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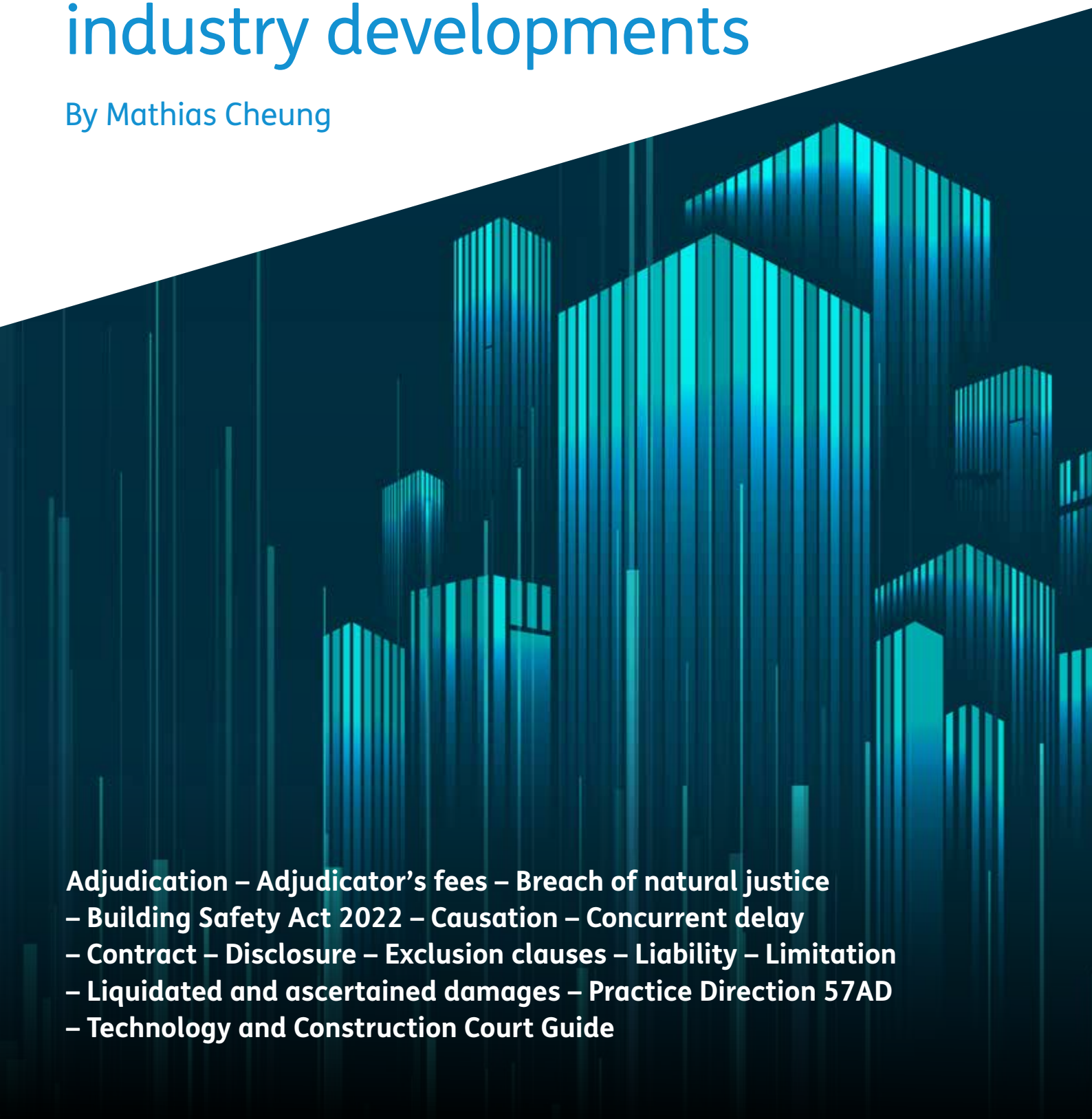
Construction law in 2022: a review of key legal and industry developments

By Mathias Cheung



Adjudication – Adjudicator's fees – Breach of natural justice – Building Safety Act 2022 – Causation – Concurrent delay – Contract – Disclosure – Exclusion clauses – Liability – Limitation – Liquidated and ascertained damages – Practice Direction 57AD – Technology and Construction Court Guide

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Please contact us on: EMEA: +44 20 8052 0560; APAC (Singapore): +65 6973 3570; Americas: +1 212 600 3460 or email customersuccess@lloydslistintelligence.com

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AUTHOR PROFILE

Mathias Cheung

Mathias Cheung is a barrister at Atkin Chambers. His domestic and international practice includes construction, engineering and infrastructure, energy and utilities, information technology, professional negligence, international arbitration, and also general commercial litigation. He has been ranked as a leading junior in both Legal 500 and Chambers & Partners. His recent reported cases include *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd* [2022] BLR 473 on the effect of an interim payment adjudication on the final account, and *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Others* [2022] EWHC 3275 (TCC) on a complex dispute arising from the construction of an energy-from-waste plant.

Construction law in 2022: key legal and industry developments

By Mathias Cheung

This article summarises some of the key legal and industry developments in construction law in 2022 (both in the UK and abroad).[1] *For many in the UK, 2022 has been a welcome return to normality (in most respects) after living under the shadow of Covid-19 for two years, and the law has similarly made significant strides in the past 12 months, both in terms of legislation and case law. It is hoped that this article provides a useful overview together with some food for thought in this fast-changing legal landscape.*

The year 2022 has been one of challenges both old and new. As the world gradually recovers from the impact of Covid-19, inflation and mounting interest rates have become some of the latest issues to seize the headlines globally, while the armed conflict in Ukraine has brought about historic levels of forced displacement and supply chain disruption.

Amid all this commotion, one can perhaps take comfort in the fact that the steady hand of common law has continued to provide guidance and support to businesses and industries both here and abroad, with an ever-growing emphasis on commercial certainty – one of the most important pillars of the rule of law, which has long been the main attraction of the English legal system. In the Neill Law Lecture delivered at the University of Oxford in February 2022, Lord Reed considered the duality of "time present and time past"[2] in the evolution of common law:

> "It follows that the common law, far from being an abstract set of rules, is embedded in the history of our society, and also has a relationship with the legal systems of other societies. Far from being static, it is characterised by both continuity and change. ... Ultimately, the courts are pragmatically concerned with what justice requires here and now; but any development of the common law in order to meet the needs of the present time has to remain faithful, at some level of generality, to principles derived from sources from the past. ..."[3]

The interplay of past precedents with present and future problems is particularly pertinent in the construction, infrastructure and energy context, given the complexity and novelty of the issues and disputes which can arise on a daily basis in these industries. This incessant diet of disputes constantly pushes the law to grow and evolve in order to meet the challenges of the hour. The recent jurisprudence arising from cladding disputes after the Grenfell Tower tragedy (as well as Parliament's intervention through the Building Safety Act 2022) provides an apt illustration.

The interplay of past precedents with present and future problems is particularly pertinent in the construction, infrastructure and energy context, given the complexity and novelty of the issues and disputes which can arise on a daily basis in these industries

This latest annual overview aims to shed light on the relevance of the past year's judicial and legislative developments to present and future disputes in the construction, infrastructure and energy industries. This will hopefully be of value not only to those who are based in the UK, but also practitioners and stakeholders across other jurisdictions who face the same or analogous problems daily in their own field of work.

[1] See also Cheung, M, Construction law in 2017: a review of key legal and industry developments; Cheung, M, Construction law in 2018: a review of key legal and industry developments; Cheung, M, Construction law in 2019: a review of key legal and industry developments; Cheung, M, Construction law in 2020: a review of key legal and industry developments; and Cheung, M, Construction law in 2021: a review of key legal and industry developments.

[2] Eliot, TS, "Burnt Norton", *Four Quartets* (1943), at line 1.

[3] Lord Reed of Allermuir, "Time Present and Time Past: Legal Development and Legal Tradition in the Common Law", The Neill Law Lecture 2022, delivered at the University Oxford on 25 February 2022.

Payment disputes and adjudications

It is a truth universally acknowledged (as Lord Denning MR puts it) that "there must be a cash flow in the building trade. It is the very lifeblood of the enterprise".[4] It is thus hardly surprising that payment disputes are still the subject of a significant number of adjudications and post-adjudication litigation. The widely discussed Court of Appeal decision in *S&T (UK) Ltd v Grove Developments Ltd* back in 2018[5] was just one example out of many.

Despite the recent trend of adjudication matters (particularly low-value ones) being diverted away from the Technology and Construction Court (TCC) to the County Court at Central London, the past year has nonetheless continued to see a host of interesting cases on payment disputes and the enforcement of adjudication decisions. Indeed, the TCC and Court of Appeal have finally had the occasion to address a number of perennial questions which have long been the subject of debate within the industry.

Statutory and contractual payment regimes

It is no hyperbole to say that payment and pay less notices are extremely important documents for the purposes of the payment regime under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), as they determine whether a contractor is entitled to immediate payment of a "notified sum", and if so, what the quantum of that "notified sum" is. For this reason, the proper interpretation of documents which are said to be payment or pay less notices is crucial, and the court generally looks at the form, substance and intent of the document in question, having regard to how it would have informed a reasonable recipient within the relevant contextual setting.[6]

The interpretation of a pay less notice was at the heart of a Part 8 claim for declarations in *Advance JV (a joint venture between Balfour Beatty Group Ltd and MWH Treatment Ltd) v Enisca Ltd*.[7] In that case, Enisca submitted payment applications numbers 24 and 25 in October and November 2021 respectively. However, the joint venture (JV) only issued a payment certificate and pay less notice on 25 November 2021, which were referable to the assessment date of 19 November 2021 and also expressly referenced payment application number 25. The JV sought to argue that the pay less notice could also be relied upon in response to payment application number 24.

Joanna Smith J helpfully summarised the well-known authorities and the court's approach, and then confirmed that "payment notices are required to be referable to payment cycles".[8] Although section 111(4)(a) of the HGCRA only requires a pay less notice to identify the sum considered to be due "on the date the notice is served" (rather than as at a particular due date), that provision expressly refers to "the payer's intention to pay less than the notified sum" as defined by section 111(3). The judge considered this to be highly pertinent:

> "... the reference to 'the notified sum' in section 111(3) appears to me to root the giving of a pay less notice firmly in the payment cycle represented by the payment notice which (in the absence of a payment certificate) will identify 'the notified sum'. Put another way, the pay less notice (which is expressing an intention to pay less than the notified sum) must be referable to the payment notice in which the notified sum is identified."[9]

Enisca further contended that a pay less notice could respond to two applications, but this was similarly rejected by the judge, on the basis that the notice expressly referred to "Application No 25" and "AFP25", and there was nothing pointing to it being a response to payment application number 24.[10] The fact that the notice was issued one day before the deadline for a pay less notice under application number 24 was, at best, neutral, given that it overlapped with the period for serving a pay less notice under application number 25.[11] Ultimately, there was no clear or unambiguous intention on the part of Enisca to respond to application number 24, and a reasonable recipient would not have understood the notice as a response to application number 24.[12]

4 *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162.
5 [2018] EWCA Civ 2448; [2019] BLR 1.
6 See eg *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC); [2015] BLR 704, at para 17 (Akenhead J), *Jawaby Property Investment Ltd v The Interiors Group Ltd* [2016] EWHC 557 (TCC); [2016] BLR 328, at para 43 (Carr J, as she then was) and *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EWHC 17 (TCC); [2017] BLR 189, at paras 32 to 37 (Deputy High Court Judge Alexander Nissen QC).
7 [2022] EWHC 1152 (TCC); [2022] BLR 605.
8 Ibid, at paras 46 to 48.
9 Ibid, at para 50.
10 Ibid, at paras 57(i) and (ii).
11 Ibid, at para 57(iii).
12 Ibid, at paras 57(vii) to (ix).

The *Advance* decision is a cautionary tale for any party which has neglected to serve timeous payment and pay less notices but seeks to circumvent the consequences legislated by the HGCRA using artificial or contrived arguments. The TCC will be astute to take a realistic and practical view on the notices in question, and to give effect to its most natural and reasonable interpretation based on the factual context. Paying parties would therefore be well advised to pay close attention to the timescales for certificates and notices in each payment cycle, as there is really no better way to have certainty over what becomes due and payable under the contract and the HGCRA.

Apart from the question of payment notices, another topical problem concerns the contractual rights and obligations as to payment in the event of one party's insolvency. It is not difficult to envisage the competing interests in such circumstances – the insolvent party (and the relevant office holder) would be interested in recovering any payments which have contractually fallen due at the time of insolvency, whereas the solvent paying party would be keen to avoid making any further payments, especially if there are disputed set-offs and/or cross-claims at stake.

It is rare for the court to have the opportunity to give detailed consideration to payment provisions which apply after a party's insolvency, but this occasion arose last year in *Levi Solicitors LLP v Wilson and Another*,[13] which was a decision of the Insolvency and Companies List in the Business and Property Courts in Leeds. There, a creditor (Levi Solicitors) challenged the proof of debt submitted by JKR Property Development Ltd, which was a creditor of the insolvent company, Farrar Construction Ltd. The key issue concerned the proper interpretation of the payment regime under clauses 4.8, 6.5 and 6.7 of the standard form JCT Minor Works Contract 2011.

Fancourt J began by confirming that clauses 6.5 and 6.7.2 to 6.7.4 of the JCT Minor Works Contract applied automatically in the event of insolvency as if a termination notice had been given, and this was "inconsistent with the continuation of the regular payment terms of the contract and can be seen to be a substitute for the continued operation of clause 4.3 to clause 4.8".[14] Importantly, the judge emphasised that "[o]nly the employer and the nominated person are given the right to serve the account after the conclusion of the works", although such an account is not final or conclusive.[15]

It follows that the crucial question was whether the issuance of a statement of account from the employer (JKR), which had to be done within three months of the end of the defects rectification period, was a condition precedent for any debt to arise under clause 6.7 of the JCT Minor Works Contract. In this regard, Fancourt J was firmly of the view that a late notice or statement could still suffice. Although JKR could not give a payee's notice under section 110B(2) of the HGCRA because those provisions have no application to the insolvency payment regime in the absence of any applicable due date for payments by an insolvent party,[16] nothing in the contract indicated that the time limit for the employer's statement of account was intended to be a strict one.[17] This also meant that there would in any event be a potential common law right to recover any overpayment made to the contractor, either as an implied term or by way of restitution for unjust enrichment.[18]

The *Advance* decision is a cautionary tale for any party which has neglected to serve timeous payment and pay less notices but seeks to circumvent the consequences legislated by the HGCRA using artificial or contrived arguments

Accordingly, Fancourt J held that JKR was entitled to provide a statement of account and claim the balance due at any time before the expiry of the relevant limitation period.[19] This reflects a sensible and pragmatic reading of the insolvency payment provisions under the JCT form of contract, against the backdrop of the statutory payment regime under the HGCRA. It should be contrasted with a contractor's entitlement to interim or final payment under normal circumstances (absent any termination or insolvency events), which has previously been held to be conditional upon the issuance of a payment certificate in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd*.[20]

In *Levi Solicitors*, Fancourt J specifically emphasised the statutory limitation period as a long-stop for payment

13 [2022] EWHC 24 (TCC).
14 Ibid, at paras 56 and 57.
15 Ibid, at para 58.
16 Ibid, at para 74.
17 Ibid, at paras 75 to 77.
18 Ibid, at para 78.
19 Ibid, at para 79.
20 [2005] EWCA Civ 814; [2005] BLR 437.

entitlements at the final account stage and in the event of termination or insolvency. This was one of the issues considered in *Hirst and Another v Dunbar and Others*,[21] where the contractor contended that the Scheme for Construction Contracts (the Scheme) applied, such that the cause of action accrued when a payment notice ought to have been issued by the employer (in March 2014). The employer, on the other hand argued that time ran from the substantial completion of the works in or around December 2012.

