agents, subcontractors or suppliers in their compliance with any of their respective obligations under the contracts with the contractor".

ABC contended that for the purpose of deducting disallowed costs, the breach had to be "wilful and deliberate", but it did not help that ABC had changed its position over time. As a starting point, Deputy High Court Judge Joanna Smith QC observed that "the natural and ordinary meaning of the word 'default' is a failure to fulfil a legal requirement or obligation. I would need very clear evidence from the remaining provisions of the

Contract, its factual matrix and commercial context to conclude that it means something different".⁹¹ This is a strong statement which almost elevates the importance of the contractual language to the status of a quasi-presumption.

The judge then considered the context of the contract and other relevant provisions, but took the view that "[b]efore accepting an unusual interpretation restricted by the addition of words which would need to be read in to the Contract the court would need to be satisfied, not only that the parties had made a mistake in referring to a 'default' without qualification, but also as to precisely the words that they had intended to use".⁹² ABC's contention based on commercial common sense was also rejected, on the basis that this was not a case involving two conflicting interpretations in an ambiguous clause, and it was irrelevant that the consequences of Network Rail's interpretation would be disastrous.⁹³

It is a stark reminder to all parties that the court will be slow to depart from the wording chosen by the parties, no matter how draconian the consequences may be for one party, and it would be prudent for parties and their legal advisers to carefully review the language used in bespoke amendments in future contracts

This is perhaps the high point of textual interpretation in the recurrent textualism versus contextualism debate, and it is clear that ABC did not quite appreciate the commercial and financial consequences of Network Rail's bespoke amendments at the time of contract. This is a stark reminder to all parties that the court will be slow to depart from the wording chosen by the parties, no matter how draconian the consequences may be for one party, and it would be prudent for parties and their legal advisers to carefully review the language used in bespoke amendments in future contracts (whether in respect of disallowed costs or more generally).

The year 2019 saw another interesting case on contractual interpretation, but in the particular context

⁸⁸ [2015] UKSC 36.

⁸⁹ [2017] UKSC 24; [2018] Lloyd's Rep Plus 13, at para 9.

⁹⁰ [2019] EWHC 1769 (TCC); [2019] BLR 522.

⁹¹ *Ibid*, at para 28.

⁹² *Ibid*, at para 35.

⁹³ *Ibid*, at paras 39 to 40.

of construing a collateral warranty. In *British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd*⁹⁴ the Inner House of the Scottish Court of Session had to consider whether the collateral warranty in favour of the purchaser incorporated the contractual prescriptive period which applied to the building contract between the developer and the contractor.

Lord Drummond Young began by noting the authorities on contractual interpretation including *Rainy Sky SA v Kookmin Bank Co Ltd*⁹⁵ and *Wood*), and observed that in addition to the parties' objective intention, "[i]t is also appropriate to rely on commercial common sense. *The exercise of construction should be both purposive and contextual*"⁹⁶ (emphasis added). The Inner House was clearly more comfortable with giving weight to the commercial purpose of the collateral warranty, and this informed the overall interpretive exercise:

"In our opinion the underlying commercial purpose of a collateral warranty is of importance in the present case. The fundamental purpose of the collateral warranty is to place the beneficiary and the contractor in an equivalent position to the original developer and the contractor, not to extend the obligations of the contractor to the beneficiary of the warranty beyond those undertaken in favour of the original developer. Details of the wording used should not obscure that basic objective."⁹⁷

Having regard to the history and development of the use of collateral warranties, Lord Drummond Young pointed out that the purpose of such an instrument is to "provide persons such as a purchaser or tenant or security holder with rights against the contractor, or a subcontractor or member of the design team, that are equivalent to the rights that were enjoyed by the original employer under the building contract and the ancillary contracts with architects, engineers, subcontractors and others. *The notion of equivalence is central. The purpose of the warranty is not to provide purchasers, tenants and security holders with rights greater than those held by the original employer; to do so would make no commercial sense*" (emphasis added). Again, there is a notable emphasis on commercial common sense which has taken more of a backseat in recent English decisions.

On this basis, the Inner House took the view that "a collateral warranty should normally be subject to the same time bar as applied to the original building

contract. By the 'same' time bar, we mean a time bar that has effect on the same date. We cannot conceive of any policy reason to the contrary"⁹⁸. It follows that clause 3 of the collateral warranty, which ensured that the same defence under the building contract would remain available as against the beneficiary under the warranty, incorporated the same prescriptive period with the same terminus as would have applied under the building contract.⁹⁹

The judgment of the Inner House is a refreshing decision which not only clarifies the interplay between a main building contract (or other underlying contract) and a collateral warranty in a way which is reminiscent of the principle of equivalence in the context of guarantees, but also illustrates the enduring role of commercial common sense in identifying the overarching *raison d'être* and context of a class of instruments before considering what the contractual wording was intended to achieve.

At the end of the day, a balance always has to be struck in every interpretive exercise – as Lord Hodge put it in *Wood*, "textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement"¹⁰⁰.

Contract/no-contract cases

It should come as no surprise to those in the construction industry that a staple of construction disputes is the contract/no-contract argument, given how frequently works are commenced on site without first signing a formal contract, or without even having a letter of intent in place. This can arise as a jurisdictional issue in adjudications, or more generally in litigation as a defence to claims for contractual payment.

Readers will recall a similar discussion in last year's review based on *Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly called CV Buchan Ltd)*.¹⁰¹ The court's reluctance to find that parties in a subsisting transaction are not bound by any contractual relationship at all has found its latest

⁹⁴ [2019] CSIH 47.

⁹⁵ [2011] UKSC 50; [2012] BLR 132.

⁹⁶ *Ibid*, at para 7.

⁹⁷ *Ibid*, at para 7.

⁹⁸ *Ibid*, at para 16.

⁹⁹ *Ibid*, at paras 25 to 30.

¹⁰⁰ *Wood*, at para 13.

¹⁰¹ [2018] EWCA Civ 2222; [2019] BLR 27.

expression in the Supreme Court's decision in *Wells v Devani*,¹⁰² which concerned an oral agreement between a vendor and estate agent.

Following (amongst other authorities) *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG*,¹⁰³ the Supreme Court objectively assessed the parties' words and conduct. In particular, Lord Kitchin (with whom the majority agreed) considered that the absence of an express term specifying the trigger for the agent's entitlement to commission did not mean that there was no complete and enforceable agreement:

"I agree with Lewison LJ that the event giving rise to the entitlement to commission may be of critical importance but I respectfully disagree that this means that unless this event is expressly identified the bargain is necessarily incomplete. It may be an express term of the bargain that the commission is payable upon the introduction of a prospective purchaser who expresses a willingness to buy at the asking price, or it may be an express term that it is payable upon exchange of contracts. But *if, as here, there is no such express term and the bargain is, in substance, 'find me a purchaser' and the agent introduces a prospective purchaser to whom the property is sold, then a reasonable person would understand that the parties intended the commission to be payable on completion and from the proceeds of sale.*"¹⁰⁴ (Emphasis added.)

It is interesting to note that the Supreme Court readily approached the alleged gap in the contractual terms as a matter of interpretation and adopted what a reasonable person would have understood, in order to render the bargain complete, certain and enforceable in the circumstances. This is demonstrative of the court's willingness to find a legally binding contract even where the parties may not have reached agreement on every single term.

Coming back to the construction context, in *Anchor 2020 Ltd v Midas Construction Ltd*,¹⁰⁵ the employer argued that it did not sign or enter into a JCT contract on 21 July 2014, such that there was no contract even though the contractor began work on the basis of a series of letters of intent and continued with the works while the parties continued to negotiate about the inclusion of the risk register as a contractual document.

Having considered the line of authorities which culminating in *RTS*, Waksman J observed that "[i]n substantial contracts such as the one in dispute here, the parties may engage in a linear process agreeing a whole host of component matters at different stages and in different ways. *The question is always whether the parties have agreed all the relevant terms in the context of the particular putative contract*"¹⁰⁶ (emphasis added).

On the facts, Waksman J concluded that the essential terms were agreed, and the outstanding drawings and quotations were agreed by the parties to be not essential in any required sense.¹⁰⁷ Further, the judge considered that the continuing negotiations in respect of the risk register did not amount to a counter-offer:

"Finally, the fact that the parties were later arguing about the inclusion or otherwise of the RR as a Contract Document (for example at the meeting on 28 October 2014) does not mean necessarily that there was still no binding contract. It is at least just as consistent with the notion that there was already a contract in existence but Midas now wished to vary it and Anchor was prepared, commercially, to see whether that might be done."¹⁰⁸

Although the employer contended that it did not intend to be bound until the contract was signed by both parties, the evidence suggests that it had a history of insisting on a contract being in place and did in fact think that the contractor was already bound. Importantly, "Midas did of course continue to perform the contract. *In a case like this, with works of considerable substance requiring detailed documents, I consider that the fact of performance is of considerable weight*"¹⁰⁹ (emphasis added).

The conclusion in *Anchor* on the contractual issue is again in line with the courts' tendency to strive to find a contract where the works have been performed. Whilst a "no-contract" argument may seem like an easy way out in theory, experience suggests that tribunals are reluctant to accede to such an argument and allow one party to take the benefit of the works while escaping the consequences of the contractual terms which were for all intents and purposes agreed.