> The reasoning in *Hirst* is noteworthy, as the judge relied heavily on the fact that the contractual claim was for a reasonable sum for the works, which was also the basis of an alternative quantum meruit claim

Having cited *Henry Boot* and a number of other relevant authorities on this issue, Eyre J draw the following distinction between two types of cases:

> "It is necessary to distinguish between (a) contractual terms (or statutory provisions) such as that in *Henry Boot Construction* which are conditions precedent to a right to payment arising and (b) provisions which impose conditions for the bringing of proceedings and which are concerned with limiting the right to bring an action to enforce an entitlement to payment. The former affect the date on which the cause of action accrues whereas the latter have no impact on that date even though they may mean that the period in which a potential claimant can commence proceedings is less than the full limitation period running from the date of accrual of the cause of action."[22]

Eyre J then concluded that had he found that a contract existed, the Scheme would be applicable due to the absence of an adequate payment mechanism.[23] However, he went on to reject the argument that the Scheme made the issuance of a payment notice a precondition of the contractor's right to payment, as para 9 of the Scheme is "concerned with the process of billing and payment not the question of when the claimants' entitlement to payment arose".[24] Importantly, the judge noted that the cause of action in this case was "the right to payment of a reasonable sum for the Works" which only depended on the completion of the works, and he distinguished this from the ICE standard conditions in *Henry Boot* which required a certificate to identify the sum due and payable.

The reasoning in *Hirst* is noteworthy, as the judge relied heavily on the fact that the contractual claim was for a reasonable sum for the works, which was also the basis of an alternative quantum meruit claim. While one can understand why time would run from the completion of the works for a claim for the reasonable value of the *entirety of the works*, it is not immediately clear that a right to *interim payments*, the quantum of which would depend on a claim or notice issued as per the default Scheme provisions, would similarly be distinguishable from the facts in *Henry Boot*.

Therefore, parties should not assume that the result in *Hirst* would necessarily apply directly to claims for interim payments which are contingent upon some form of notice being issued in accordance with the Scheme, and it would be interesting to see whether a similar conclusion would still be reached were the parties in dispute as to the limitation period for claims for interim payments.

21 [2022] EWHC 41 (TCC).

22 Ibid, at para 102.
23 Ibid, at para 114.
24 Ibid, at para 117.

Serial adjudications on payment disputes

Given the significant financial implications of payment disputes, it is not at all unusual for parties to engage in a series of adjudications on the same payment application or various successive applications. This can give rise to interesting questions as to whether a prior adjudication decision on an interim payment can have any (temporarily) binding effect on subsequent payment disputes. In 2022, this issue arose in a number of different contexts.

In *Bexheat Ltd v Essex Services Group Ltd*,[25] among the broad range of grounds deployed to resist enforcement of a "smash and grab" adjudication decision on interim payment application number 23, one argument was that this latest adjudication decision impermissibly reopened the dispute decided in a prior "true value" adjudication decision on the valuation of interim payment application number 22. This argument was premised on the fact that many of the respective items and figures in these two payment applications were the same, such that the "true value" of interim payment application number 23 was effectively determined in the prior adjudication.

O'Farrell J's starting point was that the dispute referred to the first adjudication was not the same or substantially the same as the dispute referred to the second adjudication – the first one concerned the true valuation of interim application number 22, whereas the second dealt with the validity of an alleged pay less notice in respect of interim application number 23.[26] It followed that the disputes decided in the first and second adjudications respectively were also not the same.[27]

Although the defendant's arguments were said to have a "superficial attraction",[28] O'Farrell J ultimately rejected them because the two adjudications dealt with different payment applications with different valuation periods, and it was not argued or decided in the second adjudication that the true value of interim application number 23 remained the same as that of interim application number 22.[29] In any event, by not raising this issue in the second adjudication and not reserving its position on this basis as to the adjudicator's jurisdiction, the defendant had effectively waived this jurisdictional challenge.[30]

Therefore, as far as successive interim payment valuations are concerned, it is most unlikely that an adjudicator's valuation of a prior payment application would, without more, preclude a subsequent "smash and grab" adjudication on a different payment application, even if there may well be substantial similarities in some of the items or figures being assessed. Fundamentally, a claim for the "true value" is inherently different in nature from a claim for the notified sum as defined by section 111 of the HGCRA.[31] This applies a fortiori in circumstances where different payment applications are being adjudicated upon.

Importantly, such arguments would not assist a paying party in avoiding the consequences in its own failure to serve a valid pay less notice in response to a payment application. In *Bexheat*, O'Farrell J emphasised that even if the prior adjudication on interim application number 22 was somehow relevant to the subsequent valuation of interim application number 23, it was incumbent on the defendant to issue a valid pay less notice asserting the valuation in the prior adjudication decision (which it failed to do).[32] This case is therefore a salutary reminder of the importance of issuing the correct payment or pay less notices in accordance with the HGCRA and the relevant contractual provisions.

> Fundamentally, a claim for the "true value" is inherently different in nature from a claim for the notified sum as defined by section 111 of the HGCRA

A similar question arose in a rather different context in *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd*,[33] in which this author acted for the claimant employer, Essential Living. In this case, the parties engaged in a "true value" adjudication based on one of the last interim payment applications prior to practical completion, which culminated in a detailed adjudication decision assessing the value of each of Elements' claims for works done, variation costs, extensions of time and loss and expense. However, during the subsequent final

25 [2022] EWHC 936 (TCC); [2022] BLR 355.
26 Ibid, at paras 46 to 49.
27 Ibid, at paras 50 to 53.
28 Ibid, at para 56.
29 Ibid, at para 57.
30 Ibid, at para 58.
31 On this point, see also *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC); [2018] BLR 173, at para 77 (Coulson J, as he then was) and *DSVG Façade Ltd v Conneely Façades Ltd* [2018] EWHC 4005 (TCC), at para 32 (Deputy High Court Judge Joanna Smith QC, as she then was).
32 *Bexheat*, at para 60.
33 [2022] EWHC 1400 (TCC); [2022] BLR 473.

account discussions, Elements sought to re-argue the same claims/figures which had already been rejected or assessed by the adjudicator, with a real possibility of a further adjudication being commenced on this basis.

Essential Living therefore started Part 8 proceedings in order to seek declarations as to the binding effect of the prior adjudication decision on the heads of claim being advanced by Elements in respect of the assessment of the final trade contract sum, including, inter alia, the numerous claims for variation costs. Elements contended that the prior adjudication had no relevance to the final trade contract sum because it was strictly confined to the valuation of an interim payment disputes, such that the two disputes were not the same or even substantially the same.

After surveying the well-known case law on serial adjudications, O'Farrell J observed that just because the prior adjudication did not purport to determine the final trade contract sum, "it does not follow necessarily that the adjudication decision could not bind the construction manager, in respect of specific matters determined by the adjudicator, for the purpose of ascertaining the final trade contract sum".[34] This was especially so for variations, as "the construction manager is not required, or permitted, to reconsider or revalue variations that have been accepted and valued in accordance with the contractual procedure" at the final account stage.[35]

> The *Essential Living* decision helpfully clarifies (for the first time) that an interim valuation adjudication which determines specific issues or claims can remain binding on the parties at the final account stage

On this basis, O'Farrell J concluded that the prior adjudication decision was binding to the extent that it determined the contractual entitlement to and/or value of a variation, and the same applied to any other discrete issues of dispute decided by the adjudicator – these claims or issues could only be reopened in litigation.[36] Nevertheless, the court stopped short of making specific declarations in respect of the individual disputed claims, as that was a matter of fact and degree which required careful analysis of the evidence and arguments for each claim.[37]

The above conclusion can be contrasted with the position on extensions of time. On the latter, O'Farrell J distinguished *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd (formerly known as Galliford Try Construction Ltd)*[38] and held that the adjudicator's prior assessment of Elements' extension of time claims was not binding on the construction manager at the final account stage. This was specifically on the basis of clause 2.27.5 of the JCT Trade Contract 2011, which required the construction manager after practical completion to determine a completion period that is fair and reasonable, whether "by reviewing a previous decision or otherwise".[39]

The *Essential Living* decision is a significant one. It helpfully clarifies (for the first time) that an interim valuation adjudication which determines specific issues or claims can remain binding on the parties at the final account stage, unless the contract contains express provisions for claims agreed or assessed during the works to be reopened or re-measured after completion. Indeed, in most standard form fixed price contracts, there are unlikely to be provisions allowing a contract administrator or project manager to reopen or re-measure agreed or assessed variations.

Particular care needs to be taken when referring claims to an adjudication as part of an interim payment dispute without yet having all the evidence. It would be wrong for parties to assume that they will necessarily have a second bite at the cherry on the same claims at the final account stage. If an adjudicator rejects or reduces the valuation of a claim due to a lack of evidence as part of an interim valuation dispute, that assessment could remain binding for all purposes unless and until reopened by litigation. That is one of the perils of embarking on serial adjudications.

Another interesting decision on serial adjudications last year was *John Graham Construction Ltd v Tecnicas Reunidas UK Ltd*,[40] which arose from a subcontract relating to the construction of the Tees Renewable Energy Plant Biomass Power Station. The sub-contractor, JGCL, was seeking to enforce an adjudication decision (Adjudication 4) which decided, inter alia, that the correct

34 Ibid, at para 72.
35 Ibid, at para 73.
36 Ibid, at paras 74 to 75.
37 Ibid, at para 76.
38 [2017] EWHC 1405 (TCC); [2017] BLR 443.
39 *Essential Living*, at paras 63 to 65.
40 [2022] EWHC 155 (TCC); [2022] BLR 402.

value of the interim payment application number 47 should not have included a contra-charge applied by TRL.

TRL resisted enforcement of the decision in Adjudication 4 on the basis that the contra-charge was correctly levied. TRL argued that although a prior adjudication held that the relevant works were outside JGCL's scope (such that JGCL was entitled to refuse to do those works), that was subsequently overturned by an arbitral award, which the latest adjudicator was bound by but failed to adhere to when assessing the interim certificate.

Morris J rejected TRL's argument, on the basis that the dispute in Adjudication 4 (JGCL's entitlement to payment under interim payment application number 4) was not the same as the dispute determined in the prior adjudication or the arbitration (the interpretation of the contractual scope of JGCL's works).[41] Importantly, the decision in Adjudication 4 was based on the adjudicator's conclusion that the damages claimed by TRL were caused not by JGCL's breach, but by the prior adjudication decision, and this was a determination made within the adjudicator's jurisdiction without re-deciding the matters decided in the arbitral award.[42] If TRL disagreed with this conclusion, the appropriate course would be to litigate the issue in court.[43]

It is important to note that the decision in *John Graham* was very much driven by the fact that the prior adjudication and arbitration (which the adjudicator acknowledged and applied) did not directly determine JGCL's entitlement to levy the contra-charge. Had the earlier adjudication and/or arbitration specifically decided that JGCL was contractually entitled to levy the contra-charge, then that would be a discrete issue determined by a prior adjudicator or arbitrator (akin to the situation in *Essential Living*), and it would not be open to any subsequent adjudicator to reject JGCL's entitlement as a matter of principle (although the issue of quantum may still remain open).

Another illustration can be found in *ML Hart Builders Ltd (in liquidation) v Swiss Cottage Properties Ltd*.[44] In that case, Hart entered into a creditors' voluntary liquidation (which triggered the termination provisions under clause 8.7 of the JCT form of contract), and Swiss Cottage later entered into an "Acceptance Agreement" with Aviva Insurance Ltd, under which Swiss Cottage accepted £235,000 in full and final settlement of Aviva's obligations under a guarantee bond for the works. In a subsequent adjudication regarding the parties' termination account under clause 8.7.4, the adjudicator decided that he was bound by the Acceptance Agreement and rejected Hart's claims under clause 8.7.4.

Deputy High Court Judge Roger ter Haar QC found that the adjudicator was wrong to conclude that the Acceptance Agreement precluded any further claims under clause 8.7.4.[45] The question therefore arose as to whether a fresh adjudication could be commenced to decide the dispute under clause 8.7.4, or whether a subsequent adjudicator would be bound by this prior adjudication decision.

> If serial adjudications are inevitable, then the scope of each referral should be defined carefully and unambiguously, in order to minimise the risk of any future arguments at the enforcement stage

Drawing an analogy with *Hitachi Zosen Inova AG v John Sisk & Son Ltd*[46] (where a variation which was valued by an adjudicator at £nil because he was unable to determine the quantum did not prevent a subsequent adjudication on that variation), the judge had no doubt that the prior adjudicator simply determined the effect of the Acceptance Agreement. The adjudicator did not reach any decision on the assessment of the termination account under clause 8.7.4. It was thus open to Hart to refer the latter dispute to a fresh adjudication.[47]

What is clear, therefore, is that questions of overlaps between successive adjudications and arbitrations are highly fact-sensitive, and would depend heavily on a comparison of what was referred to and above all what was decided in each adjudication. If serial adjudications are inevitable, then the scope of each referral should be defined carefully and unambiguously, in order to minimise the risk of any future arguments at the enforcement stage.

41 Ibid, at para 55.
42 Ibid, at para 56.
43 Ibid, at para 57.
44 [2022] EWHC 1465 (TCC).
45 Ibid, at paras 16 to 42.
46 [2019] EWHC 495 (TCC); (2019) CILL 4302.
47 *ML Hart*, at paras 55 to 64.

Existence of construction contract

Another threshold jurisdictional issue which commonly arises in adjudications is the existence of a construction contract between the referring party and the responding party. The challenge usually comes in one of two main permutations: either it is said that the referring or responding party is not in fact the correct or proper party to an alleged contract; or there is said to be no construction contract (within the meaning of sections 104 and 105 of the HGCRA) in existence.

A good example of the first issue mentioned above can be found in *Lumley v Foster & Co Group Ltd and Others*,[48] which, although not an adjudication enforcement decision, aptly illustrates the frequent challenges in identifying who are the correct parties to a construction contract. In this case, there was a trial of a preliminary issue on the question of whether the builder, Mr Foster, entered into a contract at a meeting in his personal capacity, on behalf of his various trading entities, or only on behalf of one company (Foster and Co Construction Ltd, or FCCL) which had already ceased trading in 2016.

The question in *Lumley* arose because Mr Foster did not issue a formal quotation or contract, and there was no signed written contract between the parties, which would have otherwise been conclusive as to the entity with which the employer contracted with. Subsequently, invoices were issued in the name of "Foster & Co" and paid into a bank account which the employer thought was in the same name, although the account in fact belonged to FCCL.[49]

Deputy High Court Judge Jason Coppel QC emphasised that the parties to an oral contract have to be identified based on an objective approach, and even if an agent is contracting on behalf of an undisclosed principal, it must be clear at the time of contract that he/she was acting as an agent.[50] On the evidence, the judge concluded that Mr Foster entered into the contract in his personal capacity:

> "... Once Mr Foster had established rapport and trust between himself and the Claimant, multiple representations to that effect were made at the meeting on 21 June 2016 in order to induce her to enter into the contract, without any indication being given that the contract would in fact be with FCCL or any other corporate entity. In my judgment, the objective meaning and effect of Mr Foster's representations was that he personally was reaching agreement with the Claimant. It may well be that if Mr Foster had taken reasonable steps to document and formalise the contract, it would have been made clear that the contract was with FCCL or some other corporate entity. But he did not take any such steps. ..."[51]

> Inevitably, where the contract is purely oral in nature, there will always be a real risk of future disputes as to the terms and identity of the parties, and this can become a thorny jurisdictional issue

The judge placed little weight on events subsequent to the making of the contract, despite the existence of some correspondence where the employer referenced one or the other of Mr Foster's other entities, which the judge described as "unguarded comments engendered by a state of confusion which Mr Foster himself created".[52] It is clear that whilst subsequent conduct is not strictly irrelevant in these types of cases, parties can expect the court to focus primarily on the words and acts at the time of contract in this type of disputes.

Inevitably, where the contract is purely oral in nature, there will always be a real risk of future disputes as to the terms and identity of the parties, and this can become a thorny jurisdictional issue in an adjudication if it is unclear whether the referring or responding party is in fact a party to the putative contract. The importance of some written document evidencing the contract cannot therefore be emphasised enough, especially if the parties are keen to ensure that the contract is entered into not in a personal capacity, but on behalf of a company in order to limit personal liability.

Quite often, however, the problem is more fundamental in that the parties do not even agree that there is a construction contract in place which can give rise to a statutory right to adjudicate. This issue took an interesting twist in *Abbey Healthcare (Mill Hill) Ltd v Simply Construct*

48 [2022] EWHC 54 (TCC).
49 Ibid, at para 20.
50 Ibid, at paras 22 and 23.
51 Ibid, at para 27.
52 Ibid, at para 28.

(UK) LLP,[53] where the Court of Appeal had to consider whether a collateral warranty executed in 2020 after the works had been completed in 2016 could nonetheless be a construction contract for the purposes of the HGCRA.

Readers of last year's annual review will recall that this case first came before the TCC back in 2021, where Deputy High Court Judge Martin Bowdery QC decided in *Toppan Holdings Ltd and Another v Simply Construct (UK) LLP*[54] that the collateral warranty was not a construction contract for the purpose of section 104(1) of the HGCRA because it related to works which had long been completed.[55] This, however, has now been reversed by the Court of Appeal, although Stuart-Smith LJ dissented from the result.

Although Coulson LJ acknowledged that "a warranty which provided a simple fixed promise or guarantee in respect of a past state of affairs may not be a contract for the carrying out of construction operations pursuant to section 104(1)",[56] that was not the end of the enquiry, as one has to further consider the purpose and wording of section 104(1).

In so doing, Coulson LJ emphasised that collateral warranties (and obligations to provide such warranties) are "important and commonplace" where the property is occupied by parties which have not been involved in the original building contract.[57] He then pointed out that "an agreement … for the carrying out of … construction operations" is not confined to traditional building contracts but is intended to cast the net as wide as possible, having regard in particular to the recognition of hybrid contracts as a species of construction contract and also the statutory purpose of creating an efficient dispute resolution mechanism for the various parties involved in construction disputes.[58]

Ultimately, the issue turned on the wording of the collateral warranty at hand. Coulson LJ relied heavily on the wording in the warranty that the contractor "has performed and will continue to perform diligently its obligations under the contract", in order to find that the warranty was not confined to past or fixed situations but was a warranty as to future performance.[59] In effect, he considered that it was an agreement for the carrying out of construction operations which had retrospective effect,[60] driven in part by concerns about the drawing of arbitrary lines based on when exactly a collateral warranty is executed.[61]

It is not difficult to imagine why Coulson LJ's (and also Peter Jackson LJ's)[62] reasoning could divide opinion, depending on whether one takes a literalist or more purposive approach to construing the HGCRA and the nature of the collateral warranty in question. This can be seen from the fact that even the Court of Appeal did not reach a unanimous conclusion in this case.

In his dissenting judgment, Stuart-Smith LJ took the view that one should not adopt a strained interpretation of section 104(1), but should construe it as meaning a contract under which the contractor undertakes "a direct contractual obligation" to the other party to carry out the works.[63] Although he agreed that the date of execution of the warranty did not really affect its proper construction, he concluded that the contractor did not undertake any direct obligations to Abbey to carry out building works under the collateral warranty, but was simply warranting that it would be liable to Abbey if it breached the direct obligations owed to the employer under the building contract.[64] This was therefore distinguishable from the wording in other collateral warranties which were found to be construction contracts within the meaning of section 104(1) of the HGCRA.[65]

The *Abbey* decision is pending an appeal to the Supreme Court, and it will be interesting to see if the Court of Appeal's judgment will be upheld. For now, however, the majority's reasoning in *Abbey* seems to be the last word, and although each case will turn on the precise wording and context of the collateral warranty, it is likely to be difficult to argue that a collateral warranty linked to an ongoing or recently completed construction project falls outside of the scope of section 104(1) of the HGCRA. From a practical perspective, this clarification is helpful in that it will prevent arbitrary distinctions being drawn based on the precise date of execution of a collateral warranty. Importantly, the current position enables the party which is actually suffering the relevant loss or damage (ie the current owners or occupiers of the property, as opposed to the employer or developer which no longer has any stake in the project) to have recourse to the adjudication procedure where litigation can be prohibitively expensive.

53 [2022] EWCA Civ 823; [2022] BLR 433.
54 [2021] EWHC 2110 (TCC); [2021] BLR 705.
55 Ibid, at paras 21 to 31.
56 *Abbey*, at para 30.
57 Ibid, at para 36.
58 Ibid, at paras 37 to 41.
59 Ibid, at paras 60 to 65.
60 Ibid, at para 72.
61 Ibid, at paras 74 and 75.
62 Ibid at paras 150 to 165.
63 Ibid, at paras 100 to 103.
64 Ibid, at paras 106 to 111.
65 See eg *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC); [2013] BLR 589.

Breach of natural justice

In the absence of any viable jurisdictional objections, parties disgruntled with an adjudication decision often turn to a smörgåsbord of allegations regarding breaches of natural justice, in an attempt to resist enforcement and avoid having to comply with an unfavourable adjudication decision. From experience, such arguments do not find favour with the court in the majority of cases. As O'Farrell J noted not so long ago in *Global Switch Estates 1 Ltd v Sudlows Ltd*, "the courts take a robust approach to adjudication enforcement".[66]

This very much remains the trend in most adjudication enforcement cases, and a good illustration can be found in *Bilton and Johnson (Building) Co Ltd v Three Rivers Property Investments Ltd*,[67] where the employer, Three Rivers, took issue with the adjudicator's conclusion on the formation of contract and the applicable terms in the context of a contractor's claim for extensions of time and repayment of liquidated damages previously deducted. These objections were framed as breaches of natural justice.

As to the formation of contract, Bilton argued in the adjudication that the agreed contract was one signed and returned on 9 January 2019, and even if a prior contract was made, it did not contain the key terms set out in the signed contract, whereas Three Rivers contended that the only contract between the parties was one which was formed in August 2018. The adjudicator found that the parties initially entered into a contract in August 2018, but this was later superseded by the signed January 2019 contract. Neither party contended that there was an initial contract which was later superseded by a formal contract.

Deputy High Court Judge Jason Coppel QC held, however, that the adjudicator's finding did not give rise to any breach of natural justice:

> "The Adjudicator agreed with the Claimant that the governing contractual terms were those of the Signed Contract and rejected the Defendant's position that the governing terms were those of the Original Contract. That the Adjudicator's precise reasoning – that the parties had entered into the Original Contract first and then the Signed Contract – does not appear to have been put forward by either party does not come close to establishing that there was a breach of natural justice. The Defendant had had a full opportunity to make submissions as to which contractual terms applied and why, and did not suffer any unfairness."[68]

The crucial point was that the adjudicator's conclusion was derived from a combination of both parties' positions, rather than some new and different basis or evidence which had not been advanced by either party. There was no unfairness in the circumstances, and it was really for Three Rivers to lead evidence on the continuing effect of the August 2018 contract as part of its case (which it failed to do). Furthermore, the alleged breach of natural

66 [2020] EWHC 3314 (TCC); [2021] BLR 111, at para 44 (citing, inter alia, Chadwick LJ in *Carillion v Devonport Royal Dockyard* [2005] EWCA Civ 1358; [2006] BLR 15, at paras 85 to 87).

67 [2022] EWHC 53 (TCC); (2022) CILL 4661.

68 Ibid, at para 15.

justice would not have been material in any event, as it did not affect the adjudicator's ultimate conclusion that the applicable terms were those of the signed January 2019 contract.

> The *Bilton* case is a very good example of a party seeking to challenge the substantive merits of an adjudication decision through the back doors of natural justice. Parties can expect the court to take a robust approach in rejecting such attempts

Similarly, the judge rejected Three Rivers' argument that the adjudicator failed to address its case on the rectification of the liquidated damages provisions due to a mistake in the terms of the signed contract. In the judge's view, the adjudicator did in fact consider and rule upon the issue of rectification. At no point did the adjudicator say that he had no jurisdiction to rectify the contract or determine the issue. The adjudicator simply concluded that there was no enforceable right to levy liquidated damages at a higher rate prior to any rectification, and that the higher rate would amount to an unenforceable penalty in any event.

The *Bilton* case is a very good example of a party seeking to challenge the substantive merits of an adjudication decision through the back doors of natural justice. Parties can expect the court to take a robust approach in rejecting such attempts. However, this should not be taken to mean that a natural justice argument can never succeed, and the past year has seen a few success stories which provide interesting points of comparison against *Bilton* and other similar cases.

In *Liverpool City Council v Vital Infrastructure Asset Management (Viam) Ltd (in administration)*,[69] the adjudicator found in his decision that the council had expressly or implicitly conceded in a compensation event notice that there was an error in the contractual schedule of rates which had to be amended in favour of the rate specified in the bill of quantities. The question was whether this finding amounted to a breach of natural justice on the facts.

The council's position during the adjudication was that such a correction was impossible due to an order of precedence clause, and that any correction would have had to be applied using the defined cost approach in accordance with the terms of the NEC3 contract.[70] None of those points were really addressed by the adjudicator in his decision. Indeed, Vital's notice of adjudication and referral did not even assert any error in the schedule of rates, such that it was questionable whether he had any jurisdiction determine this issue.[71]

The adjudicator therefore sought to work around these complications by construing the council's compensation event notice (which stated that there was no applicable rate in the schedule of rates) as a concession, even though this was not a case ever advanced by Vital and the council was never given the opportunity to make any submissions on this point. In these circumstances, HHJ Stephen Davies held that there was plainly a breach of natural justice:

> "In my judgment these were fundamental departures from the obligation to follow a fair procedure. … He has not, in his supplemental observations, been able to explain in any way which I regard as convincing on what basis he considered that he was entitled to reach the decision he did without allowing LCC the opportunity to address him on the point. He has not been able to suggest that these departures from natural justice have had no practical adverse effect upon LCC. …"[72]

How does one reconcile the *Liverpool City Council* decision with the likes of *Bilton*? Both cases involved an adjudicator drawing conclusions on the terms of the contract based on the materials before him but straying beyond the parties' submissions. However, the TCC reached diametrically opposite conclusions on the issue of breach of natural justice.

The distinguishing factor, it seems, is that in *Bilton*, the adjudicator effectively found that both parties' submissions on the formation of contract were right to an extent, and that the referring party was correct on the final governing contractual terms, such that his decision was an intermediate position based on issues and facts squarely addressed by both parties. In contrast, the adjudicator in *Liverpool City Council* went on a frolic of his own when concluding that there was effectively an admitted correction to a mistake in the

69 [2022] EWHC 1235 (TCC); [2022] BLR 619.

70 Ibid, at paras 50 to 52.
71 Ibid, at para 56.
72 Ibid, at para 57.

contract, which was neither part of the case advanced by the referring party nor something which the responding party addressed in any of its submissions. The latter was therefore an extreme (and rare) case of unfairness which had a material impact on the result of the adjudication.

Another example of a successful argument on breach of natural justice can be seen in *Van Oord UK Ltd v Dragados UK Ltd*,[73] this time in the Outer House of the Scottish Court of Session. The adjudication in question related to claims for extensions of time and prolongation costs in relation to the Aberdeen Harbour extension project. Readers may recall that the same parties and project were the subject of another interesting decision in 2021 (on the validity of a purported omission of works), which was covered in the previous year's annual review.[74]

> It will still take a rare set of facts for the court to conclude that an adjudicator's conduct is so unfair that it amounts to a material breach of natural justice. It is understandable why adjudicators do not always canvas alternative positions with parties, given the tight timeframe and the tendency for submissions or correspondence to go on ad infinitum. There is clearly a balance to be struck

The adjudicator awarded an extension of time and prolongation costs based on compensation event notice "CEN 048", but in so doing, he relied on a programme rejected by the parties' experts as the baseline, and he also relied on an earlier critical date which was not in fact advanced by Van Oord. Lord Braid helpfully summarised the litmus test for a breach of natural justice, which aptly captures the distinction between cases such as *Bilton* and other more problematic scenarios as in *Liverpool City Council*:

> "... That is the acid test: where an adjudicator has departed from the four corners of the submissions made by parties, was it fair not to seek further submissions? If the issues have been fairly canvassed, or if the adjudicator has simply adopted an intermediate position, fairness will not require that the parties be given an opportunity to make further submissions. Conversely, if the adjudicator proposes a novel approach on a significant issue which has not been canvassed, fairness will point in the opposite direction."[75]

On the facts, Lord Braid noted that the adjudicator relied on a baseline programme rejected by the experts when adopting the novel critical date which was earlier than that argued for by Van Oord. This, he held, was something which both parties should have been given a further opportunity to address, especially since the earlier critical date could have been significant in terms of the contractual time bar (which was an argument raised by Dragados, albeit in a slightly different context).[76] The adjudication decision was therefore tainted by a breach of natural justice.

The facts in *Van Oord* were similar to those in *Liverpool City Council* – both cases involved an adjudicator who reached a conclusion on a significant issue in a manner which cannot be characterised as being based on the parties' submissions, whether as an intermediate position or otherwise. The position being adopted by the adjudicator was simply not something to which either party had or could have addressed their minds in the circumstances.

Nevertheless, the above examples come with the important caveat that it will still take a rare set of facts for the court to conclude that an adjudicator's conduct is so unfair that it amounts to a material breach of natural justice. At the same time, it is understandable why adjudicators do not always canvas alternative positions with parties, given the tight timeframe and the tendency for submissions or correspondence to go on ad infinitum. There is clearly a balance to be struck, but where there is a significant issue which does not obviously arise from the parties' submissions, it would always be a counsel of prudence for an adjudicator to raise that issue with the parties at least once before proceeding to make any determinations.

73 [2022] CSOH 30; [2022] BLR 373.
74 See *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50; (2021) 38 BLM 10 8.
75 Ibid, at para 26.
76 Ibid, at para 30.

Adjudicator's fees

The recovery of adjudicator's fees is a topic which is close to the heart of the numerous practitioners and construction professionals who act as adjudicators day in day out. Readers of last year's annual review will remember the case of *Davies & Davies Associates Ltd v Steve Ward Services (UK) Ltd*,[77] where Deputy High Court Judge Roger ter Haar QC rejected the defendant's argument that the adjudicator had abandoned his duties by resigning over a jurisdictional issue and should not be entitled to recover the fees incurred before his resignation. It is worth recalling that clause 1 of Mr Davies' terms of appointment provided as follows:

> "... Save for any act of bad faith by the Adjudicator, the Adjudicator shall also be entitled to payment of his fees and expenses in the event that the Decision is not delivered and/or proves unenforceable."