Indeed, the author has previously dealt with a very similar contract/no-contract case in an adjudication context, and there, the employer was seeking to escape the effect of a termination clause and rely on quantum meruit instead.

¹⁰² [2019] UKSC 4; [2019] BLR 221.

¹⁰³ [2010] UKSC 14; [2010] BLR 337.

¹⁰⁴ *Wells*, at para 26.

¹⁰⁵ [2019] EWHC 435 (TCC).

¹⁰⁶ *Ibid*, at para 91.

¹⁰⁷ *Ibid*, at para 93.

¹⁰⁸ *Ibid*, at para 97.

¹⁰⁹ *Ibid*, at para 113.

The adjudicator had little difficulty accepting jurisdiction and rejecting the “no-contract” argument, on the basis that works have been done under a letter of intent for a good six months, and the failure to sign a formal contract did not detract from the simply interim contract which was already in place.

Had the “no-contract” argument succeeded, however, what would be the basis for calculating the reasonable remuneration on a quantum meruit basis?

Quantum meruit is not a silver bullet whenever one is faced with a difficult contract – it is very much a last resort for any tribunal, and in any event, a tribunal may well adopt a basis of calculation which approximates (if not follows) the terms of a putative contract

This issue was also considered by Waksman J (albeit strictly obiter) in *Anchor*. Given that there was a contract in any event based on the letters of intent, and payment had previously been made in accordance with the JCT terms, “the proper basis for a Quantum Meruit assessment for the Works in this case, had it arisen for consideration, should be the JCT payment terms as set out in the putative contract”, and “any financial valuation should take into account defects in the works but on the other hand should allow for any claim made by Midas based on prolongation of the works for which it was not responsible”.¹¹⁰

The courts are clearly keen not to allow a party to escape the putative bargain it had operated under simply because that bargain later turned out to be unprofitable or otherwise undesirable. Parties should therefore bear in mind that quantum meruit is not a silver bullet whenever one is faced with a difficult contract – it is very much a last resort for any tribunal, and in any event, a tribunal may well adopt a basis of calculation which approximates (if not follows) the terms of a putative contract.

¹¹⁰ *Anchor*, at para 157.

“No oral modification” clauses

The Supreme Court’s decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*,¹¹¹ which effectively gave no oral modification (NOM) clauses a new lease for life and made it very difficult for parties to circumvent an express NOM clause on the basis of waiver or estoppel, was discussed in last year’s review. The implications of that decision on, for instance, variation provisions in construction contract may well be significant, and it will be interesting to see how that decision will be applied in the construction context.

Two decisions in 2019 related to this topic. First, in *NHS Commissioning Board v Vasant*¹¹² (which is not a construction case but is nonetheless of interest), the Court of Appeal had to consider whether a variation to a General Dental Services (GDS) contract complied with a NOM clause, and if so, whether it incorporated by reference the Intermediate Minor Oral Surgery (IMOS) contract terms (including a provision for termination by one month’s notice) despite the entire agreement clause.

Lewison LJ considered that the variation agreement did comply with the requirements of the NOM clause in the GDS contract, but properly construed, the entire agreement clause was not simply backward-looking but applied to the GDS contract as subsequently varied in writing, and given that the terms of the IMOS contract was not expressly referred to in the variation, it was impossible to discern which (if any) of the IMOS contract terms were incorporated.¹¹³

The *NHS* decision is a timely reminder that aside from ensuring compliance with a NOM clause when varying a contract, parties should pay attention to the terms of the written variation – does it contain all the varied terms or make express reference to all the terms which are meant to be incorporated? If not, it may be caught by an entire agreement clause which is sufficiently wide to cover both the original agreement and any subsequent variation agreements.

In a very different context, the issue of non-waiver clauses arose in *Sumitomo Mitsui Banking Corp Europe Ltd v Euler Hermes Europe SA (NV)*,¹¹⁴ which concerned a performance bond issued by a building contractor in connection with a public private partnership project to construct a waste treatment facility. The bondsman,

¹¹¹ [2018] UKSC 24; [2018] BLR 479.

¹¹² [2019] EWCA Civ 1245.

¹¹³ *Ibid*, at para 39.

¹¹⁴ [2019] EWHC 2250 (Comm); [2019] BLR 561.

Euler, contended that there was no valid assignment of the bond because there was no written confirmation by the claimant/assignee, Sumitomo, of its acceptance of the special purpose vehicle's repayment obligations under the bond. Sumitomo alleged that that requirement had been waived by Euler.

Butcher J considered the effect of the non-waiver clause in the performance bond, which provided that no waiver shall amend, delete or add to the terms of the bond unless and only to the extent expressly stated, and took the view that the waiver alleged by Sumitomo was not specific enough and did not expressly identify any terms of the bond.¹¹⁵ Further, relying on *MWB*,¹¹⁶ Butcher J observed that the non-waiver clause was not itself waived:

“In my judgment there would have to be something which showed that there was not only a waiver but a waiver of the non-waiver clause. An analogy may be drawn which what was said by Lord Sumption JSC in *Rock Advertising* about estoppels at paragraph 16. *Applying that reasoning and language to an alleged waiver, it appears to me that if it is said that waiver prevents reliance on a no waiver clause there would have to be something which indicated that the waiver was effective notwithstanding its noncompliance with the non-waiver clause and something more would be required for this purpose than what might otherwise simply constitute a waiver of the original right itself.* In my judgment, applying that test here, the terms of the Notice of Assignment did not meet it.”¹¹⁷ (Emphasis added.)

It is abundantly clear from the *Sumitomo* decision that in light of *MWB*, parties would find it difficult to escape the consequences of a NOM or non-waiver clause on the basis of forbearance, waiver or estoppel. The court would require something which amounts to a waiver or modification of the NOM or non-waiver clause, and the putative oral waiver or oral modification alone does not in and of itself displace the operation of the NOM or non-waiver clause.

In effect, there must be a specific representation that the NOM or non-waiver clause does not apply – unsurprisingly, such cases would be few and far between, as the parties would probably have committed the waiver or modification to writing had they applied their minds to the NOM or non-waiver clause in the first place. The importance of recording any modification or waiver in writing, even if unilaterally, simply cannot be stressed enough.

¹¹⁵ *Ibid*, at paras 52 to 53.

¹¹⁶ *MWB*, at para 16 (Lord Sumption).

¹¹⁷ *Sumitomo*, at para 56.

Dispute resolution clauses

If the common strand that runs through the recent case law on contractual interpretation is the upholding of the parties' freely negotiated bargain, then this is certainly apparent from the courts' treatment of dispute resolution clauses and their tendency to hold parties to the agreed dispute resolution procedure.

In *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*,¹¹⁸ the court had to consider the enforceability of a dispute resolution clause and whether it operates as a condition precedent. The clause expressly provided for an internal escalation process followed by mediation under the CEDR Model Mediation Procedure, and if the parties are unable to resolve the dispute by mediation, then either party may commence court proceedings.

O'Farrell J considered the relevant authorities on the effect of dispute resolution clauses and summarised the applicable principles – the clause must create an enforceable obligation which is expressed clearly as a condition precedent, and importantly:

“The dispute resolution process to be followed does not have to be formal but must be *sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure* without the requirement for any further agreement by the parties.”¹¹⁹ (Emphasis added.)

Based on past experience, this final hurdle is the one which trips most parties up, as a poorly drafted clause may simply provide for a without prejudice meeting or mediation without a sufficiently certain procedure or machinery. This is an important consideration for any practitioner drafting a dispute resolution clause, especially where a contract provides for liability in damages or costs in the event that one party fails to comply with the provisions.

In *Ohpen*, however, O'Farrell J considered that the provisions were sufficiently clear and enforceable, as the clause contained a specified procedure which applied to all disputes arising “during the development and implementation phase”, and these provisions survived termination.¹²⁰ It was also held to be a condition precedent, given that “the words used are clear that the right to commence proceedings is subject to the

¹¹⁸ [2019] EWHC 2246 (TCC); [2019] BLR 576.

¹¹⁹ *Ibid*, at para 32(iv).

¹²⁰ *Ibid*, at paras 33 to 51.

failure of the dispute resolution procedure, including the mediation process”.¹²¹

O’Farrell J therefore exercised her discretion to stay proceedings pending compliance with the dispute resolution clause (with an order to serve pleadings so as to clarify matters before the mediation), noting that “[t]here is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation”.¹²² This is consistent with the courts’ overriding objective and the need to respect the parties’ contractual bargain, and it would probably take an exceptional case for the court to refuse to grant a stay despite a clear and enforceable dispute resolution clause. For any party seeking to commence court proceedings, the first port of call would always be to consider the effect and enforceability of any contractual dispute resolution procedure, and to take steps to ensure compliance as far as practicable.

However, one must be careful not to go to the other extreme and take the requirements of a dispute resolution clause too far, in a way which would frustrate the parties’ attempt to engage in alternative dispute resolution as per the contract. A case in point is *Equitix ESI CHP (Sheff) Ltd v Veolia Energy & Utility Services UK plc*,¹²³ where Equitix (an operations and maintenance (O&M) contractor) sought declarations to the effect that the adjudication procedure could not be invoked in a dispute regarding alleged defects, and that the adjudicator appointed in any event fell foul of the field of expertise (ie biomass energy plants) specified in the dispute resolution provisions.