The defendant (SWS) appealed against the TCC's decision and the claimant (Mr Davies) cross-appealed on the reasons for his resignation. This gave the Court of Appeal a valuable opportunity to provide further guidance on the relevant principles in *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd*.[78] In short, Coulson LJ (with whom the other judges agreed) dismissed SWS' appeal and allowed Mr Davies' cross-appeal, effectively upholding Mr Davies' right to the payment of his fees.

To begin with, Coulson LJ found that there was "a clear and obvious jurisdictional problem", and taking into account, inter alia, the absence of a satisfactory response from either party and the absence of any unqualified acceptance of his jurisdiction, "Mr Davies was entitled to conclude that BIL [was] not a party to the contract".[79] Indeed, contrary to the findings in the TCC, it could not be said that there was any clear waiver of that jurisdictional issue where there was no unqualified acceptance of his jurisdiction.[80]

Coulson LJ strongly disagreed with the TCC's conclusion that the adjudicator should have ignored the jurisdictional issue and took what he called the "ostrich option",[81] simply because neither party had raised the issue:

> "I consider that, on a proper analysis, that conclusion is unsustainable. Can it sensibly be suggested that, where there is a real jurisdictional issue, which the adjudicator has spotted and which goes to the viability of the entire adjudication, the adjudicator should say nothing about it, and instead proceed solemnly to the end of the process, leaving the point to any disputed enforcement hearing? In my view, that is not the law and would be contrary to common sense."[82]

The above conclusion seems unassailable, given that para 9(1) of the Scheme allows an adjudicator to "resign at any time on giving notice in writing to the parties to the dispute".[83] More importantly, para 13 of the Scheme requires an adjudicator to "take the initiative in ascertaining the facts and the law necessary to determine the dispute", and if the adjudicator identifies an issue which goes to his/her jurisdiction, then he/she is "duty bound to consider and determine that issue".[84] There is clearly a strong policy argument in favour of encouraging adjudicators to identify and address any potential jurisdictional issues, rather than allow parties to waste time and costs obtaining an adjudication decision which may ultimately be unenforceable.

77 [2021] EWHC 1337 (TCC); [2021] BLR 542.
78 [2022] EWCA Civ 153; [2022] BLR 268.
79 Ibid, at paras 49 and 50.
80 Ibid, at para 48.
81 Ibid, at para 61.
82 Ibid, at para 59.
83 Ibid, at para 56.
84 Ibid, at para 60.

As to the allegation of bad faith on the part of Mr Davies, Coulson LJ noted that "a finding of bad faith must involve some form of unconscionable or deliberately unacceptable conduct on the part of the adjudicator", which is a higher threshold than a simple default.[85] On this basis, he confirmed that Mr Davies acted properly by raising the potential jurisdictional issues and by resigning in the absence of any satisfactory responses from the parties.[86] There was nothing unconscionable about Mr Davies' failure to give a final warning prior to resigning,[87]even though "[t]hat is always good practice when an adjudicator is preparing to do something draconian, such as resigning".[88]

Finally, SWS sought to challenge the interpretation and enforceability of clause 1 of Mr Davies' terms. Coulson LJ rejected the contention that clause 1 only applied where there were "justifiable reasons" preventing the adjudicator from determining the dispute, or where the decision had been reached but was simply not physically delivered, as these were attempts to rewrite the terms and the clause as it stood made complete commercial sense.[89]

There was also no room for applying section 3 of the Unfair Contract Terms Act 1977 to clause 1, as parties to an adjudication must envisage that an adjudicator may resign, such that clause 1 did not render a contractual performance substantially different from that which was reasonably expect of Mr Davies.[90] On any view, the clause was reasonable and commonly found, and there was no inequality or bargaining power given that both sides were represented.[91]

Parties considering the prospects of challenging an adjudicator's entitlement to their fees would be well advised to read the *Steve Ward* decision in full and carefully consider whether their complaints are any stronger than those advanced by SWS. Given that clauses entitling an adjudicator to his/her fees subject to bad faith are ubiquitous, it is most likely going to take some form of deliberately egregious conduct (such as bias or unfairness which would in any event give rise to a breach of natural justice) for any defence to even begin to get off the ground.

85 Ibid, at paras 92 and 93.
86 Ibid, at para 96.
87 Ibid, at para 97.
88 Ibid, at para 65.
89 Ibid, at paras 79 to 83.
90 Ibid, at para 105.
91 Ibid, at para 106.

Topical issues in delay and disruption claims

Liquidated and ascertained damages

The enforceability of liquidated and ascertained damages (LADs) has been a topical issue for the courts in recent years, and one only has to look at the widely discussed decisions of *Triple Point Technology Inc v PTT Public Company Ltd*[92] and *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd*[93] back in 2021. This trend continued in 2022, as the court had to continue to grapple with the effect of liquidated damages clauses in a variety of contexts.

First, in *Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd*,[94] Buckingham sought Part 8 declarations to the effect that the LADs provisions under an amended JCT Design and Build Contract 2016 were void and unenforceable, on the basis that the contract provided for two different completion dates, two different sets of rates for LADs, and/or two different contract sums on which the calculation of LADs was based. Buckingham further contended that there was no workable scheme to adjust the LADs to account for the partial possession of the works (similar to the situation in the *Eco World* case).

Deputy High Court Judge Alexander Nissen QC held that the LADs were sufficiently certain and enforceable. Although the Contract Particulars specified that the "Date for Completion" for the purpose of standard clause 2.29 was 1 October 2018, the parties inserted a bespoke clause 2.29A which defined a regime of milestone dates leading up to a completion date of 30 November 2018. Schedule 10 of the contract expressly provided for LADs by reference to those milestone dates, and it was clear that the parties intended the bespoke regime under clause 2.29A to apply.[95]

As to the different sets of rates for LADs included in Schedule 10, the judge rejected Buckingham's contention that the parties did not reach agreement on the proposed LADs, as it was plain that the parties copied and pasted the table discussed in pre-contractual negotiations into the contract, and this was why the table was (somewhat unfortunately) headed "LADs Proposal".[96] It was also clear that the second, discounted set of rates was the applicable one, as that was the basis on which Buckingham offered the reduced contract sum which was ultimately agreed between the parties.[97]

Further, the parties expressly specified lump-sum weekly rates for the LADs, and that was sufficiently certain and enforceable. The fact that the rates did not reflect the final contract sum was neither here nor there, as the parties could have adopted a revised pro-rated calculation based on the final contract sum but elected not to do so.[98] It is abundantly clear that the court would strive to give effect to what the parties have expressly agreed, and it would not be sufficient to point to mere infelicities or oddities in the drafting.

It is noteworthy that witness evidence on the background of Schedule 10 and how it became incorporated into the contract was considered to be admissible (although it was not essential to the conclusion above), because "it sheds light on why the parties included within their executed agreement a table described as 'LADs Proposal'" and was not being relied on to demonstrate the parties' substantive positions during negotiations or to prove the subjective intention of a party.[99] This is particularly relevant to commercial parties in negotiations and their legal advisers, as it is worth bearing in mind that discussions or correspondence exchanged during negotiations may well come under judicial scrutiny if there is a subsequent dispute about whether or why a particular contract document has been incorporated by the parties.

> It would take a rare and somewhat extreme case for a court to conclude that LADs provided by a construction or infrastructure contract are void and/or penal

Finally, on the issue of partial possession, Buckingham argued that the milestone dates were intended to be operated as a sectional completion regime, but there

92 [2021] UKSC 29; [2021] BLR 555.
93 [2021] EWHC 2207 (TCC); [2021] BLR 687.
94 [2022] EWHC 1842 (TCC); [2022] BLR 528.
95 Ibid, at paras 47 and 48.
96 Ibid, at para 56.
97 Ibid, at para 58.
98 Ibid, at paras 66 and 67.
99 Ibid, at paras 54 and 55.

were no means of calculating the value of the partially possessed works as a proportion of the total value of the relevant section as required by clause 2.34. The judge was firmly of the view that the parties did not intend to provide for sectional completion, given that the Contract Particulars expressly stated that sectional completion did not apply under the contract.[100]

Interestingly, the judge went on to conclude that clause 2.34 was in fact inoperable, as it only applied to the adjustment of a single rate for LADs under the original clause 2.29, which had been superseded by the parties' bespoke clause 2.29A and milestone regime.[101] This, however, did not assist Buckingham in the end, as it was not argued that the unadjusted rates for LADs were penal as a result of partial possession.

Would the result be different had Buckingham argued that the LADs were penal? Given that the TCC has only recently rejected a similar argument in *Eco World*,[102] it seems unlikely that Buckingham would have persuaded the court that the LADs were unconscionable, extravagant or exorbitant. Moreover, it is likely that Buckingham did not advance such an argument because it would have struggled to show that the LADs levied were out of all proportion to the employer's legitimate financial interest in the timely completion of the works. The moral of the story is that it would take a rare and somewhat extreme case for a court to conclude that LADs provided by a construction or infrastructure contract are void and/or penal.

Apart from challenges posed by ambiguous LADs provisions, the effect of the Supreme Court's decision in *Triple Point* was another important issue which the TCC had the occasion to consider. At the very end of 2022, the TCC handed down its judgment in *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others*,[103] which arose from the termination of the EPC contractor engaged to design and construct an energy-from-waste plant in Hull. The decision considered, inter alia, the post-termination effect of LADs for delay which had accrued up to the point of termination.

In essence, M+W relied on *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire & Life Assurance Corp Ltd*[104] to argue that no LADs were payable in the event of termination, because the LADs had to be calculated by reference to the difference between the actual and contractual dates of Take Over. The difficulty with this argument, however, was that the Supreme Court had already considered the effect of *Glanzstoff* and rejected any suggestion that it created some special rule applicable to similarly worded LADs clauses.[105]

Pepperall J therefore had little difficulty rejecting M+W's contentions and instead following the orthodox position restored by the Supreme Court in *Triple Point*, as it would otherwise "render the liquidated damages clause of little commercial value".[106] In reaching this conclusion, he also relied on the fact that the entitlement to LADs accrued from time to time and did not crystallise solely upon the certification of Take Over, according to the express provisions of the contract.[107]

The judge's conclusion in *Energy Works* shows that it would be an uphill struggle to challenge the enforceability or recoverability of accrued LADs for delay based on the event of termination, unless the parties have expressly provided for an entitlement to LADs to be extinguished or suspended upon termination. Again, this is consistent with the court's general approach in recent times of upholding the freedom of contract and giving effect to the express provisions agreed by experienced parties to a commercial bargain, and one would need to be extra-cautious before advancing any argument in court which challenges the operability and/or enforceability of a LADs clause.

Causation and concurrent delay

The question of causation, particularly in the context of concurrent or overlapping causes of delay and disruption, is a recurrent issue which has vexed many a delay expert, construction practitioner and tribunal. The question is twofold: first, what kind of delays can truly and properly be characterised as concurrent; and second, what is the consequence of concurrent delays in terms of entitlements to extensions of time and loss and/or expense?

The authorities do not always speak with one voice on the proper approach to the issue of concurrency in delay claims. The competing views are recognised by the authors of the *Society of Construction Law's Delay and Disruption Protocol* (2nd Edition) (SCL Protocol). At para 10.10, their

100 Ibid, at para 81.
101 Ibid, at paras 84 to 87.
102 Ibid, at paras 79 to 82.
103 [2022] EWHC 3275 (TCC); (2022) CILL 4773.
104 [1913] AC 143.
105 *Triple Point*, at para 42 (Lady Arden).
106 *Energy Works*, at para 314.
107 Ibid.

recommended view is that "[c]oncurrent delay only arises where the Employer Risk Event is shown to have caused Delay to Completion or, in other words, caused critical delay (ie it is on the longest path) to completion". This means that where completion would in any event be delayed by a greater period due to the contractor's own delays, the overlapping employer's delay is not in fact an effective cause and is not truly concurrent.

The authorities do not always speak with one voice on the proper approach to the issue of concurrency in delay claims

Support for the SCL Protocol's position can be found, for instance, in *Adyard Abu Dhabi v SD Marine Services*,[108] where Hamblen J (as he then was) held that in order to obtain an extension of time, the contractor had to show that the employer's act caused *actual* delay and *actually* prevented the contractor from completing the works within the agreed period. This was followed by Coulson J (as he then was) in *Jerram Falkus Construction Ltd v Fenice Investments Inc (No 4)*,[109] who went a step further and observed that "the existence of a delay for which the contractor is responsible, covering the same period of delay which was caused by an act of prevention, would mean that the employer had not prevented actual completion". These cases, which set a very high bar for extension of time claims where there are both employer and contractor delays, were cited by Fraser J with approval in *North Midland Building Ltd v Cyden Homes Ltd*.[110]

Two cases in the past year serve as important reminders that the approach to concurrent delays is far from being settled as a matter of English law. First, in *Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council*,[111] the TCC had to consider, inter alia, a contractor's extension of time claims arising from delays to the construction of the Blackburn Bus Station due to: (i) delays to the structural steel works for which the contractor was not responsible; and (ii) delays in the same period to the roof works for which the contractor was liable, both of which were prerequisites for the completion of the interior finishes.

It should immediately be obvious why the legal approach to the issue of concurrency was crucial in this dispute. If one were to follow the strict approach taken in *Adyard* and *Jerram Falkus*, then the contractor in *Thomas Barnes* would not be entitled to any extension of time, as the non-culpable delays to the steelwork did not actually prevent timely completion in the light of the contractor's own culpable delays to the roof works.

Remarkably, however, after finding that "both of the work items were on the critical path as regards the hub finishes and both were causing delay over the same period",[112] HHJ Stephen Davies held that the contractor was entitled to 119 days of extension of time in respect of the delays due to the steelworks.[113] The basis of this conclusion rested very much on the judge's adoption of the parties' agreed position as to concurrent delays and causation:

> "... following the approach at first instance of: (a) Edwards-Stuart J in *De Beers v Atos Origin IT Services UK Ltd* [2011] BLR 274 at para 177; (b) Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 Comm at para 277; and (c) Akenhead J in *Walter Lilly* at para 370, the law is settled and is accurately summarised by the editors of *Keating on Construction Contracts* 11th edition ("Keating") at 9–105 as follows:
>
> 'In respect of claims under the contract:
>
> (i) depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; ...'"[114]

In effect, the parties' agreed position and the judge's approach in *Thomas Barnes* reverted to the position before *Adyard*, *Jerram Falkus* and *North Midland*.[115] Importantly, it does not appear that *Jerram Falkus*, *North Midland* and section 10 of the SCL Protocol were cited or considered by HHJ Davies. Parties should therefore

108 [2011] EWHC 848 (Comm); [2011] BLR 384, at paras 282 and 292.
109 [2011] EWHC 1935 (TCC); [2011] BLR 644, at para 50.
110 [2017] EWHC 2414 (TCC); [2017] BLR 605, at paras 23 to 29.
111 [2022] EWHC 2598 (TCC); (2022) CILL 4762.
112 Ibid, at para 140.
113 Ibid, at para 148.
114 Ibid, at para 118.
115 See *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 33, at para 13 (Dyson J, as he then was), *De Beers UK Ltd (Formerly The Diamond Trading Co Ltd) v Atos Origin IT Services Ltd* [2010] EWHC 3276 (TCC); [2011] BLR 274, at para 177 (Edwards-Stuart J) and *Walter Lilly & Co Ltd v Mackay and Another* [2012] EWHC 1773 (TCC); [2012] BLR 503, at para 370 (Akenhead J, as he then was).

be careful not to attach too much weight to *Thomas Barnes*, as another judge or tribunal furnished with all the relevant authorities and faced with a dispute as to the correct position may well take a very different approach as in *Jerram Falkus*.