Jefford J referred to the authorities on contractual interpretation which have already been discussed earlier in this article, and having regard to the provisions of the contract as a whole, the judge considered that “the purpose of these provisions was and is to ensure that, where there is a dispute as to the performance of the O&M Contractor or the EPC [engineering, procurement and construction] Contractor that sits, so to speak, on the interface, there is a dispute resolution procedure in which the three relevant parties are involved. That is particularly so in the case of an Alleged Defect”.¹²⁴

The issue was complicated by the fact that the contract also provided for a procedure to deal with parallel liabilities in order to have the employer procure the EPC Contractor to remedy an alleged defect. Although Equitix contended

that this was the exclusive route where notice was given in respect of parallel liabilities, Jefford J adopted a commercial reading of the provisions and concluded that “the way to make all these provisions work together and give them effect is to recognise, as Veolia contends, that there are two dispute resolution streams which may be operated at the same time”.¹²⁵

This is a warning to parties that the court would be most reluctant to interfere in the adjudicator appointment process, unless there are issues such as conflicts of interest

Finally, in relation to the requirement for the adjudicator to be an expert in the field of biomass energy plants, Jefford J observed that “[t]he context is that of dispute resolution and that militates in favour of a meaning which relates the nature of the expertise to dispute resolution”.¹²⁶ This meant that the contract did not necessarily require an adjudicator with technical expertise, especially since there are no clear words requiring particular qualifications, and so the nomination of the adjudicator was valid.

Readers will note, in particular, Jefford J’s observation that “it would run contrary to policy if parties were able to thwart an adjudication by readily challenging whether the adjudicator was an appropriate appointee”.¹²⁷ This is a warning to parties that the court would be most reluctant to interfere in the adjudicator appointment process, unless there are issues such as conflicts of interest.

If parties intend to specify an adjudicator with particular technical expertise or qualifications, the surest way to do would be to expressly say so in the contract (or name specific individuals known to have such qualifications). It is clear that the courts would be astute to adopt a purposive interpretation and discourage any attempt to frustrate an adjudication on a technicality, and this is again consistent with the general policy of the courts to encourage and facilitate alternative dispute resolution.

¹²¹ Ibid, at para 53.

¹²² Ibid, at para 58.

¹²³ [2019] EWHC 593 (TCC); (2019) 36 BLM 05 11.

¹²⁴ Ibid, at para 53.

¹²⁵ Ibid, at para 66.

¹²⁶ Ibid, at para 95.

¹²⁷ Ibid, at para 105.

TORTIOUS DUTIES IN CONSTRUCTION

It is now well-established that a building contractor which has carried out construction works under a contract does not normally owe a concurrent duty in tort (although the position may well be different for a design and build contractor). This was clarified in *Robinson v PE Jones (Contractors) Ltd*, where Jackson LJ observed that “[a]bsent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property”.¹²⁸

This issue arose again for consideration in *Thomas and Another v Taylor Wimpey Developments Ltd and Others*,¹²⁹ where the claimant sought to circumvent the above principle by relying on a purported exception for a defective building which is so close to the boundary that it is a potential source of injury to persons or property on neighbouring land or highway, relying on the dictum of Lord Bridge in *Murphy v Brentwood District Council*.¹³⁰

HHJ Keyser QC began by considering the conflicting authorities on this point – on the one hand, HHJ O’Donoghue in *Morse v Barratt (Leeds) Ltd*¹³¹ followed Lord Bridge’s dictum, but on the other, in *George Fischer Holding Ltd v Multi Design Consultants Ltd*,¹³² HHJ Hicks QC considered obiter that Lord Bridge’s dictum was contrary to the ratio of *Murphy*.

The judge ultimately concluded that, although Lord Bridge’s dictum was not contrary to the ratio of *Murphy*,¹³³ it would not be correct as a matter of law to allow a claimant to recover pure economic loss in the circumstances identified by Lord Bridge, especially in light of the principles laid down in *Robinson*.¹³⁴

This decision is very much correct as a matter of principle, for it is difficult to see how Lord Bridge’s dictum can be consistent with the general position that a contractor does not owe a duty of care in respect of pure economic

loss in the absence of an assumption of responsibility. HHJ Keyser QC’s further clarification of the law is to be welcomed, and parties would be well-advised to steer clear of any tortious claims against building contractors unless they have concrete grounds for establishing an assumption of responsibility (for example, in respect of design aspects) which goes beyond the mere existence of a building contract. This is especially important from a limitation perspective.

Another recurrent issue in tort law is the liability (if any) of local authorities and approved inspectors in respect of building control approval. Indeed, the author has previously advised on tortious claims which were brought by residential owners against (among others) approved inspectors, whether as a tactical decision or as a way of circumventing limitation issues. It suffices to say that such tortious claims are not straightforward as a matter of law – back in 1990, the House of Lords in *Murphy* took the view that an approved inspector did not owe a duty of care in tort to the owner, and this was followed by the Court of Appeal most recently in *The Lessees and Management Co of Herons Court v Heronslea Ltd*,¹³⁵ where Hamblen LJ observed that:

“The result, the reasoning and a number of the speeches in *Murphy* mean that it is highly persuasive authority that a local authority does not owe a duty under s.1 DPA 1972 in the exercise of its building control functions. Indeed, Mr Letman does not positively contend for such a duty. His essential point is that this is not an issue that needs to be addressed as the position of an AI is materially different to that of local authority inspector. I do not agree. As Mr Townend points out, the statutory regimes governing the building control functions of local authorities, and the role and responsibilities of AIs, directly parallel one another, and insofar as the regimes diverge, it is to give the local authority more expansive powers than those available to its AI counterpart.”¹³⁶

Interestingly, 2019 saw yet another case regarding the potential liability of an approved inspector. In *Zagora Management Ltd and Others v Zurich Insurance plc and Others*,¹³⁷ the freeholder and some of the long leaseholders of a block of flats brought a claim against their insurers on the basis of building warranties (which succeeded), and against the approved inspector on the basis of deceit in the certified approval of the works.

¹²⁸ [2011] EWCA Civ 9; [2011] BLR 206, at para 68.

¹²⁹ [2019] EWHC 1134 (TCC); [2019] BLR 382.

¹³⁰ (1990) 50 BLR 1.

¹³¹ (1993) 9 Const LJ 158.

¹³² (1998) 61 Con LR 85.

¹³³ *Thomas*, at para 26.

¹³⁴ *Ibid*, at para 33.

¹³⁵ [2019] EWCA Civ 1423; [2019] BLR 600.

¹³⁶ *Ibid*, at para 54.

¹³⁷ [2019] EWHC 140 (TCC).

The claim in deceit was presumably motivated by the well-known difficulties of alleging negligence against an approved inspector.

HHJ Davies noted that whilst an intention to deceive is not a necessary ingredient in a claim in deceit, “as a matter of common sense the court is likely, when considering the issue of dishonesty, to ask itself why Mr Mather should knowingly or recklessly have made a false representation”,¹³⁸ and if there is no clear answer, then the more likely inference is that of an innocent or careless mistake.

On the facts, it was conceded that the approved inspector represented in his certificates that he had taken reasonable steps to satisfy himself as to the compliance of the works with the Building Regulations; that there was in fact a failure to take such steps; and that he intended some of the individual leaseholders to rely on the certificate. However, it was denied that the approved inspector intended a subsequent purchaser of the freehold (Zagora) to rely on the certificate. HHJ Davies held that:

“Applying those principles, it seems impossible to me to conclude that Mr Mather intended, in the legal sense, a subsequent purchaser of the freehold such as Zagora to rely upon the Bldg Regs final certificates over two to three years later. There is no evidence that Mr Mather ever expressly contemplated the position of a purchaser of the freehold, as opposed to the purchaser of the individual flats, at the time he issued the Bldg Regs final certificates. This is not surprising, since there is no suggestion that JCS intended to dispose of the freehold at the time Mr Mather was having dealings with its representatives.”¹³⁹

In respect of the individual leaseholders, the judge further concluded on the evidence that their claims also failed on the point of reliance, because “at no time prior

¹³⁸ Ibid, at para 11.5.
¹³⁹ Ibid, at para 11.19.

to exchange was the Bldg Regs final certificate even in existence, let alone referred to. It follows, in my view, that it could only have been relied upon prior to completion on the basis that it influenced the decision whether or not to complete. There is simply no documentary evidence which shows that it did influence that decision”.¹⁴⁰

Given the recent torrent of decisions which have found against tortious claims against approved inspectors, it will remain an uphill struggle to seek recourse on the basis of negligent or fraudulent building control approval. That said, *Zagora* may pave the way to a rare exception on the right set of facts – had there been evidence of reliance by the individual leaseholders on the building control certificates, their claims would have been made out.

This is food for thought for practitioners who advise on conveyancing matters – one way of maximising the protection enjoyed by purchasers against defective works may be to specifically request early sight of the building control certificates and include that as part of the standard suite of documents to be provided to and reviewed with the purchasers prior to completion of the sale. Depending on the particular circumstances, that may become important evidence of reliance on the building control approval in a defects claim somewhere down the line.

Given the recent torrent of decisions which have found against tortious claims against approved inspectors, it will remain an uphill struggle to seek recourse on the basis of negligent or fraudulent building control approval

¹⁴⁰ Ibid, at para 11.47.

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DELAY CLAIMS

Like death and taxes, delay claims are a certainty in the life of almost every construction project. However, it is not every day that the courts have the occasion to provide judicial guidance on important points of principle relevant to delay claims. Riding on the wave of 2018, the past year has seen a number of new Court of Appeal decisions, as well as cases in other common law jurisdictions, which provide helpful insight into topics such as practical completion, loss and expense and liquidated damages.

Analysis of critical delay and practical completion

The identification of what activities and events were driving/preventing practical completion and when practical completion was in fact achieved is often central to delay analysis in construction disputes. This begs the question: what is practical completion?

As discussed in last year's review, the case of *University of Warwick v Balfour Beatty Group Ltd*¹⁴¹ touched on the issue of practical completion, albeit in the specific context of defining sectional completion. In 2019, the Court of Appeal had the occasion to specifically consider the definition of practical completion in *Mears Ltd v Costplan Services (South East) Ltd & Others*¹⁴² – a topic which has been left relatively untouched since the decision of the Hong Kong Court of Final Appeal in *Mariner International Hotels Ltd and Another v Atlas Ltd and Another*¹⁴³ and the TCC's decision in *Walter Lilly & Co Ltd v Mackay and Another*.¹⁴⁴

In *Mears*, the Court of Appeal was concerned with an agreement for lease which provided that a reduction in room size of more than three per cent would be material, and the claimant contended that any such material reduction would prevent the developer's agent from certifying practical completion, which would in turn entitle the claimant to determine the agreement.

Coulson LJ considered the well-known authorities on the definition of practical completion, including (amongst other cases) *Mariner* and *Walter Lilly*, and he doubted the correctness of the courts' observations in *Menolly*

*Investments 3 SARL v Cereps SARL*¹⁴⁵ and *Bovis Lend Lease Ltd v Saillard Fuller & Partners*¹⁴⁶ to the effect that practical completion would not be prevented by a defect which does not affect beneficial occupation.¹⁴⁷

The judge then summarised the legal principles: practical completion is “easier to recognise than define”, and while the existence of latent defects would not prevent practical completion, patent defects other than ones to be ignored as trifling would.¹⁴⁸ Importantly, he emphasised that:

“Whether or not an item is trifling is a matter of fact and degree, to be measured against ‘the purpose of allowing the employers to take possession of the works and to use them as intended’ (see Salmon LJ in *Jarvis*). However, this should not be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied.”¹⁴⁹ (Emphasis added.)

Applying those principles to the facts, Coulson LJ held that it was incorrect to say that any failure to meet the three per cent tolerance, however trivial, would automatically prevent practical completion, in the absence of any express contractual agreement as to the parameters for the granting of practical completion.¹⁵⁰ Importantly, the fact that a breach or defect may be irremediable is irrelevant to the issue of practical completion.¹⁵¹

The latest judicial guidance in *Mears* clarifies the ambiguity in some of the previous authorities as to the touchstone for practical completion – whilst parties have at times relied on certain authorities to contend that practical completion should be granted insofar as an employer is able to take possession and enjoy beneficial occupation of the property, this has been roundly rejected by the Court of Appeal.

That said, the assessment of whether a patent defect is trifling would necessarily be assessed against the purpose of allowing an employer to take possession, and to that extent, the degree to which an employer is able to use the property despite the patent defects will remain relevant, and this is where the future battlegrounds are likely

¹⁴⁵ [2009] EWHC 516 (Ch).

¹⁴⁶ (2001) 77 Con LR 134.

¹⁴⁷ *Mears*, at para 69 to 70.

¹⁴⁸ *Ibid*, at paras 74(a) to (d).

¹⁴⁹ *Ibid*, at para 74(e).

¹⁵⁰ *Ibid*, at paras 76 to 78.

¹⁵¹ *Ibid*, at para 80.

¹⁴¹ [2018] EWHC 3230 (TCC); [2019] BLR 138.

¹⁴² [2019] EWCA Civ 502; [2019] BLR 289.

¹⁴³ [2007] 10 HKCFAR 1.

¹⁴⁴ [2012] EWHC 1773 (TCC); [2012] BLR 503, at para 372.

to be. One can conceivably think of items traditionally categorised as “snags” which are so cosmetic and trivial (because they do not in any way affect possession and use) that they would not prevent practical completion. In the end, it is all a matter of fact and degree, and for want of a better phrase, one will know it when one sees it.

The latest judicial guidance in *Mears* clarifies the ambiguity in some of the previous authorities as to the touchstone for practical completion

It is not only the achievement of practical completion which is a matter of fact and degree. Indeed, the entire exercise of analysing critical delay is inherently fact-sensitive and depends on a careful consideration of the evidence as to what was driving or preventing completion at any given point in time. This point found its most recent and colourful expression in the Australian decision of *White Constructions Pty Ltd v PBS Holdings Pty Ltd and Another*.¹⁵²

In *White*, the Supreme Court of New South Wales considered (amongst other things) the delay experts’ competing methodologies and analyses (based on an as-planned versus as-built windows analysis and a collapsed as-built analysis respectively), in a dispute concerning the delay caused by an alleged failure by a sewer designer and water servicing coordinator to submit a sewer design which was acceptable to the relevant authorities.

Faced with the starkly contrasting methodologies, Hammerslag J observed that “both experts are adept at their art”, but “both cannot be right” and “[i]t is not inevitable that one of them is right”.¹⁵³ Whilst recognising that the methods enumerated in the SCL Delay and Disruption Protocol (Protocol) “have apparently been accepted into programming or delay analysis lore”,¹⁵⁴ the judge emphasised that the “only appropriate method is to determine the matter by *paying close attention to the facts*”¹⁵⁵ (emphasis added), and he accepted that a methodology may or may not be appropriate irrespective of whether it appears in the Protocol.¹⁵⁶

In the end, the judge opted for a common-sense approach and relied instead on the opinion of a court-appointed delay expert who was independent of the parties’ respective experts. This is nothing less than a nuclear option for the court, but it is a timely reminder that expert evidence in high-value construction disputes often become far too lengthy, complex and impenetrable to the tribunal. The dangers are plain to see, and a party risks losing the tribunal’s attention completely if its expert does not have the ear of the tribunal.

From experience, the author has also seen delay expert evidence in both litigation and arbitration which is so hypothetical and far removed from the factual evidence that it gets completely torn apart during cross-examination. The message to take home from *White* is this: as with many things in life, less is often more, and the quality of an expert’s delay analysis is measured not by its volume and quantity, but by the degree to which the analysis is tied to the factual evidence in play. After all, the expert’s role is to assist the tribunal in analysing the programming implications of various factual events.

Loss and expense claims

Delay analysis is often directed at substantiating a financial claim for loss and expense (which is typically accompanied by a corresponding award of extension of time). A threshold question for such claims is a contractor’s compliance with contractual notice requirements, which in turn depends on the true and proper construction of the relevant clause.

In *Maeda Kensetsu Kogyo Kabushiki Kaisha and Another v Bauer Hong Kong Ltd*¹⁵⁷ (which concerned the construction of the Hong Kong to Guangzhou Express Rail Link tunnels), the Hong Kong Court of First Instance considered an appeal against an interim arbitral award on a question of law. One of the issues raised was the true and proper construction of the notice requirements for its claim for additional payment (which was advanced as a variation claim, or alternatively as a “like rights” claim, ie a parallel claim).

The subcontract in question required the contractor to give a first notice showing an intention to make a claim, and a subsequent second notice stating the contractual basis together with full and detailed particulars and the evaluation of the claim. Unfortunately, Bauer only gave

¹⁵² [2019] NSWSC 1166.

¹⁵³ Ibid, at para 18.

¹⁵⁴ Ibid, at para 190.

¹⁵⁵ Ibid, at para 197.

¹⁵⁶ Ibid, at para 191.

¹⁵⁷ [2019] HKCFI 916.

notice on the basis of a variation claim, but not on the basis of a “like rights” claim.

Mimmie Chan J held that Bauer failed to give proper notice of the like rights claim, given the clear and unambiguous requirement of specifying the contractual basis of the claim, citing the UK Supreme Court’s emphasis on the contractual language in *Rainy Sky* and *Arnold*:

“In any event, however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served, with no qualifying language such as ‘if practicable’, or ‘in so far as the sub-contractor is able’ (cf *Multiplex Construction (UK) Ltd v Honeywell Control Systems (No 2)* [2007] 111 Con LR 78). [...] In particular, the language used in Clause 21.1 is in my view clear on its plain reading, and the decisions in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Arnold v Britton* [2015] AC 1619 highlight the importance of the language used in the provision to be construed, notwithstanding the need to read such language in the proper factual and commercial context. There is no basis for a court or tribunal to rewrite the subcontract or clause 21 for the parties after the event.”¹⁵⁸

The *Maeda* case serves as a harrowing reminder to parties of the importance of paying close attention to the language of contractual notice requirements and the requisite contents of the notice. The author has on various occasions advised on notices which purport to comply with the contractual requirements, but in fact failed to do so upon closer examination, often because of lack of particulars as to the basis and/or quantum of the claim. It is also interesting to see the textual approach in *Arnold* stretching its legs to Hong Kong, and it is fair to say that parties should expect contracts to mean what they say.