What is most interesting, however, is that HHJ Davies's approach in *Thomas Barnes* was not an isolated deviation from the recent trend in the authorities. On the contrary, a similar approach can be found in the TCC's decision in *Energy Works*,[116] which has already been mentioned above in the context of LADs provisions. One of the primary issues in this dispute turned on the causes of critical delay and M+W's entitlement to an extension of time, which would in turn determine the validity of Energy Work's termination of the EPC contract.

In a very short section dealing with the proper approach to delay claims, Pepperall J readily accepted M+W's submissions and observed as follows:

> "... I accept that M+W would be entitled to a full extension of time without apportionment in the event that there were two concurrent causes of delay only one of which gave rise to a claim for an extension: see *Walter Lilly v Mackay* (supra) at paras 366–370, Akenhead J; *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, at para 13, Dyson J, as he then was; and *De Beers UK Ltd* v Atos Origin IT Services Ltd [2010] EWHC 3276 (TCC), (2010) 134 Con LR 151, at para 177, Edwards-Stuart J."[117]

What is most interesting is that HHJ Davies's approach in *Thomas Barnes* was not an isolated deviation from the recent trend in the authorities

Again, as in *Thomas Barnes*, the decisions in *Jerram Falkus* and more recently in *North Midland* did not really feature in the parties' submissions or Pepperall J's reasoning in *Energy Works*. In any event, it was not strictly necessary for the judge to determine the consequences of any concurrent delays, as he found on the evidence that the causes of critical delays were M+W's wrongful suspension of commissioning works and remedial works to the defective fuel feed system, all of which were culpable delays attributable to M+W.[118] Therefore, the judge's observations were only obiter.

It is noteworthy that the TCC's most recent approach has also been echoed by the Singapore High Court in *Ser Kim Koi v GTMS Construction Pte Ltd and Others*,[119] where it was also accepted as a general principle that "if during a period of culpable delay by the contractor, a variation is given, then the contractor is entitled to an extension of time for the period of delay caused by the variation even if it is concurrent with a period of culpable delay by the contractor", citing the same English cases as in *Thomas Barnes* and *Energy Works*. However, Quentin Loh JAD noted that the parties failed to make any submissions on *North Midland*, which had a bearing on the correct approach to concurrent delays but had not been dealt with by the Singapore courts. The observations in *Ser Kim Koi* were therefore similarly based on no more than a partial survey of the English authorities.

Where does this all leave us? For those seeking clarity and certainty from the court, these recent judicial observations in the TCC leave much to be desired – one decision is based on the parties' agreed position, and another consists of dicta which does not seem to consider all the competing authorities. While contractors will no doubt seek to rely on *Thomas Barnes* and *Energy Works* in future disputes, employers will inevitably continue to push for the approach in *Jerram Falkus* and *North Midland*.

Until the issue of concurrent delays receives more authoritative treatment from the Court of Appeal and/or Supreme Court, there are likely to be more first instance decisions in the future adopting a variety of inconsistent approaches, leaving it open to parties to rely on the decisions which are most favourable to their own cases. One thing is for certain – the decisions in *Thomas Barnes* and *Energy Works* are by no means the last word on this subject, and practitioners in the construction, infrastructure and energy industries should continue to watch this space.

116 [2022] EWHC 3275 (TCC); (2022) CILL 4773.
117 Ibid, at para 176.
118 Ibid, at paras 236 to 265.
119 [2022] SGHC(A) 34, at para 171.

Issues of contractual interpretation

One of the topics which is of the widest interest to stakeholders and practitioners in the construction, infrastructure and energy industries is the court's approach to contractual interpretation, whether generally or in respect of particular types of clauses such as exclusion clauses and dispute resolution provisions. A number of decisions from the past year provide helpful guidance on the most current approach taken by the courts.

Literalism versus commercial common sense

The seminal decisions in *Arnold v Britton and Others*[120] and *Wood v Capita Insurance Services Ltd*[121] provided the most authoritative exposition of the modern approach to interpretation, and they are almost invariably taken to be the starting point of any interpretive exercise.

Year on year, the courts have continued to grapple with the application of the principles laid down in *Arnold* and *Wood*, and 2022 was no exception. A number of interesting case studies illustrate the court's ongoing emphasis on the primacy of the natural and ordinary meaning of the parties' language, even if the result may seem uncommercial for one or the other party.

In *Solutions 4 North Tyneside Ltd v Galliford Try Building 2014 Ltd*,[122] the parties were in dispute as to the scope of Galliford's works and obligations on a PFI project in respect of local authority sheltered housing dwellings, some of which were replaced whilst others were refurbished. In particular, it was contended that the roof works and all its structural and non-structural elements in the unaltered parts of refurbished dwellings had to meet certain design life/life expectancy requirements pursuant to the output specification.

Eyre J adopted the decisions in *Arnold* and *Wood* as his starting point, but went on to make a few further observations on the relevance of the commercial consequences of particular interpretations, noting the potential difficulties and risks of interpreting a contract in the abstract without full knowledge of the evidence and the practical implications:

> "... The court must exercise care in having regard to what it regards as commercial common sense and to the consequences envisaged. In particular it must not rewrite the parties' contract to protect one or other side from having made a bad bargain or entered a commercially foolish arrangement. Nonetheless regard is to be had to the commercial consequences of competing interpretations as part of the exercise of ascertaining the parties' intentions from the language used when seen in its context. When the interpretation exercise is undertaken against the background of a particular alleged breach the court can form a better view of the consequences flowing from the competing interpretations. ..."[123]

At first sight, the observations above suggest that the court is very wary of rewriting the parties' bargains, and where the language is sufficiently clear, a party cannot escape from a bad bargain by way of strained interpretations. If this is correct, then commercial common sense would act as little more than a cross-check or safety valve for extreme cases, but it seems unlikely to be the primary factor when determining what a contract means.

> Where the language is sufficiently clear, a party cannot escape from a bad bargain by way of strained interpretations

However, this may be understating the relevance and significance of the commercial consequences of competing interpretations, as one can see from Eyre J's reasoning in *Solutions 4*. The judge started with a textual analysis of the relevant provisions, and reading them together, he concluded that the requirement to "all elements of all the dwellings whether new build or refurbishment achieve the design life set out in the table" was referring only to new building works carried out by Galliford and not the wholesale replacement of otherwise unaltered parts of refurbished dwellings.[124] However, this was not the end of the exercise, as he went on to note the relevance of the consequences of the local authority's arguments:

120 [2015] UKSC 36; (2015) 32 BLM 07 6.
121 [2017] UKSC 24; [2018] Lloyd's Rep Plus 13.
122 [2022] EWHC 2372 (TCC).
123 Ibid, at para 76.
124 Ibid, at paras 85 to 87.

> "... I remind myself that I must guard against rewriting the parties' contract and if the Defendant entered an agreement which had that effect then so be it. The consequence of the Claimant's approach is nonetheless a relevant consideration particularly when regard is had to the context of the Construction Subcontract. ... The Defendant is right to say that the Claimant's interpretation would mean that the Defendant was having to undertake significant refurbishment works well in advance of the date they would otherwise be due. ... that would be an unusual arrangement (not to say a wasteful one) and if such were the parties' intention one would have expected it to be set out in clear terms."[125]

In other words, the practical and commercial implications of the local authority's proposed interpretation had a significant bearing on the judge's final conclusion, albeit one which was ultimately grounded in the wording of the contract construed as a whole. One should not therefore jump to any conclusion that the contractual language is the be all and end all of the interpretative exercise.

The infelicities and ambiguities in the drafting of the PFI contract in *Solutions 4* meant that commercial and contextual considerations had a greater role to play in the interpretive exercise. Given the length and complexity of many contracts in construction and infrastructure projects, the importance of context should not be ignored. As Eyre J noted:

> "... it is almost inevitable in contracts of the length and complexity of those connected with the Project that there will be infelicities in the drafting and that there may be definitions which are worded in a way which on a strict logical analysis is circular but whose meaning will be more or less easily and clearly discerned when seen in context."[126]

However, there is still a limit to what contextual and commercial factors can achieve, and it cannot be relied on to create novel rights and entitlements where the contract is otherwise silent. This can be seen in *Energy Works*,[127] which also gave rise to a number of questions of contractual interpretation, including the right (if any) to suspend works in the event of a default by the other party.

In that decision, Pepperall J adopted Lord Neuberger's summary of the principles in *Arnold* which emphasised the focus on the meaning of the relevant words,[128] and he went on to reject M+W's contention that there was an unfettered right under the EPC contract to respond to breaches by suspending works or withholding performance, simply because it was reasonable to do so and without any express provision to that effect:

> "... It is absolutely not the position that, where a contract is silent, a party can respond to the other's breach of contract 'as it sees fit' and subject only to its response not being unreasonable. On the contrary, the primary remedy for a breach of contract is a claim for damages. In some cases, the court may order specific performance of the obligation. Further, the innocent party may, in certain circumstances, be entitled to treat the contract as at an end. Absent some term of the contract to the contrary, the innocent party is not, however, entitled simply to withhold performance of its own obligations, whether such course would be reasonable or not."[129]

The relevance of the principles of contract interpretation also extends to disputes regarding the basis of contract formation. In *The Sky's the Limit Transformations Ltd v Mirza*,[130] one of the preliminary issues was whether a building contract for alterations to a residential property

125 Ibid, at para 88.
126 Ibid, at para 103.
127 [2022] EWHC 3275 (TCC); (2022) CILL 4773.
128 Ibid, at para 32.
129 Ibid, at para 75.
130 [2022] EWHC 29 (TCC); (2022) 39 BLM 02 10.

was made on the basis of an agreed fixed price. The contractor argued that the contract was based on the payment of a reasonable price, as the quotations or correspondence only referred to an "estimate" of the price for the works.

HHJ Stephen Davies referred to his own previous decision in *Optimus Build Ltd v Southall,*[131] where he considered a similar issue and cited the principles set out in *Arnold* and *Wood*. Applying that approach, the judge concluded that the reference to an "estimate" should not be taken literally and had to be read in the context of all the documents and exchanges, which made it clear that the contract was a fixed price contract:

> "... I do not regard the use of the word 'estimate' in this case as having any real relevance. It was not used consistently. It may well have been apt for the first estimate, because that was produced without the benefit of a site visit so that, whilst the plans gave enough bare bones to provide a price, it was clear that until the specification was known, at least in a little more detail, it was subject to significant uncertainty and qualification. ... If there was room for any residual doubt that was removed by the production of and subsequent agreement that the contract was entered into on the terms of the FMB standard form, which is plainly intended to be used on the basis of a fixed price contract with detailed provisions as to changes to the work scope."

Recent case law demonstrates that the natural and ordinary meaning of the words used is a convenient starting point but not necessarily the endpoint of an exercise of interpretation. Where there are numerous drafting infelicities in a complex contract, or informal contracts based on exchanges of correspondence in the absence of legal advice, the courts are ready and willing to give greater weight to wider contextual and/or commercial considerations when determining the parties' objective intentions. Nevertheless, when it comes to certainty and avoidance of disputes, there is no real substitute for careful and unambiguous drafting at the pre-contractual stage.

Alternative dispute resolution clauses

The interpretation and enforceability of multi-tier alternative dispute resolution (ADR) clauses have been taking on increasing importance in recent years, as such types of procedures are becoming more and more common in commercial contracts, especially within the construction and infrastructure industry. This is part of the modern emphasis on ADR procedures, with litigation and arbitration being very much the last resort.

The relevant principles are well-established, and have been summarised not so long ago in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*[132] by O'Farrell J. In essence, the procedure must be "expressed clearly as a condition precedent to court proceedings or arbitration", and it must be "sufficiently clear and certain by reference to objective criteria".[133]

The latest illustration of the application of the above principles can be found in *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd and Another,*[134] where Kajima sought to strike out a claim relating to the redevelopment of the Royal Alexandra Hospital for Sick Children in Brighton, on grounds of failure to comply with a contractual ADR provision which was said to be a condition precedent to the commencement of proceedings. If Kajima was right, then Children's Ark would be time-barred from issuing fresh proceedings.

Joanna Smith J considered the relevant authorities in some detail.[135] Most notably, she disagreed with some of O'Farrell J's observations in *Ohpen* and considered that the court has an inherent jurisdiction to stay proceedings for the enforcement of an ADR provision where the clause creates a mandatory obligation and where it is enforceable, even if it is not clearly expressed as a condition precedent.[136]

In other words, the primary question for the court was whether there was a sufficiently enforceable and mandatory ADR provision. Nevertheless, she found on the facts that the contractual requirement to refer disputes to a Liaison Committee was indeed a condition precedent, especially since the contract expressly provided that "Disputes *shall first* be referred to the Liaison Committee for resolution"[137] (emphasis added).

131 [2020] EWHC 3389 (TCC), at paras 5 to 11.

132 [2019] EWHC 2246 (TCC); [2019] BLR 576.
133 Ibid, at para 32.
134 [2022] EWHC 1595 (TCC); (2022) CILL 4747.
135 Ibid, at paras 39 to 45.
136 Ibid, at paras to 47 and 48.
137 Ibid, at para 58.

However, that was not the end of the matter, as the judge went on to find that the ADR procedure was not sufficiently certain to be enforceable. In her view, the provisions contained "no meaningful description of the process to be followed", as the Liaison Committee could make its own rules and procedures, and the role of the NHS Trust's representative in the Committee was also unclear.[138] Indeed, the parties involved in the Liaison Committee were the NHS Trust and Children's Ark, such that it was unclear how Kajima could be involved, how the Committee would be resolving disputes between Children's Ark and Kajima, or how the Committee's decision would have any effect on Kajima.[139]

Further, the judge considered that it was unclear whether proceedings could be commenced as soon as 10 days have elapsed since the referral, as the right to commence legal proceedings only arose "to the extent not finally resolved", which suggested that the Liaison Committee had to be given a proper (but not sufficiently defined) opportunity to arrive at a resolution.[140] This was yet another reason why the procedure was not sufficiently certain or straightforward to be enforced.[141]

The *Children's Ark* decision is an interesting example of an ADR provision being found to be unenforceable, as the recent trend in the case law has been to give effect to the parties' ADR provisions where possible. It is worth highlighting that the ADR provisions in *Children's Ark* were "slightly unusual and surprising" (as counsel accepted during the hearing),[142] such that the judge's conclusion has to be seen in that particular contractual context.

Nevertheless, this decision shows that parties should not simply assume that the court would always adopt a lenient approach to the interpretation of ADR clauses and give effect to them invariably, and care must be taken when drawing up such ADR provisions at the pre-contractual stage. Indeed, the *Children's Ark* decision has now been affirmed by the Court of Appeal (see [2023] EWCA Civ 292, handed down on 17 March 2023), and this will be covered in more detail in the next annual review.

Exclusion/limitation clauses

The *Energy Works*[143] decision has already been mentioned a few times in this review because it covers an extraordinary range of contractual and evidential issues which are commonly found in construction and infrastructure disputes. One other issue touched on in that decision was the proper interpretation of the exclusion and limitation clauses under that EPC contract, applying the principles of interpretation summarised in *Arnold*.