The *Maeda* case serves as a harrowing reminder to parties of the importance of paying close attention to the language of contractual notice requirements and the requisite contents of the notice

All of the above assumes that a contract expressly provides for an entitlement to loss and expense for non-culpable delay. What if the contract in fact provides that there is no such entitlement, and an extension of time represents the sole remedy for delay? This was the case in *Lucas Earthmovers Pty Ltd v Anglogold Ashanti Australia Ltd*,¹⁵⁹ where the Federal Court of Australia had to consider whether the contractor was also prevented from recovering time-related costs arising from a variation which delayed the works.

White J held that the contractor was indeed prevented from making a distinct claim for prolongation costs, because “when clause 18.8 is construed in the context of the Contract as a whole, it is to be understood as making it plain that Lucas was not to have any claim for losses, costs and expenses which result from any delay or disruption. The word ‘any’ is significant. It indicates that clause 18.8 is directed to delays or disruptions of all kinds”.¹⁶⁰

However, the judge noted that the application of the variation rates would inherently include some time-related costs, such that the contractor was not left completely without any compensation for the time and labour spent on the variations:

“The remuneration for labour is usually time based. So are many of the costs associated with the supply of plant and equipment. Costs of this kind are usually taken into account in one way or another in the pricing of the work or in the fixing of the remuneration. clause 18.8 is not concerned with these costs per se. It is only when costs are the consequence of delay or disruption that clause 18.8 has application to them.”¹⁶¹

The *Lucas* decision highlights the interesting cross-over between a delay and disruption claim and a variation claim. In *Lucas*, the claimant sought to value a variation (at least in part) as a delay and disruption claim, but that was rejected due to the express contractual exclusion. Would the opposite be possible, ie valuing a delay and disruption claim as a variation?

The author has recently encountered a scenario where a claimant sought to recover the time-related costs caused by alleged changes in the programme and sequence of works as a variation claim, and that claim was valued on a prospective basis as a variation rather than as a conventional delay and disruption claim. Whilst such an approach may not necessarily be precluded by the terms

¹⁵⁹ [2019] FCA 1049.

¹⁶⁰ *Ibid*, at para 292.

¹⁶¹ *Ibid*, at para 297.

¹⁵⁸ *Ibid*, at para 31.

of the contract, one can see how such an exercise would run into serious evidential difficulties. After all, there is a world of difference between the valuation of a variation based on applicable or reasonable rates for specific items of additional work on the one hand, and the valuation of time-related costs in a prolongation claim on the other.

Liquidated damages

One of the talking points of 2019 was probably the Court of Appeal's decision in *Triple Point Technology Inc v PTT Public Company Ltd*,¹⁶² where the court considered the long-debated issue of whether a liquidated damages clause survives the termination of a contract. It was commonly considered to be the orthodox position that the liquidated damages clause applies up to the point of termination, after which a claim lies in general damages – see, for instance, Ramsey J's decision in *Bluewater Energy Services BV v Mercon Steel Structures BV*¹⁶³ – although there have been instances where the court has awarded liquidated damages up to actual completion post-termination – see, for instance, Coulson J's decision in *Hall v Van Der Heiden (No 2)*.¹⁶⁴

Returning from retirement, Sir Rupert Jackson considered the various authorities relating to this vexed issue,¹⁶⁵ and noting what was usually considered to be the orthodox position, he observed that it was not free from difficulty:

“It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract. *In my view, the question whether the liquidated damages clause (a) ceases to apply or (b) continues to apply up to termination/ abandonment, or even conceivably beyond that date, must depend upon the wording of the clause itself. There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss.*”¹⁶⁶ (Emphasis added.)

In effect, the Court of Appeal left open the question for a case-by-case consideration in the future – on the facts of that particular case, the clause provided for liquidated damages to apply “from the due date for delivery up to the date PTT accepts such work”, and so no liquidated

damages accrued where the works were never delivered up by reason of the superseding termination.

It bears emphasis that the Supreme Court has granted permission to appeal against the Court of Appeal's decision, so this is not the last word on this important topic. The Supreme Court's decision will no doubt be one of the most anticipated decisions in the year ahead, and readers should certainly watch this space.

In any event, the jury is still out as to whether another court faced with a differently worded provision would reach a different decision. There is at least an argument for saying that where the standard form contracts provide for liquidated damages to be calculated per day of delay where a contractor fails to meet a completion date, that failure is itself sufficient to trigger an entitlement to liquidated damages which would accrue on a daily basis until the delay ceases or the liquidated damages cease to be enforceable (whichever happens first). All in all, the position remains far from clear.

Before leaving the fascinating world of liquidated damages, it is worth mentioning one other decision on the enforceability of liquidated damages. In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*,¹⁶⁷ the Singapore High Court dealt with (amongst other things) the issue of delays caused by the employer to works carried out under a letter of intent, which did not contain any extension of time provisions.

Tan Siong Thye J held that “[i]t is axiomatic that where there is no EOT clause, and the employer commits an act of prevention, the contractor is no longer bound by the original contractual completion date, and the time for the completion of the project will be set at large. Thus, any liquidated damages clauses entered into between the parties is rendered inoperative”.¹⁶⁸

Although this type of scenario rarely arises in modern day construction due to the existence of extension of time provisions in standard form contracts, the *Crescendas* case comes as an instructive reminder that the prevention principle and the concept of “time at large” remain alive and well, and they still have a role to play where an extension of time clause is absent or (perhaps more controversially) if it is inadequate. This can arise, as in *Crescendas*, where the parties have proceeded with the works on a letter of intent which stipulates liquidated damages but does not contemplate any extension of time mechanism.

¹⁶² [2019] EWCA Civ 230; [2019] BLR 271.

¹⁶³ [2014] EWHC 2132 (TCC), at para 526.

¹⁶⁴ [2010] EWHC 586 (TCC), at paras 76 to 77.

¹⁶⁵ *Triple Point*, at paras 76 to 105.

¹⁶⁶ *Ibid*, at para 110.

¹⁶⁷ [2019] SGHC 4.

¹⁶⁸ *Ibid*, at para 353.

RECENT TRENDS IN INTERNATIONAL DISPUTE RESOLUTION

As with previous years, there have been various developments in other jurisdictions which have a direct or oblique impact on the resolution of construction disputes, particularly cross-border matters. These developments come at a time when the international market is in a somewhat volatile state. Closer to home, the industry has been grappling with Brexit and the uncertainties brought about by changes in government; and, farther afield, the ongoing US-China trade war and the recent anti-extradition-bill protests in Hong Kong have sent shockwaves which could be felt globally.

However, there has so far been no visible impact on the amount of construction disputes both here and abroad, and in fact, there is an ever-growing demand for the services of experienced legal practitioners, experts and construction professionals in international construction matters. As such, it remains important to follow closely the various trends and developments in other jurisdictions, and for the purpose of this article, the author will set out some of the highlights in relation to Hong Kong, Singapore and the Middle East.

Hong Kong

Apart from the anti-extradition-bill protests which have taken the media by storm in the final two quarters of 2019, the commission of inquiry (COI) into the Mass Transit Railway Corporation Ltd's (MTRCL) Shatin-Central Link Project (which was discussed in last year's review) is still ongoing and remains a focal point within the construction industry in Hong Kong.

Readers will recall that the Chinese government had extended the terms of reference to include other parts of Hung Hom Station going beyond the platform slabs and diaphragm walls. Since then, the COI has reconvened on a number of occasions to hear factual and expert evidence on gaps in record-keeping, structural safety of stitch joints in the tunnel structures, and also various residual issues arising from MTRCL's holistic report on the investigation of the alleged defects and the implementation of suitable measures.

As a result of the proposed suitable measures, the opening of the Shatin-Central Link has been delayed,

and in the meantime, it will be interesting to see the COI's report in the first or second quarter of 2020. The report will very likely have an impact on the future procurement of contracts by the Hong Kong Government and MTRCL, and it will also have wider implications on project management and record-keeping practices in the construction industry.

Turning to the arbitration scene in Hong Kong, following the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in 2017 and the Code of Practice for Third Party Funding of Arbitration which was issued in 2018, section 3 of the 2017 Ordinance (which applies to third-party funding for arbitrations) has formally entered into force on 1 February 2019 – it will be interesting to see the extent to which this encourages the choice of Hong Kong as a forum for arbitration. Section 4 on third-party funding for mediation will enter into force at a later date, so readers should monitor developments.

More recently, the Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the courts of the Mainland and of the HKSAR (the Arrangement) entered into force on 1 October 2019. This is a momentous arrangement for arbitrations seated in Hong Kong, as parties are now able to seek interim measures (for “property preservation, evidence preservation and conduct preservation” pursuant to article 1 of the Arrangement) from the Mainland Chinese courts, and it is no longer necessary for parties to opt for a Mainland-seated arbitration in order to obtain or enforce interim measures in the Mainland.

The Arrangement will further encourage Chinese parties and parties involved in Chinese projects to select Hong Kong as the seat of arbitration, although the tangible results may take time to crystallise. It will also be interesting to see whether the Mainland Chinese courts are willing to grant injunctive relief such as anti-suit injunctions, which would no doubt provide a further boost to the attractiveness of Hong Kong-seated arbitrations.

Meanwhile, the Hong Kong courts continue to produce various decisions of interest when it comes to attempts at challenging arbitral awards. In particular, 2019 saw a number of robust decisions from the Hong Kong courts regarding purported challenges against arbitral awards.

First, in *Maeda Kensetsu Kogyo Kabushiki Kaisha and Another v Bauer Hong Kong Ltd*,¹⁶⁹ which relates to the same ongoing dispute already discussed above, the Hong

¹⁶⁹ [2019] HKCFI 1006.

Kong Court of First Instance considered an attempt to set aside or remit parts of an arbitral award on the grounds of serious irregularity. In particular, Maeda alleged that: (i) there was no pleaded case or any evidential basis for the additional payment for idling resources awarded; (ii) there was no evidential basis and no reasonable opportunity to investigate certain findings on design changes which went beyond the pleaded case; and (iii) the Arbitrator failed to consider or give any decision on the costs of certain remedial works claimed by Maeda.

Mimmie Chan J summarised the relevant authorities on the appropriate legal test, and stressed that the remedy of setting aside an award is “not an appeal against the arbitral award, on facts or on law”, and the court “should only be concerned with the process of the arbitration, and whether it is fair”.¹⁷⁰ This is wholly consistent with well-established principles.

In the end, the judge rejected all three grounds of challenge: (i) the idling of resources was one of the key issues to be determined by the Arbitrator and Maeda had a fair and reasonable opportunity to deal with the claim;¹⁷¹ (ii) the criticisms of the Arbitrator’s findings on the design changes went to the correctness of the Arbitrator’s findings in law and on facts, with which the court is not concerned;¹⁷² and (iii) the Arbitrator did address the key issue of Maeda’s counterclaim in damages, and what was “unaddressed” was simply an argument raised by Maeda.¹⁷³

The *Maeda* decision illustrates the court’s lack of sympathy for attempts by disgruntled parties to present criticisms of the merits of an award as issues of procedural irregularity. The court was at pains to emphasise that the proper avenue for challenging the merits of the award would be to appeal on a question of law, and “setting aside on the ground of serious irregularity causing substantial injustice is not to be used as a back door way of appealing on facts”.¹⁷⁴ That the court was unimpressed by such an approach is also apparent from its criticisms of the making of lengthy legal submissions in the parties’ affidavits.¹⁷⁵

A further reminder of the court’s reluctance to descend into the substantive merits of an award on a setting aside application can be found in *N v C*,¹⁷⁶ which concerned a HKIAC arbitration that has been ongoing since 2015. The dispute was in respect of final account claims for

¹⁷⁰ Ibid, at para 7.

¹⁷¹ Ibid, at paras 11 to 37.

¹⁷² Ibid, at paras 38 to 52.

¹⁷³ Ibid, at paras 53 to 68.

¹⁷⁴ Ibid, at para 18.

¹⁷⁵ Ibid, at paras 70 to 72.

¹⁷⁶ [2019] HKCFI 2292.

extensions of time and additional payment in a residential development in Macau.

The arbitrator awarded (amongst other things) additional extensions of time and a substantial sum by way of loss and expense, and the claimant applied to set aside or remit the award on the basis that there was a serious irregularity, that the decisions went beyond the scope of the submission to arbitration, and/or that the procedure was not in accordance with the parties’ agreement. In particular, the claimant’s challenge centred on the arbitrator’s alleged failure to deal with its time-bar argument, and also his findings on the parties’ agreed daily rate which were said to go beyond the parties’ evidence and submissions.

In a concise judgment, Mimmie Chan J referred back to the principles she had recited in *Maeda*,¹⁷⁷ and having analysed the materials before the arbitrator and the arbitrator’s decision, the judge had little difficulty concluding that the challenge was doomed to fail:

“The parties had adduced extensive factual evidence on the scope and effect of the agreed daily rate in respect of the defendant’s entitlement to loss and expense. Witnesses were called and cross-examined on the application of the agreed daily rate, and what the parties had meant when they referred to the daily rate being subject to the comments from the Architect, and/or the Architect’s assessment of the EOT. [...] *As counsel for the defendant pointed out and I accept, the defendant’s case on agreed entitlement on the basis of the agreed daily rate had been fairly put to the plaintiff, and argued before the Arbitrator, and the plaintiff had been given the full opportunity to respond to the defendant’s evidence and arguments.*”¹⁷⁸ (Emphasis added.)

As in *Maeda*, the court in *N v C* emphasised the difference between failing to deal with an issue and rejecting an argument for which reasons had been omitted,¹⁷⁹ and above all, “[w]hether the Arbitrator is right on his findings of facts and law, whether his decision is supported by evidence, whether he has given sufficient reasons for his finding, and the quality of the Arbitrator’s reasoning, are not matters of consideration in an application to set aside for serious irregularity, or under section 81 of the Ordinance”.¹⁸⁰

Again, the court’s approach in *N v C* accords with well-established principles, and it is somewhat surprising that

¹⁷⁷ Ibid, at para 12.

¹⁷⁸ Ibid, at para 23.

¹⁷⁹ Ibid, at para 36.

¹⁸⁰ Ibid, at para 38.

despite the plethora of judicial guidance, many parties still decide to try their luck and have a go at challenging an arbitral award on grounds of serious irregularity despite not having any real procedural complaints. To this end, the Hong Kong courts' willingness to uphold arbitral awards and reject unmeritorious challenges is to be welcomed.

Finally, in *Chun Wo Construction & Engineering Co Ltd & Others v The Hong Kong Housing Authority*,¹⁸¹ the Hong Kong Court of Appeal considered the legal test for an appeal against an award on a question of law – the substance of the appeal concerned the proper interpretation of a schedule of rates for the purpose of valuing the replacement works for sliding window hinges.

Cheung JA confirmed that the “obviously wrong” test was applicable to one-off situations as in this case,¹⁸² and for cases of general public importance, the “serious doubt” test connotes a high threshold although it does not require a “strong prima facie case”.¹⁸³ In the event, Cheung JA did not consider it appropriate to interfere with the first instance decision, as the judge was not plainly wrong on the result.¹⁸⁴

The Court of Appeal's decision in *Chun Wo* provides helpful confirmation of the high threshold for an appeal against an award on questions of law, whether under the “obviously wrong” test or “serious doubt” test. It is perhaps a missed opportunity that the court did not clarify the precise benchmark for the “serious doubt” test, and this may have to be revisited on another occasion. What is clear, however, is that the Hong Kong courts continue to adopt a pro-arbitration policy, and that parties can expect arbitral awards to be upheld and enforced save in exceptional circumstances.

Singapore

Singapore is another popular forum for international arbitrations. From June to August 2019, Singapore's Ministry of Law held a public consultation on certain proposed amendments to the International Arbitration Act (Cap 143A) – these proposed amendments include (amongst other things) allowing parties to request a tribunal to rule on its jurisdiction, an opt-in mechanism allowing appeals to the courts on questions of law in

an award, and allowing the courts to order costs in the arbitration where the award has been set aside.

These proposed amendments would bring Singaporean law in line with international good practice, and it is likely that this would encourage more parties to consider and opt for Singapore as the seat of arbitration. It will be particularly interesting to see whether the opt-in procedure for appeals on questions of law makes it into legislation, as that could mean more decisions from the Singapore courts on substantive matters of construction law in the future.

Given the popularity of Singapore as a seat of arbitration, the Singapore courts have always been a source of interesting decisions relating to challenges to arbitral awards and interpretation of arbitration agreements. Two particular cases in 2019 are worth mentioning.

First, in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*,¹⁸⁵ the plaintiff sought to set aside an award in a Singapore International Arbitration Centre (SIAC) arbitration on the basis that it played no part in the proceedings (apart from seeking extensions of time), and that the tribunal in fact lacked jurisdiction because of a Memorandum of Understanding (MOU) to withdraw the ongoing arbitration, the effect of which was in dispute between the parties.

The Singapore High Court refused to set aside the award on the basis that the plaintiff failed to take advantage of article 16(3) of the UNCITRAL Model Law to challenge the tribunal's jurisdiction, and that the MOU did not in any event terminate the tribunal's mandate. On appeal, the Singapore Court of Appeal reversed the High Court's decision and held that the MOU was “immediately operative upon its execution”,¹⁸⁶ and article 16(3) of the Model Law would not preclude a party from raising a jurisdictional objection at a later stage if the party did not in fact participate in the proceedings:

“In the absence of a clear duty on the respondent to participate in the arbitration proceedings imposed either by the Model Law or the IAA we find it difficult to conclude that a non-participating respondent should be bound by the award no matter the validity of the reasons for believing that the arbitration was wrongly undertaken. [...] In our view, neither article 16(3) nor section 10 should be construed so as to prevent a respondent who chooses not to participate in an arbitration because

¹⁸¹ [2019] HKCA 369.