First, Pepperall J considered the meaning of "wilful default", as liability for wilful default was expressly excluded by clause 45.3A of the EPC contract from the scope of the liability cap. After reviewing the case law on the interpretation of similarly worded clauses in other contracts,[144] the judge concluded that "wilful default" is established where a party either "intended to commit such breach or was recklessly indifferent as to whether its conduct was in breach of contract or not",[145] as it is clear that the parties contemplated something which was wider than "deliberate default".

This latest guidance will be helpful to parties which are in the process of negotiating similar wordings in exclusion or limitation clauses, as well as those who already have similar clauses in their construction contracts. If the parties wish to limit (or expand) the scope of "wilful default", then they should do so by including an express and bespoke definition of what the term is intended to mean.

Secondly, Pepperall J had to construe the scope of clause 45.1(b) of the EPC contract, which expressly excluded, inter alia, liability for any loss of revenue. M+W contended that this was broad enough to exclude EWH's claim for additional financing costs arising from the early termination of the EPC contract due to M+W's defaults. In the judge's view, however, although there was a clear correlation between financing costs and revenue, "as a matter of ordinary language a claim for additional financing costs is not a claim for lost revenue".[146] It followed that "clear words would be required to exclude a claim for additional financing costs incurred by reason of the delayed completion".[147]

This is again helpful guidance to parties in negotiations who are contemplating the exclusion of liability for financing costs – clear and express words would be required to achieve that effect, and general references to

138 Ibid, at para 61(i).
139 Ibid, at paras 61(ii) to (iv).
140 Ibid, at para 61(v).
141 Ibid, at para 65 and 66.
142 Ibid, at para 64.

143 [2022] EWHC 3275 (TCC); (2022) CILL 4773.
144 Ibid, at paras 326 to 329.
145 Ibid, at para 330.
146 Ibid, at para 395.
147 Ibid, at para 397.

"loss of revenue" or even "indirect or consequential losses" are most unlikely to suffice. More generally, it is plain that the court will focus keenly on the language chosen by the parties when construing exclusion or limitation clauses, and it will resist any invitation to rewrite an exclusion clause in order to make it more or less expansive.

Implied duties of good faith

The principle of good faith has been the subject of frequent judicial consideration in recent years, although its reception by the English courts has been mixed at best. It all began with the well-known decision of Leggatt J (as he then was) in *Yam Seng Pte (a company registered in Singapore) v International Trade Corp*,[148] which opened the doors for the implication of a duty of good faith into long-term transactions which are often known as "relational contracts".[149] That has largely been the exception rather than the rule, as the courts have repeatedly emphasised that there is still no general doctrine of good faith in English law.[150] This was recently restated by Lord Hodge in 2021 in the Supreme Court decision of *Pakistan International Airline Corp v Times Travel (UK) Ltd.*[151]

On the other hand, the courts have recently implied duties of good faith into the sub-postmasters' contracts in *Bates v Post Office (No 3)*[152] and the 25-year PFI contract in *Essex County Council v UBB Waste (Essex) Ltd.*[153] These cases demonstrate that the principles laid down in *Yam Seng* are by no means redundant, but continue to be of practical application with the right set of facts.

This topic received its most recent treatment during 2022 in *Candey Ltd v Bosheh and Another*,[154] where the Court of Appeal had to consider whether a duty of good faith should be implied into a conditional fee agreement (CFA) between a client and a firm of solicitors, in circumstances where the solicitors argued that the client was in breach of a duty of good faith by settling a claim on terms which precluded the solicitors' entitlement to any costs.

Coulson LJ started by emphasising that "the mere fact that some relationships are long-term does not make the underlying contract a relational contract", and "the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law".[155] He then went on to reject the contended implied duty of good faith, as such a term was neither obvious nor necessary for the CFA to work, and there was nothing distinguishing a CFA from an ordinary retainer which justified the inclusion of a duty of good faith.[156]

These cases demonstrate that the principles laid down in *Yam Seng* are by no means redundant, but continue to be of practical application with the right set of facts

Further, Coulson LJ went through the checklist proposed by Fraser J in *Bates* as a "sense check", and he noted that the CFA was not necessarily a long-term contract as it could have ended in a matter of weeks.[157] Importantly, the parties' fiduciary relationship was different from a relationship of trust and confidence, and there was no high degree of communication and no expectation of loyalty, nor was there any investment by the client or any element of exclusivity.[158]

Although *Candey* is not a construction case, it does provide a glimpse of the court's latest approach when assessing whether a contract is sufficiently relational in order to give rise to an implied duty of good faith. Given that most construction contracts are short-term and based on a defined completion period, without any particular elements of trust and confidence or expectation of loyalty, it is likely to be an uphill struggle in most cases to seek to imply a duty of good faith into a typical building or engineering contract.

Moreover, it is important to bear in mind that even a long-term contract is not necessarily a relational one, such that one cannot simply assume that a long-term infrastructure contract (such as a PFI contract) would inevitably contain an implied duty of good faith. An express duty of good faith, such as the express duty of mutual trust and cooperation in NEC contracts, remains the most reliable way to incorporate the concept of good faith into the parties' contractual relationship.

148 [2013] EWHC 111(QB); [2013] BLR 147.
149 Ibid, at para 142.
150 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200; [2013] BLR 265, at para 105 (Jackson LJ) and *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494, at para 45 (Moore-Bick LJ).
151 [2021] UKSC 40; (2021) 38 BLM 09 1.
152 [2019] EWHC 606 (QB); (2019) CILL 4313.
153 [2020] EWHC 1581 (TCC).
154 [2022] EWCA Civ 1103.
155 Ibid, at para 32.
156 Ibid, at paras 36 to 38.
157 Ibid, at para 41(b).
158 Ibid, at paras 41(f)–(i).

Claims for defective works

Building Safety Act 2022

On 28 June 2022, the Building Safety Act 2022 (BSA) came into force, just over five years after the Grenfell Tower tragedy on 14 June 2017. It is an ambitious piece of legislation, with a total of 171 sections dealing with the new building safety regulator and its functions, amendments to the Building Act 1984 (BA), different parties' duties relating to "higher-risk buildings", new and extended causes of action and remedies relating to building defects, construction products and service charges, as well as various other regulatory changes.

It is impossible in the space of this review to address all of the provisions contained in the BSA in detail.[159] For practitioners and stakeholders in the construction industry, the most significant aspects of the BSA are likely to be the amendments to the Defective Premises Act 1972 (DPA). In particular, there are three major changes to the causes of action arising under the DPA.

First, the BSA has extended the scope of the DPA to works done to *existing* dwellings. Prior to the BSA, claims under section 1(1) of the DPA were confined to "work for or in connection with the provision of a dwelling" (ie the construction of a *new* dwelling). This has now changed by virtue of section 134 of the BSA, which introduces a new section 2A of the DPA and creates a new cause of action for "work in relation to any part of a relevant building", a "relevant building" being "a building consisting of or containing one or more dwellings".

Like section 1 of the DPA, the new section 2A imposes a duty to see that the works are done in a workmanlike or professional manner, with proper materials and so that the dwelling is fit for habitation. It also extends to anyone who arranges for another person to carry out the works. These duties now extend to refurbishments, renovations, extensions and the like in an existing house or building which contains one or more dwelling.

Secondly, section 135 of the BSA inserts a new section 4B into the Limitation Act 1980. This provides that: (i) all claims under sections 1 and 2A of the DPA (ie claims relating to both new dwellings and existing dwellings) shall have a limitation period of "15 years from the date on which the right of action accrued"; and (ii) section 4B(4) provides that for claims under section 1 of the DPA which accrued before the commencement date of section 135 of BSA (ie before 28 June 2022), the limitation period is retrospectively extended to 30 years, which effectively resurrects claims relating to residential developments which were completed up to 30 years before 28 June 2022.

It is noteworthy that section 135(5) of the BSA expressly requires the court to dismiss an action "if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights". Parties faced with new claims under the DPA on the basis of the extended 30-year limitation period are most likely to allege potential breaches of Article 6 (right to fair trial) and Article 1 of the First Protocol (protection of property) of the European Convention on Human Rights, and it will be interesting to see how the TCC grapples with such arguments in the years to come.

Thirdly, and perhaps the most controversial of all the provisions, section 130 of the BSA now empowers the High Court (including the TCC) to "make a building liability order if it considers it just and equitable to do so". Sub-sections 130(2) to (4) provide that where an original body corporate is liable under any provision of the DPA or section 38 of the BA, a building liability order can be made to extend that liability to other specified bodies corporate which are or have been "associated with the original body", at any time between the beginning of the works in question and the making of the building liability order.

Parties faced with new claims under the DPA on the basis of the extended 30-year limitation period are most likely to allege potential breaches of Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights, and it will be interesting to see how the TCC grapples with such arguments in the years to come

[159] For a more detailed summary of the BSA, see Cheung, M, "Building Safety Act 2022: A Blessing for Claimants and a Curse for Defendants?", *TECBAR Review*, Winter 2022, available at https://tecbar.org/.

The touchstone of liability under a building liability order is the exercise of "control" by the associated body corporate, and sub-sections 131(2) and (3) of the BSA provide for a number of specific circumstances where the requisite level of control can be established. For instance, for any given company Y, a body corporate X is an associate if it possesses at least 50 per cent of: (i) Y's issued share capital; (ii) votes at Y's general meetings; (iii) Y's income if the whole of it were distributed to shareholders; or (iv) Y's assets if Y were wound up or in any other circumstances. This is not a closed list, as sub-section 131(4) of the BSA provides that a body corporate X controls another body corporate Y "if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes".

> The court has a very wide discretion as to the making of a building liability order, as it simply needs to be satisfied that it is "just and equitable" to do so, and the Judicial College is considering the production of some guidance on the relevant factors for the courts to take into account

The purpose of a building liability order is therefore to pierce the corporate veil and render developer groups potentially liable even where they have set up a special purpose vehicle as a subsidiary company (with limited assets) to manage/carry out the building works in question. It bears emphasis that a building liability order is not confined to cladding defects, but can apply to any damages relating "a risk to the safety of people in or about the building arising from the spread of fire or structural failure" by virtue of section 130(6) of the BSA.

The court has a very wide discretion as to the making of a building liability order, as it simply needs to be satisfied that it is "just and equitable" to do so, and the Judicial College is considering the production of some guidance on the relevant factors for the courts to take into account. One can expect such factors to include, for instance, the extent and seriousness of the defects, the quantum of the remedial costs, the leaseholders' financial position, and the solvency of the primarily liable parties and/or their insurers. Parties and their legal advisers should keep a close eye on any new case law dealing with building liability orders in the months and years ahead, which may well shed light on the courts' approach to applications for building liability orders.

It is worth mentioning that, beyond conventional building and engineering claims under the DPA as amended and supplemented by the BSA, claimants who are also leaseholders of the relevant building may consider concurrent proceedings in the First-tier Tribunal (FTT) (Property Chamber) against the landlord of the building. This can be done by applying for a remediation order under section 123 of the BSA to require the landlord to remedy the relevant defects, and/or by applying for a remediation contribution order against the landlord, the developer and/or an associated person as defined by section 121 of the BSA (similar to an associated body for the purpose of building liability orders) to require one or all of them to meet the incurred and/or prospective remedial costs.

Further, claimants or leaseholders should also seek specialist legal advice on whether prospective service charges relating to remedial works or measures to prevent or mitigate a building safety risk are in fact payable, in the light of the new restrictions on service charges under section 122 and Schedule 8 of the BSA. Indeed, para 12 of Schedule 8 empowers the Secretary of State to make further regulations in the future for the recovery of service charges which are no longer payable as a result of the BSA, and it is important to keep an eye out for any such new regulations.

Finally, it is noteworthy that section 148 of the BSA creates a new cause of action against any person who: (i) fails to comply with a construction product requirement;[160] (ii) makes a misleading statement when marketing or supplying a construction product; or (iii) manufactures an inherently defective construction product, as a result of which a "relevant building"[161] is unfit for habitation due to that product being installed in or attached or applied to the building.

Section 148 of the BSA applies *prospectively* to defaults after its commencement date (ie 28 June 2022), and the person liable has to pay damages for any personal injury,

[160] This is defined under section 147 of the BSA as any construction product regulations made under para 1 of Schedule 11, Regulation (EU) No 305/2011, and the Construction Products (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/465).

[161] For the purpose of construction product liability, this is defined under section 147 of the BSA as a building which consists of a dwelling or which contains two or more dwellings.

damage to property or economic loss suffered by any person with a legal or equitable interest in the relevant building or any dwelling contained in that building. The only exception relates to cladding products, as section 149 of the BSA imposes liability on *past defaults* relating to the marketing, supply or manufacture of cladding products.[162]

Pursuant to section 10B of the Limitation Act as inserted by section 150 of the BSA, for construction product claims which accrue under sections 148/149 of the BSA after 28 June 2022, the limitation period is 15 years from the date of accrual (ie the date of completion of construction if installed during the construction of a building, or the date when the works are completed in other cases). As for actions which accrued before 28 June 2022, the limitation period is again 30 years (similar to the position for claims under section 1(1) of the DPA which accrued before 28 June 2022).

Given the sweeping changes introduced by the BSA, not just for existing causes of action under the DPA but also in terms of new causes of action and remedies relating to fire safety defects, one thing is for certain – there is likely to be a proliferation of disputes in the TCC and also in the FTT relating to cladding defects and other fire safety defects. Although many of these may end up being settled out of court, it is likely that at least some of them will go to trial and result in some helpful judicial guidance on the common issues and challenges relating to such disputes and the proper application of the BSA provisions.

[162] The relevant "cladding product requirements" refer to the Construction Products Regulations 1991 (SI 1991/1620) and Regulation (EU) No 305/2011 before 31 December 2020, and thereafter, Regulation (EU) No 305/2011 and the Construction Products (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/465).

Liability and causation issues in cladding claims

In July 2022, the TCC handed down its first post-Grenfell decision on fire safety defects in *Martlet Homes Ltd v Mulalley & Co Ltd*.[163] The dispute related to alleged defects in the cladding system installed by Mulalley (the design and build contractor) at five high-rise residential towers in Gosport, including the use of combustible expanded polystyrene (EPS) insulation boards and the inadequate installation of fire barriers.

This was a very detailed judgment which considered, inter alia, the applicable Building Regulations and industry guidance on the combustibility of external cladding systems (especially insulation materials), the contractual obligations and standard of care owed by contractors and professional designers, and the recoverability of cladding replacement costs where there could have been other less expensive remedial schemes. The TCC's reasoning will therefore be of great interest to parties to ongoing and future cladding disputes.

Functional requirement B(4)(1) of the Building Regulations 2000 requires that "the external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building". HHJ Stephen Davies noted that Approved Document B (2002) did not expressly prohibit the use of combustible insulation panels in buildings over 18m unless the cladding system had passed a BS 8414-1 full-scale fire test,[164] although para 13.7(3) did reference the advice given in BRE 135 report (1988), which was later superseded by the 2003 version.

[163] [2022] EWHC 1813 (TCC); (2022) CILL 4729.
[164] Ibid, at para 198.

The judge observed that "[i]f the question here was whether the system as designed and installed complied with functional requirement B4(1) then I would have no difficulty in answering that it did not",[165] given the absence of fire barriers in the as-built installation. Nevertheless, given that the final design specified fire barriers, and there was no expert evidence explaining in detail how the fire barriers would not have adequately resisted the spread of fire, the judge did not feel able to conclude that the design was non-compliant.[166]

> It is likely that another judge or tribunal faced with the same question would give a lot of weight to HHJ Davies' interpretation of the scope and effect of BRE 135 (2003)

However, an important feature of the design and build contract was the strict contractual requirement under the Employer's Requirements for Mulalley to conform with the requirements, directions, recommendations and advice contained in BRE 135 report (2003) as the latest version at the time of the works.[167] The more important question, therefore, was whether Mulalley failed to comply with the requirements and/or recommendations in BRE 135 (2003), Annex A of which was found by the judge to have "created a performance standard which was to be found in Annex A and which was to be assessed through the tests to be undertaken in accordance with BS 8414-1".[168]

On this issue, HHJ Davies held that BRE 135 (2003) did indeed contain a clear recommendation/advice that a contractor should not specify a cladding system comprising a combination of combustible thermoplastic EPS insulation and an organic surface render, unless it had been shown to meet the performance standard in Annex A of BRE 135 (2003) in accordance with the test method set by BS 8414-1.[169] This finding is of wider significance for other cladding disputes, as it is likely that another judge or tribunal faced with the same question would give a lot of weight to HHJ Davies' interpretation of the scope and effect of BRE 135 (2003).

Given that Mulalley owed a strict obligation to comply with BRE 135 (2003), and there was no evidence of any BS 8414-1 test being done on the cladding system, the judge concluded that Mulalley was clearly in breach – it was not an answer to suggest that others in the industry may have also failed to heed the recommendations of BRE 135 (2003) when specifying the same cladding system in other high-rise buildings, nor could Mulalley simply rely on the relevant BBA certificate.[170] This, in turn, meant that the cladding system failed to comply with functional requirement B4(1).[171]

Those within the industry will also be interested in HHJ Davies' obiter observations on the standard of care owed by a design and build contractor or professional designer at the time in respect of the specification of cladding systems, as this would be relevant to other disputes where there are no strict warranties as to compliance or quality but only a duty to exercise reasonable skill and care. The judge took the view that Mulalley would have been in breach of its duty of care in any event:

> "... any reasonably competent designer specifier could not have failed to be aware at the time that BRE 135 (2003) – as the most up to date and authoritative report on the topic – contained a clear recommendation and advice to avoid specifying a product such as the StoTherm Classic system with a combination of combustible EPS insulation and combustible organic acrylic render for a high-rise residential building unless there was evidence that it met the Annex A performance criteria via a BS 8414-1 test. At the very least in my judgment they would have needed to ask the question of the supplier and, if the answer came that it had not passed a test to BS 8414-1, to have sought and obtained satisfactory confirmation that it otherwise met the requirements of functional requirement B4(1). ..."[172]

HHJ Davies' observations on causation are also highly pertinent to other cladding disputes. Mulalley contended that it was not liable for the cost of replacing the cladding because its breaches were not the but-for cause, and the cladding would have had to be replaced in any event due to regulatory changes post-Grenfell. This argument is commonly raised by defendants in other similar disputes where the full cladding replacement costs are being claimed.

165 Ibid, at para 192.
166 Ibid, at paras 194 and 195.
167 Ibid, at para 203.
168 Ibid, at paras 131 to 135.
169 Ibid, at paras 206, 209 and 213.
170 Ibid, at paras 219 and 222.
171 Ibid, at para 259.
172 Ibid, at para 267.

The judge considered that this was an appropriate case to apply the effective cause test, as it was plain that the claimant suffered a loss as a result of the defects,[173] otherwise the claimant would be forced to choose between a partial repair of the cladding system or not repairing or replacing the cladding at all.[174] On this basis, he held that Mulalley's breaches were an effective cause of the replacement costs, especially since "the other effective causes, namely the change in the fire safety regulatory regime and the impact of Grenfell, is not conduct amounting to fault by some third party or conduct which should negative the defendant's responsibility for the consequences of its earlier fault".[175]

> It is crucial for any party seeking to claim the remedial/replacement costs for fire safety defects to carefully document the professional advice received and the decision-making process when choosing a remedial scheme

The judge also analysed the decision-making process for the cladding replacement works in some detail, and concluded that the final decision was made with the benefit of full investigations and detailed advice from external consultants and at a time when the installation defects were plainly an effective cause of the decision.[176] He also warned against viewing the evidence "through the prism of litigation-driven hindsight".[177]

Interestingly, the judge noted that had the breaches been confined to installation defects relating to fire barriers, it would not have been reasonable to replace the cladding and the claimant would not have been entitled to recover the full replacement costs.[178] He considered that there was no evidence that the repair of the installation defects would not be technically appropriate in those circumstances,[179] and that the expert advice and final decision to replace the cladding was based on a number of factors which went beyond compliance with the current Building Regulations.[180]

It is crucial, therefore, for any party seeking to claim the remedial/replacement costs for fire safety defects to carefully document the professional advice received and the decision-making process when choosing a remedial scheme. Particular attention needs to be given to the alternative remedial schemes being proposed (especially if advanced by the defendants being pursued), and the reasons for opting for a more extensive and/or expensive remedial option, especially where the prospects of establishing design defects are finely balanced as compared to the prospects of proving installation defects. This can have a significant bearing on the amount of recoverable loss, depending on the precise facts and the nature and extent of the defects in each case.

Nevertheless, it is quite apparent that the courts are taking a generally pro-claimant approach, and a case in point is the TCC's second post-Grenfell decision on a cladding dispute in *LDC (Portfolio One) Ltd v George Downing Construction Ltd and Another*,[181] which was handed down in December 2022. This concerned, inter alia, the inadequate cavity barriers and fire-stopping in the external cladding construction of some university halls of residence in Manchester.

Deputy High Court Judge Veronique Buehrlen KC had little difficulty finding that the cladding sub-contractor owed a strict obligation to comply with all statutory requirements, and to complete the works so as not to give rise to any breach of the main contractor's obligations.[182] The judge then went on to conclude (based on the fire engineering experts joint conclusions) that the design and/or installation of the cladding was in breach of the Building Regulations, the architectural specification and the standard of good workmanship.[183]

On the whole, the *Martlet Homes* and *LDC* decisions bear full reading by any party or practitioner involved in a dispute relating to fire safety defects. There are helpful lessons for both claimants and defendants in such disputes. Given the increasing number of disputes on cladding and other fire safety defects, it is likely that there will be further judgments coming out of the TCC in the coming months and years, and it will be instructive then to consider any differences in the court's approach due to different sets of facts and/or differences in the expert evidence received.

173 Ibid, at para 291.
174 Ibid, at para 292.
175 Ibid, at para 293.
176 Ibid, at para 355.
177 Ibid, at para 352.
178 Ibid, at paras 387 and 388.
179 Ibid, at para 363 to 374.
180 Ibid, at paras 376 to 379.
181 [2022] EWHC 3356 (TCC).
182 Ibid, at paras 45 and 46.
183 Ibid, at paras 71 to 78.

Mitigation of loss

The reasonableness of the proposed remedial scheme and the claimed remedial costs is only one aspect of the issue of mitigation. Further questions often arise as to whether a claimant has taken sufficient steps to reduce the relevant costs by, for instance, adopting a competitive tender process or accepting remedial proposals from one or more of the defendants.

In the *Martlet Homes*[184] decision, for example, one aspect of the claimed costs consisted of a variation to include additional works relating to scaffolding and gas safety. Although Mulalley contended that these works should have been included in the tender/contractual documents so that they could form part of a competitive tender process, HHJ Davies rejected this argument on the basis that the contractors would simply have returned higher tenders, and there was no evidence that a lower cost could or would have been secured.[185]

On the other hand, in the *LDC* case,[186] the contractors argued that the replacement of the structural insulated panels with a steel framing system to comply with latest Building Regulations amounted to betterment. The judge rejected this argument and held that this was not betterment, as LDC had no reasonable choice and a like-for-like replacement would have been contrary to regulation 7(2) of the latest Building Regulations 2010 (as amended). In any event, LDC acted reasonably in following the expert advice it had received.[187]

Other recent cases going beyond cladding disputes also provide some helpful guidance on the court's approach to questions of mitigation. In *Energy Works,*[188] M+W challenged the overall reasonableness of the costs of completion and defect rectification costs being claimed. This was argued against, for example, the costs of instructing an alternative contractor, Black & Veatch, to carry out some of the outstanding works, which formed a significant part of the quantum of the termination claim.

Pepperall J acknowledged that "the pool of potential alternative contractors was limited" and "EWH was right to appoint its chosen contractor quickly after termination without launching a protracted procurement process".[189] Nevertheless, he observed that the risk of termination was foreseen back in May 2018 (almost a year before the termination in March 2019) and the decision to negotiate with only one contractor gave rise to "a foreseeable and avoidable risk of leaving itself with little or no bargaining power". In the event, the judge awarded a reduced (but still substantial) sum of circa £8.3 million, out of a claim for circa £12 million.

The lesson here is that the courts will take a pragmatic approach when considering alleged failures to mitigate one's losses, taking into account the urgency of the remedial works and the challenges of sourcing appropriate contractors, but that may not provide a complete answer where there is a missed opportunity to consider competing quotations or tenders for the relevant works. Where possible, a claimant would be well-advised to put any remedial works out to tender, before selecting a suitable contractor and seeking to recover the costs of its works.

In many defect claims where the works have only recently been completed less than one or two years ago, the effect of a contractual defects liability/rectification period and its potential impact on the quantum of a claim against the contractor need to be specifically considered. The recent decision of the Singapore High Court in *Thio Keng Thay v Sandy Island Pte Ltd*[190] provides a timely reminder, as Lee Seiu Kin J reiterated that where a contractor has been prevented from carrying remedial works as contemplated by a defects liability clause, "the damages that the Plaintiff is entitled to in this situation would be the amount that the Defendant would have incurred had the rectification been undertaken in accordance with the defects liability clause".[191]

Therefore, where a contractor or defendant has offered to carry out the remedial works at its own costs, extra care needs to be taken before rejecting the offer and pursuing the costs to be incurred by an alternative contractor. Having said that, the burden would ultimately be on the contractor or defendant to prove that it would have incurred less costs to carry out the relevant remedial works, and that is not always a straightforward exercise. In *Thio Keng Thay*, the contractor failed to adduce any evidence whatsoever to prove the costs (whether nil or otherwise) it would have incurred, such that the judge concluded that no failure to mitigate could be established.[192] This is a cautionary tale for defendants who may seek to run similar arguments in the future without any evidence on its own likely costs.

184 [2022] EWHC 1813 (TCC); (2022) CILL 4729.
185 Ibid, at para 455.
186 [2022] EWHC 3356 (TCC).
187 LDC, at paras 107 and 108.
188 [2022] EWHC 3275 (TCC); (2022) CILL 4773.
189 Ibid, at para 381.
190 [2022] SGHC 69.
191 Ibid, at paras 8 and 9 (citing the English case of *Pearce and High Ltd v Baxter* (1999) 66 Con LR 110).
192 Ibid, at paras 10 and 11.

Civil procedure

There were two particularly important developments in the Civil Procedure Rules (CPR) for TCC users, namely the conversion of the Disclosure Pilot Scheme under the previous Practice Direction 51U into the permanent Practice Direction 57AD, and the publication of the new 3rd Edition of the Technology and Construction Court Guide (TCC Guide).

Practice Direction 57AD on Disclosure

The Disclosure Pilot Scheme for the Business and Property Courts was first introduced under PD 51U in January 2019, and the relevant requirements/case law have been covered in some of the previous annual reviews. In summary, PD 51U created a regime based on the provision of Initial Disclosure at the pleading stage, followed by Extended Disclosure by reference to the parameters set out in a Disclosure Review Document which has to be prepared (and where possible, agreed) by the parties in advance of the first case management conference. The objective of the pilot scheme was to reduce the scope and costs of the disclosure process.

On 1 October 2022, the Disclosure Pilot Scheme was made permanent and converted into the new PD 57AD, incorporating a number of updates and amendments to the provisions of the previous PD 51U.[193] The key changes introduced in PD 57AD include the following:

- Part 8 claims are formally exempt from the requirements of PD 57AD – see para 1.4(7). If an order for extended disclosure is sought in a Part 8 claim, the applicant will need to submit an list of issues for disclosure and the proposed disclosure models, and the court may adapt the procedure in PF 57AD as appropriate – see para 1.12.
- Disclosure of adverse documents extends to information which contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, *whether or not that issue is one of the agreed Issues for Disclosure* – see para 2.7.
- Parties are required to have regard to the primary functions of the list of issues for disclosure when drafting such issues, including the purpose of assisting the court to determine the appropriate disclosure models and assist the parties to carry out the disclosure process in a practical and proportionate way – see para 7.7.

> It is expected that the case law on the previous PD 51U will continue to be relevant and applicable to the corresponding provisions of PD 57AD

- A party may address Model C requests not only to the other party or parties, but also propose that Model C be used in respect of documents which it may propose searching for and disclosing – see para 8.3 (sub-para (2) under "Model C").
- The Disclosure Certificate can now be signed by a party's legal representative provided that its significance has been explained to the client and written authority has been obtained to sign on the client's behalf – see para 12.6.
- A claim with a value of less than £1 million should be treated as a Less Complex Claim to which the simplified disclosure procedure in Appendix 5 can be applied, unless the nature, value, complexity and the likely volume of Extended Disclosure will benefit from the full procedure under PD 57AD. The application of the Less Complex Claims regime should be considered when preparing the Disclosure Review Document for cases where disclosure is likely to be limited – see para 10.2.

It is expected that the case law on the previous PD 51U will continue to be relevant and applicable to the corresponding provisions of PD 57AD. Further, the court will no doubt have the occasion to provide guidance on some of the new provisions introduced by PD 57AD, and parties and practitioners alike should stay tuned for any new authorities in this regard.

[193] See the changes indicated in the redline version published by the judiciary, https://www.judiciary.uk/wp-content/uploads/2022/07/PD57AD-and-Appendix-1-Definitions-July-2022-Redline101003048v1.pdf.

Revised Technology and Construction Court Guide

The previous edition of the TCC Guide was published in October 2005, and revisions to that edition were last made in March 2014 (ie more than eight years ago). The latest 3rd Edition of the TCC Guide has therefore been a long time coming, and it was finally published on 12 October 2022. This provides important new procedural guidance for parties and practitioners who are frequent users of the TCC.