¹⁸² Ibid, at paras 8.9 to 8.10.

¹⁸³ Ibid, at paras 8.3 and 8.12.

¹⁸⁴ Ibid, at para 8.4.

¹⁸⁵ [2019] SGCA 33.

¹⁸⁶ Ibid, at para 91.

he has a valid objection to the jurisdiction of the tribunal from raising that objection as a ground to set aside such tribunal's award."¹⁸⁷

Judith Prakash JA noted the objection that this might encourage parties to keep quiet about jurisdiction during the arbitral proceedings but considered that this does not apply to a party who did not participate in the arbitral proceedings and did not contribute to any wastage of costs.¹⁸⁸

Readers will recall that the English courts have grappled with the same concerns in the context of jurisdictional challenges in jurisdictions by refusing to countenance vague general reservations of right. If a party participates in the arbitral proceedings without properly reserving its rights as to jurisdiction or raising its objections at the earliest stage, then the issue of waiver would probably come into play, but where a party has not participated at all, the Singapore Court of Appeal's decision seems eminently sensible and principled.

The other judgment of interest is *BNA v BNB and Another*,¹⁸⁹ where the plaintiff sought to challenge the tribunal's jurisdiction in a SIAC arbitration in Shanghai, on the grounds that the arbitration agreement was invalid under People's Republic of China (PRC) law, because PRC law prohibits foreign arbitral institutions from administering arbitrations of domestic disputes and PRC-seated arbitrations generally.

Anecdotally, it is worth noting that two of the three members of the tribunal ruled that it had the requisite jurisdiction over the dispute, but the third member, Ms Theresa Cheng SC (who is the incumbent Secretary for Justice of Hong Kong) dissented and was in favour of a PRC-seated arbitration administered by a PRC arbitral institution.

The issue before the Singapore courts entailed the application of the three-stage test laid down in *Sul América Cia Nacional de Seguros SA and Others v Enesa Engenharia SA and Others*¹⁹⁰ to determine the proper law of the arbitration agreement. The Singapore High Court ruled that the arbitration was seated in Singapore and could proceed, but this decision was ultimately reversed by the Singapore Court of Appeal.

The Singapore Court of Appeal agreed that there was no express choice as to the proper law of the arbitration

agreement,¹⁹¹ but held that the natural meaning of the phrase "arbitration in Shanghai" was that Shanghai was the seat of the arbitration,¹⁹² and there were no convincing indicia to the contrary. Accordingly, it followed that law of the seat and the implied choice of proper law of the arbitration agreement were PRC law.¹⁹³

This decision indicates that Singapore's pro-arbitration policy does not necessarily mean that the Singapore courts would always lean towards upholding the parties' express intention to arbitrate based on SIAC rules, and the courts would have regard to the parties' choices as to the seat and venue of the arbitration. The dangers of an ambiguous arbitration agreement are obvious, and this is a timely reminder that parties should apply their minds to the proper law of the arbitration agreement and the seat of the arbitration when drafting arbitration clauses, and the wording should be unambiguous to ensure that the agreement says what it means.

Middle East

As with Hong Kong and Singapore, the Middle East remains a hotspot for high-value construction disputes and international arbitrations, and previous reviews have already described some of the progressive developments in recent years. This ongoing trend has continued over the past year,

Worthy of note is the United Arab Emirates (UAE) Cabinet Resolution No 57 of 2018, which entered into force on 16 February 2019. This Cabinet Resolution introduced significant amendments to the UAE Civil Procedure Code (Federal Law No 11 of 1992). In particular, Chapter IV (articles 85 to 88) of the Cabinet Resolution replaces articles 235 to 238 of the UAE Civil Procedure Code, and the provisions concerning enforcement of foreign judgments are now applicable to foreign arbitration awards if the subject matter of the award is arbitrable under UAE law and the award is enforceable in the country of origin.

Further, in order to streamline the procedure for enforcing foreign arbitration awards, the Cabinet Resolution provides that an enforcement application can now be brought before an enforcement/execution judge, and a decision would be made within three days of the date of filing the application. This will no doubt be welcomed by parties to international arbitrations, and it is an

¹⁸⁷ Ibid, at para 74.

¹⁸⁸ Ibid, at paras 76 to 77.

¹⁸⁹ [2019] SGCA 84.

¹⁹⁰ [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671.

¹⁹¹ *BNA*, at para 56.

¹⁹² Ibid, at paras 64 to 69.

¹⁹³ Ibid, at para 94.

important step forward in making the UAE more and more arbitration-friendly.

At the same time, readers will note that the Abu Dhabi Global Market (ADGM) Courts issued a new set of Litigation Funding Rules in April 2019, which are the first of their kind in the Middle East and Africa region. This is an important and symbolic step which brings the ADGM Courts in line with the growing international practice of allowing third-party litigation funding in litigation and arbitration, following on from the examples made by Hong Kong and Singapore recently.

The Litigation Funding Rules contain various provisions which deal with the funder's principal business, the need to have qualifying assets of not less than US\$5 million, the minimum terms in funding agreements, eg as to conflicts of interest, the funder's involvement in the settlement of proceedings, and the funder's obligations about dealings with lawyers.

Former Deputy President of the Supreme Court Lord Hope, who is now the Chief Justice of the ADGM Courts, explained that this new development "signals our strong desire to strike a balance between litigants' needs for financing of their proceedings to ensure access to justice, the legitimate commercial interests of Funders, and promoting transparency of the Funder's role for the benefit of consumers of these resources". Again, this is likely to be warmly received by the international arbitration community, and it will be interesting to see the positive impact of the Litigation Funding Rules on parties' preference to bring their disputes to the ADGM Courts in the coming years.

Issues arising from Middle Eastern disputes and arbitrations sometimes find their way to the UK. In 2019, the English Commercial Court dealt with an interesting challenge brought under section 68 of the Arbitration Act 1996 in *Obrascon Huarte Lain SA (t/a OHL Internacional) and Another v Qatar Foundation for Education, Science & Community Development*,¹⁹⁴ which arose from an ICC arbitration proceedings in respect of the construction of the Sidra hospital in Doha. The dispute was governed by Qatari law.

The claimants (who were in a joint venture) sought remission of the issue of the validity of the defendant's termination under the Qatari Civil Code, on the basis of serious irregularity. Carr J emphasised the well-established policy that "the courts strive to uphold

arbitration awards", and section 68 of the Arbitration Act "imposes a high threshold for a successful challenge, reflecting the purpose of the Act which is to reduce the extent of court intervention in the arbitral process. *It is not to be used simply because one of the parties is dissatisfied with the result, but rather as a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice 'calls out for it to be corrected'*" (emphasis added).¹⁹⁵

On the facts, although the claimants contended that it was not given a reasonable opportunity to put its case on the need for the parties to agree to automatic termination of a contract for breach without the need for a court judgment/order, Carr J observed that it is not the function of the court to analyse whether the tribunal was right or wrong,¹⁹⁶ and held that there was no irregularity in the award at all:

"My conclusion in summary is that the Tribunal did not dismiss the existence of the Automatic Termination Condition as the JV alleges; rather it rejected the JV's construction of article 184 in a manner which reflected the evidence and arguments canvassed at the hearing in April/May 2018. There has been no irregularity for the purpose of section 68(2)(a) of the Act."¹⁹⁷

Carr J made it clear that she could not accept that "this eminent and highly experienced Tribunal made a fundamental error of unfairness", although she was not giving any undue deference to the tribunal.¹⁹⁸ In practice, and from past experience, it would take something truly out of the ordinary and egregious in order to persuade the court that an experienced arbitral tribunal has conducted the proceedings in an unfair or irregular manner.

The *Obrascon* decision therefore serves as a helpful reminder that in international disputes of this calibre, the choice of arbitral tribunal can be crucial not only to the fairness of the proceedings and the quality of the substantive award, but also to the enforcement stage and any potential challenges which may be raised by a disgruntled unsuccessful party. Even though the dispute in *Obrascon* is governed by Qatari law and may have been appropriate for a civil law tribunal, the fact that the tribunal is composed of three well-known common lawyers from the English bar/bench was certainly not lost on the English Commercial Court.

¹⁹⁵ Ibid, at para 44.

¹⁹⁶ Ibid, at para 68.

¹⁹⁷ Ibid, at para 98.

¹⁹⁸ Ibid, at para 102.

¹⁹⁴ [2019] EWHC 2539 (Comm); [2019] 2 Lloyd's Rep 559.

CONCLUDING OBSERVATIONS

It is hoped that this overview of 2019 does it justice, as it was nothing short of an eventful year. A few cases have already paved the way for an interesting year ahead, including the pending appeals to the Supreme Court against the *Triple Point* decision on liquidated damages post-termination, and the *Bresco* decision on adjudication enforcement in the event of insolvency, along with the appeal to the Court of Appeal against the TCC's decision in *PBS* on the issue of fraud. These will be interesting judgments to watch out for in mid to late 2020.

Last year's review touched on the ongoing Grenfell Tower inquiry, and since then, Sir Martin Moore-Bick has issued a Phase 1 Report in relation to the cause and origin of the fire and the response of the London Fire Brigade and other emergency services, with recommendations to the government to improve fire safety in high-rise buildings in the future.

The Phase 2 Module 1 hearings from 27 January 2020 onwards will start examining the primary refurbishment of the tower (overview and cladding) – the evidence to be heard and the upcoming interim reports will no doubt be of great interest to the construction industry and the regulation of construction materials in this country in the future. Again, this is something to keep an eye out for in 2020. Readers will also note that the collateral impact of the Grenfell Tower tragedy is also being felt in the TCC, as the court has already been hearing cases over the past year about the recovery of costs of replacing combustible building materials (an example of which is *Zagora Management Ltd and Others v Zurich Insurance plc and Others*), and there may well be more on the way.

On a related note, following from Dame Judith Hackitt's Independent Review of Building Regulations and Fire Safety (which was again covered in last year's review), the government has launched a consultation entitled

“Building a safer future: proposals for reform of the building safety regulatory system”, which includes (amongst other things) introducing the concept of duty-holders from design through to occupation, a new building safety regulator, and a stronger enforcement and sanction regime. The consultation closed on 31 July 2019, and it will be interesting to see the findings in the consultation report and any proposed legislation in the year ahead.

Finally, in the aftermath of the collapse of Carillion and the associated public inquiry, the “Aldous Bill” on retention reforms (which was introduced in January 2018) has unfortunately not been carried over to the new parliamentary session after the second reading was put back no less than half a dozen times, in part due to the seemingly endless Brexit debates. Similarly, the related “Abrahams Bill” (which proposed the use of project bank accounts on public sector projects) also failed to be heard in 2019.

There is news within the industry that work is already under way on a new private member's bill which will combine both the Aldous and Abrahams proposals in order to improve payment security. This is certainly something to watch out for in 2020, and indeed, there is good reason to be more optimistic about pushing through such a bill in the year ahead, given that Prime Minister Boris Johnson's Brexit deal has now been approved by Parliament.

It is fair to say that the coming year again promises to be intriguing, with the UK entering into a post-Brexit transitional period up to the end of the year, and with important construction-related appeals, inquiries and legislation all in the pipeline. The cogwheels of construction law both here in the UK and abroad will never stop, and until the next annual review, it is hoped that this article has provided a springboard for legal practitioners and construction professionals alike to navigate the year ahead and keep their fingers firmly on the pulse of the industry.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2019 judgments analysed

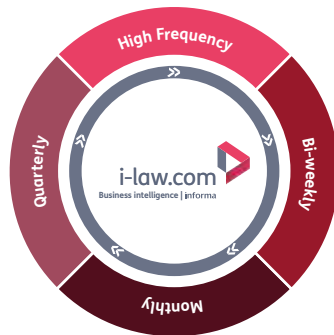
- Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC)
- Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd* [2019] EWHC 1659 (TCC); [2019] BLR 495
- Bennett (Construction) Ltd v CIMC MBS Ltd (formerly Verbus Systems Ltd)* [2019] EWCA Civ 1515; [2019] BLR 587
- Billingford Holdings Ltd and BFL Trade Ltd v SMC Building Solutions Ltd and Another* [2019] EWHC 711 (TCC); [2019] BLR 310
- BNA v BNB and Another* [2019] SGCA 84
- Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27; [2019] BLR Plus 20
- British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd* [2019] CSIH 47
- Chun Wo Construction & Engineering Co Ltd & Others v The Hong Kong Housing Authority* [2019] HKCA 369
- Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4
- C Spencer Ltd v MW High Tech Projects UK Ltd* [2019] EWHC 2547 (TCC); [2019] BLR 643
- Dickie & Moore Ltd v Trustees of the Lauren McLeish Discretionary Trust* [2019] CSOH 71; (2019) 36 BLM 09 7
- Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd* [2019] EWHC 1876 (TCC); [2019] BLR 514
- Equitix ESI CHP (Sheff) Ltd v Veolia Energy & Utility Services UK plc* [2019] EWHC 593 (TCC); (2019) 36 BLM 05 11
- Flexidig Ltd v A Coupland (Surfacing) Ltd* [2019] EWHC 2578 (TCC)
- Grandlane Developments Ltd v Skymist Holdings Ltd* [2019] EWHC 747 (TCC); [2019] BLR 363
- ICCT Ltd v Pinto* [2019] EWHC 2134 (TCC)
- Indigo Projects London Ltd v Razin and Another* [2019] EWHC 1205 (TCC); [2019] BLR 454
- J J Rhatigan & Co (UK) Ltd v Rosemary Lodge Developments Ltd* [2019] EWHC 1152 (TCC)
- LJH Paving Ltd v Meeres Civil Engineering Ltd* [2019] EWHC 2601 (TCC); [2020] BLR 57
- Lucas Earthmovers Pty Ltd v Anglogold Ashanti Australia Ltd* [2019] FCA 1049
- Maeda Kensetsu Kogyo Kabushiki Kaisha and Another v Bauer Hong Kong Ltd* [2019] HKCFI 916
- Maeda Kensetsu Kogyo Kabushiki Kaisha and Another v Bauer Hong Kong Ltd* [2019] HKCFI 1006
- M Davenport Builders Ltd v Greer and Another* [2019] EWHC 318 (TCC); [2019] BLR 241
- Meadowside Building Developments Ltd (In Liquidation) v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC); [2020] BLR 65
- Mears Ltd v Costplan Services (South East) Ltd & Others* [2019] EWCA Civ 502; [2019] BLR 289
- N v C* [2019] HKCFI 2292
- Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2019] EWHC 1769 (TCC); [2019] BLR 522
- NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245
- Obrascon Huarte Lain SA (t/a OHL Internacional) and Another v Qatar Foundation for Education, Science & Community Development* [2019] EWHC 2539 (Comm); [2019] 2 Lloyd's Rep 559
- Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC); [2019] BLR 576
- Ove Arup and Partners International Ltd v Coleman Bennett International Consultancy plc* [2019] EWHC 413 (TCC)
- PBS Energo AS v Bester Generacion UK Ltd* [2019] EWHC 996 (TCC); [2019] BLR 350
- Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33
- RGB P&C Ltd v Victory House General Partner Ltd* [2019] EWHC 1188 (TCC); [2019] BLR 465
- Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and Another* [2019] SGHC 11
- Sumitomo Mitsui Banking Corp Europe Ltd v Euler Hermes Europe SA (NV)* [2019] EWHC 2250 (Comm); [2019] BLR 561
- The Lessees and Management Co of Herons Court v Heronslea Ltd* [2019] EWCA Civ 1423; [2019] BLR 600
- Thomas and Another v Taylor Wimpey Developments Ltd and Others* [2019] EWHC 1134 (TCC); [2019] BLR 382
- Triple Point Technology Inc v PTT Public Company Ltd* [2019] EWCA Civ 230; [2019] BLR 271
- Universal Sealants (UK) Ltd v Sanders Plant and Waste Management Ltd* [2019] EWHC 2360 (TCC)
- Wells v Devani* [2019] UKSC 4; [2019] BLR 221
- White Constructions Pty Ltd v PBS Holdings Pty Ltd and Another* [2019] NSWSC 1166
- Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1591 (TCC); (2019) 36 BLM 07 5
- Zagora Management Ltd and Others v Zurich Insurance plc and Others* [2019] EWHC 140 (TCC)

Judgments considered

- 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
- Arnold v Britton* [2015] UKSC 36
- Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC)
- Bovis Lend Lease Ltd v Saillard Fuller & Partners* (2001) 77 Con LR 134
- Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15
- Cosite Projects Ltd v Andritz AG* [2003] EWHC 958 (TCC)
- George Fischer Holding Ltd v Multi Design Consultants Ltd* (1998) 61 Con LR 85
- Hall v Van Der Heiden (No 2)* [2010] EWHC 586 (TCC)
- Mariner International Hotels Ltd and Another v Atlas Ltd and Another* [2007] 10 HKCFAR 1
- Matthew Harding (trading as MJ Harding Contractors) v Paice and Another* [2015] EWCA Civ 1231; [2016] BLR 85
- Menolly Investments 3 SARL v Cereps SARL* [2009] EWHC 516 (Ch)
- Morse v Barratt (Leeds) Ltd* (1993) 9 Const LJ 158
- Murphy v Brentwood District Council* (1990) 50 BLR 1
- Rainy Sky SA v Kookmin Bank Co Ltd* [2011] UKSC 50; [2012] BLR 132
- Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2011] BLR 206
- Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24; [2018] BLR 479
- RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14; [2010] BLR 337
- S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448; [2019] BLR 1
- SG South Ltd v King's Head Cirencester LLP* [2009] EWHC 2645 (TCC); [2010] BLR 47
- Sul América Cia Nacional de Seguros SA and Others v Enesa Engenharia SA and Others* [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671
- University of Warwick v Balfour Beatty Group Ltd* [2018] EWHC 3230 (TCC); [2019] BLR 138
- Walter Lilly & Co Ltd v Mackay and Another* [2012] EWHC 1773 (TCC); [2012] BLR 503
- Wood v Capita Insurance Services Ltd* [2017] UKSC 2; [2018] Lloyd's Rep Plus 13
- Wycombe Demolition Ltd v Topevent Ltd* [2015] EWHC 2692 (TCC); [2015] BLR 765

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