In summary, the latest TCC Guide contains the following new provisions:

- Enforcement of adjudicator's decisions should ordinarily be commenced in the County Court instead of the High Court TCC in London when the sum in issue is less than £100,000, except where there are allegations of fraud – see para 1.3.8. Adjudication enforcement claims can also be issued in the TCCs outside of London, but where the sum in issue is less than £50,000, the claim may be transferred to the County Court – see para 1.3.9.
- Claims of less than £500,000 should generally be brought in the County Court instead of the High Court TCC in London – see para 1.3.8. For the TCCs outside of London, claims of less than £100,000 should generally be issued in the County Court instead of the High Court – see para 1.3.9.
- Adjudication enforcement hearings will usually take place within about six to eight weeks of the directions being made by the court – see para 9.2.8. Updated draft directions for enforcement proceedings are provided in Appendix F.
- The default position for all hearings under half a day (including Friday applications lists and adjudication enforcement hearings) will be for such hearings to take place remotely – see para 4.3.1. The mode of longer hearings will be up to the judge – see para 4.3.2. Appendix K contains a protocol for remote and hybrid hearings.
- Electronic filing using the court's CE-Filing system is mandatory if a party is legally represented – see para 3.8.1.
- Parties are encouraged to deal with applications electronically and in writing wherever practicable, particularly disputes over disclosure or evidence and applications for abridgments or extensions of time or other variations to existing directions – see para 4.5.1.
- The disclosure regime under PD 57AD is now formally recognised by the TCC Guide – see section 11. Particular emphasis is placed on the requirement of giving Initial Disclosure with the statements of case, and the need to complete the Disclosure Review Document in advance of the first case management conference – see paras 11.1.6 and 11.1.7.
- The guidance on witness statements in PD 57AC has also been formally recognised by the TCC Guide, with particular emphasis on the need for conciseness and the avoidance of lengthy narratives or citations from documents – see paras 12.1.3 and 12.1.4.
- Witnesses who are located abroad or who would find the journey to court inconvenient or impracticable may give evidence via video link, and the TCC Guide emphasises that such evidence is regularly received by the TCC – see para 12.4.1. Applications for evidence via video link should be made at the Pre-Trial Review – see para 12.4.2.
- Appendix I contains some general guidance on the contents of statements of case, emphasising the need to set out only the primary allegations and their corresponding particulars, avoiding the inclusion of evidence and general narratives. Where the particulars of an allegation are lengthy, they should be set out in schedules or appendices.
- Appendix J contains helpful general guidance on the format, contents filename, size and mode of submission of electronic bundles for court hearings.

Global perspectives

As in previous years, the notable legal developments of 2022 were not confined to case law and legislation in the UK. In Hong Kong SAR, Singapore and the UAE, there were a number of judicial decisions and developments which will be of interest to those who are involved in cross-border litigation and arbitrations relating to construction, infrastructure and energy projects in those regions.

Hong Kong SAR

Despite the ongoing disruption caused by Covid-19 and the related restrictions, Hong Kong and the Hong Kong International Arbitration Centre (HKIAC) continue to be a popular seat and venue for arbitrating construction, infrastructure and energy disputes arising from projects in the Asia Pacific region, and parties from abroad are likely to feel more confident about litigating and arbitrating in Hong Kong now that the majority of Covid-19 restrictions have been relaxed before the end of 2022.

In terms of legislative developments, the most significant one in the past year was undoubtedly the enactment of the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645), which implemented the Mutual Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region signed in 2019. The new legislation will come into force in or around mid-2023 once the implementation mechanism is in place.

The significance of this legislation cannot be overstated, as most civil and commercial judgments (both monetary and non-monetary) will be reciprocally enforceable in Hong Kong and Mainland China, subject only to limited exceptions (such as insolvency, matrimonial and family matters). This may well influence more parties to opt for Hong Kong as the choice of forum for bringing future legal proceedings, either to resolve a substantive dispute or to enforce arbitral awards against parties who are based in Mainland China.

In addition to the above, there were three particular decisions in the Hong Kong courts which are worth noting from the past year, as they illustrate the courts' approach to a number of issues which commonly arise in litigations and arbitrations relating to construction, infrastructure and energy disputes.

First, in *Employer v Consultant* and *Employer v Contractor A and Others* and *Contractor A v Subcontractor*,[194] which arose from a dispute relating to the design and construction of a bridge, the Hong Kong Court of First Instance had to consider an application by the Employer to consolidate its arbitration against the Consultant (Arbitration 1) with the arbitration between the Employer and the various Contractors (Arbitration 2) and the arbitration between Contractor A and its Sub-contractor (Arbitration 3), the latter two of which had already been consolidated by consent.

The application was made under section 2 of Schedule 2 of the Arbitration Ordinance (Cap 609), on the ground that there were common questions of law and fact in the arbitrations, that the rights to relief claimed were in respect of or arose out of the same transaction or series of transactions, and that it was desirable to make an order for consolidation. The key question was whether the consultancy agreement provided that Arbitration 1 was a domestic arbitration, such that Schedule 2 of the Arbitration Ordinance could apply by virtue of section 100(a) of that Ordinance.

Mimmie Chan J found that section 100(a) of the Ordinance did not require an express provision to that effect, such that an implied provision or term would equally suffice, and this was not inconsistent with the legislative intent of permitting the construction industry to retain the use and benefit of the domestic arbitration regime.[195] The court therefore had to consider whether the consultancy agreement contained the requisite provision by implication.

> This is indicative of the pragmatic approach of the Hong Kong courts in encouraging parties in related disputes to resolve all their disputes in the same forum, as that is likely to be more efficient and cost-effective

Although the HKIAC Domestic Arbitration Rules 1993 (which were expressly adopted by the consultancy agreement) could be applied to both domestic and international arbitrations, the judge was satisfied that

194 [2022] HKCFI 887.
195 Ibid, at paras 13 to 17.

the parties intended the arbitration to be domestic, for at the time of contract, section 100 was not in existence, and the arbitration agreement was domestic by operation of the law, without the need to make any specification or provision for the agreement and arbitration to be domestic.[196] Moreover, the HKIAC's domestic rules were intended for use in domestic arbitrations and not intended for international arbitrations.[197]

The judge therefore had the power to and did indeed order the consolidation of Arbitration 1 with Arbitrations 2 and 3, noting that "[t]he entire dispute is complex, multilayered but intertwined, and it is necessary for the arbitrator to be able to manage the claims and the dispute under one ceiling or reference, in a consolidated arbitration".[198] This is indicative of the pragmatic approach of the Hong Kong courts in encouraging parties in related disputes to resolve all their disputes in the same forum, as that is likely to be more efficient and cost-effective.

Secondly, in *Hip Hing Construction Company Ltd v Hong Kong Airlines Ltd*,[199] which related to the construction of the construction of the Hong Kong Airlines Aviation Training Centre at Chep Lap Kok, the plaintiff/contractor sought summary judgment against the defendant/employer for the outstanding contract sum which was not in dispute. The question was whether the defendant's set-off/counterclaim was sufficiently arguable and substantial to resist summary judgment.

Although Anthony Chan J found that the defendant's set-off/counterclaim in respect of alleged leakages was arguable,[200] he observed that the defendant had "failed to condescend to details as to how the figure of HK$212 million was calculated" for the proposed remedial works for the leakages,[201] and the breakdown for the HK$40 million claim for costs of alternative training abroad was not explained at all.[202] As for the proposed remedial works for other defects, the cost estimates were "all lump-sum items with no particulars or breakdowns".[203]

In the event, the judge granted summary judgment to the plaintiff, save for the sum of HK$21 million which reflected the estimated remedial costs submitted by the plaintiff based on a quantity surveying expert's report.[204] This decision provides a salutary reminder to parties both here and abroad about the importance of properly particularising the quantum of one's claims/counterclaims. A failure to do so can lead to a statement of case being struck out in extreme cases, although this is less likely in the context of an arbitration. Nevertheless, the other party may still be able to take advantage of the lack of particularisation in order to obtain interim measures such as a partial interim payment or security for costs, and these are also risks which can and should be guarded against.

This decision provides a salutary reminder to parties both here and abroad about the importance of properly particularising the quantum of one's claims/counterclaims. A failure to do so can lead to a statement of case being struck out in extreme cases, although this is less likely in the context of an arbitration

Thirdly, the Hong Kong Court of Appeal considered whether a partial arbitral award should be set aside for lack of jurisdiction in *C v D*,[205] on grounds that the claimant failed to comply with a multi-tier dispute resolution procedure (the referral of disputes to the chief executive officers for resolution by negotiation) which operated as a condition precedent to arbitration proceedings.

Chow JA considered the case law in various common law jurisdictions,[206] including the recent English authorities of *Republic of Sierra Leone v SL Mining Ltd*[207] and *NWA and Another v NVF and Others,*[208] and then noted the similar distinction between issues of admissibility and issues of jurisdiction which had already been recognised by the Hong Kong Court of First Instance in *Kinli Civil Engineering Ltd v Geotech Engineering Ltd*[209] and *T v B.*[210] This was also

196 Ibid, at para 34.
197 Ibid, at para 35.
198 Ibid, at para 40.
199 [2022] HKCFI 622.
200 Ibid, at para 31.
201 Ibid, at para 33.
202 Ibid, at para 37.
203 Ibid, at para 38.
204 Ibid, at para 39.
205 [2022] HKCA 729; [2022] Lloyd's Rep Plus 104.
206 Ibid, at paras 29 to 41.
207 [2021] EWHC 286 (Comm); [2022] 2 Lloyd's Rep 458.
208 [2021] EWHC 2666 (Comm); [2022] 1 Lloyd's Rep 629.
209 [2021] HKCFI 2503.
210 [2021] HKCFI 3645.

consistent with a substantial body of academic writings,[211] and the judge considered that "[t]here is … much to be said for recognising the distinction between admissibility and jurisdiction for the purpose of Article 34(2)(a)(iii)".[212]

> It is envisaged that the specialism of English construction lawyers in adjudication matters may be of great value in Hong Kong in the coming years, and there will be increasing room for cross-fertilisation in terms of case law and lessons learned

The judge then observed that "[t]he true and proper question to ask is whether it is the parties' intention (or agreement) that the question of fulfilment of the condition precedent is to be determined by the arbitral tribunal, and thus falls "within the terms of the submission to arbitration" under Article 34(2)(a)(iii)", and "[t]here is no reason in either principle or logic why such a dispute must necessarily be outside the scope of the arbitration agreement, or be regarded as jurisdictional in nature".

In light of the nature of the alleged breach of the multi-tier dispute resolution provision, the judge concluded that the objection clearly went to admissibility only, as it was "targeted 'at the claim' instead of 'at the tribunal'".[213] The approach of the Hong Kong courts is entirely consistent with the weight of the recent authorities in various jurisdictions, and discourages parties from trying to circumvent an arbitration agreement by relying on technical breaches of a multi-tier dispute resolution clause. It is also a good example of how a comparative analysis of authorities from different jurisdictions can be very fruitful in respect of arbitration-related questions.

Finally, it bears noting that there is increasing interest within Hong Kong's construction circles in English authorities regarding adjudications, ever since the Hong Kong Government's Development Bureau issued Technical Circular (Works) No 6/2021[214] which contained, inter alia, the mandatory incorporation of security of payment and adjudication provisions into all public works contracts. It is envisaged that the specialism of English construction lawyers in adjudication matters may be of great value in Hong Kong in the coming years, and there will be increasing room for cross-fertilisation in terms of case law and lessons learned.

211 *C v D*, at para 42.
212 Ibid, at para 46.
213 Ibid, at para 60.
214 See https://www.devb.gov.hk/filemanager/technicalcirculars/en/upload/386/1/C-2021-06-01.pdf.

Singapore

Singapore has similarly continued to be a hugely popular seat and venue for cross-border arbitrations, particularly for parties and projects based in Southeast Asia, no doubt thanks to the well-established pro-arbitration approach of the Singapore courts and the continuing excellence of the Singapore International Arbitration Centre (SIAC).

The pragmatic and pro-arbitration approach of the Singapore courts is illustrated in a number of decisions from 2022 arising from purported challenges to the enforcement of arbitral awards. First, in *Shanghai Xinan Screenwall Building & Decoration Co Ltd v Great Wall Technology Aluminium Industry Pte Ltd*,[215] the parties' arbitration agreements provided that disputes should be submitted to the "China International Arbitration Centre" for resolution. The named institution, however, did not exist, and the question for the Singapore High Court was whether this meant that the arbitration agreements were void because Articles 16 and 18 of the Arbitration Law of the People's Republic of China mandated the selection of an arbitral institution. It is noteworthy, however, that no application was made to the China International Economic and Trade Arbitration Commission (CIETAC) at the time to challenge the jurisdiction of tribunal appointed.[216]

Philip Jeyaretnam J considered that whether the contracts did indeed select an arbitral institution, and whether that arbitral institution was CIETAC, was a matter of construction,[217] and an arbitration agreement is to be construed like any other commercial agreement, with a view to striving to make an arbitration clause effective and workable.[218] After considering the other potential Chinese arbitral institutions, the judge concluded that the parties in fact agreed on CIETAC, as none of the others were realistic alternatives:

> "Parties did not adopt the official name or designation of CIETAC in the arbitration agreements. However, this does not mean that they did not express the common intention to choose CIETAC as the arbitral institution. … parties used the first two words in CIETAC's name, namely 'China' and 'International'. They also used another word contained in CIETAC's name, namely 'Arbitration'. …"[219]

[215] [2022] SGHC 58.
[216] Ibid, at para 44.
[217] Ibid, at para 43.
[218] Ibid, at para 47.
[219] Ibid, at para 49.

The Singapore courts will clearly have no sympathy with technical and opportunistic arguments based on obvious mistakes or infelicities in the drafting of an arbitration clause, especially where it is sufficiently clear what the parties have intended and agreed. This approach will no doubt be welcomed by parties seeking to enforce arbitral awards in Singapore, although it is also important to remember the need for clarity in arbitration clauses if similar disputes are to be avoided in the future.

Another widely discussed arbitration-related decision from 2022 is *CEF and Another v CEH*,[220] which related to the development of a steel-making plant in Malaysia. The appellants were contracted to design and build the plant for the respondent, but the project was delayed and the plant failed to achieve its production targets, and the respondent sought to terminate the contract.

The Singapore courts will clearly have no sympathy with technical and opportunistic arguments based on obvious mistakes or infelicities in the drafting of an arbitration clause, especially where it is sufficiently clear what the parties have intended and agreed

The arbitral tribunal found that the respondent was entitled to rescind the contract due to misrepresentations, and they made three orders, namely: (i) a repayment order requiring the appellants to pay back the contract price for the works, less two loans extended to the respondent and the respondent's use of and diminution in value of the plant; (ii) a transfer order requiring the respondent to transfer the title of the plant to the appellants; and (iii) a damages order requiring the appellants to pay the respondent a sum of RM$176,245,250.

The Singapore Court of Appeal only partially set aside the arbitral award. The court was not persuaded that the transfer order was made in breach of natural justice or without giving the appellants an opportunity to present their case, as the transfer of title to effect a counter-restitution in specie was a live issue throughout the

[220] [2022] SGCA 54.

arbitration,[221] and the appellants simply chose to conduct their case without addressing that possibility.[222]

Similarly, the court refused to set aside the repayment order, because the diminution in value of the plant was again a live issue in the arbitration as demonstrated by the parties' pleadings, and the appellants bore the burden of prove but failed to adduce any evidence.[223] Further, the court rejected the so-called "no evidence rule" adopted in Australia and New Zealand, which would mean that any findings of fact with no evidential basis is liable to be set aside – this was held not to be part of Singapore law as it would otherwise "run contrary to the policy of minimal curial intervention in arbitral proceedings".[224]

However, the court did set aside the damages order on the basis of the "fair hearing rule", as the appellants' natural justice rights were prejudiced by the award. The arbitral tribunal adopted what was called a "flexible approach" to the quantum, by awarding the respondent an arbitrary 25 per cent of each head of reliance loss in the absence of sufficient supporting evidence. This was not an approach which was raised with the parties before the award.

In the court's view, "the Tribunal's chain of reasoning in respect of the Damages Order was not one which the parties had reasonable notice that the Tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments",[225] as the parties would have expected the tribunal to award only sums which could be proven.[226] Moreover, the authority relied on by the tribunal was only cited in the respondent's reply post-hearing submissions for a different proposition (ie that the tribunal needed to be satisfied that the quantum was more likely than not to be true).[227]

The *CEF* decision continues to set a high bar for a party to successfully set aside an arbitral award on grounds of breach of natural justice. Although some may see the *CEF* decision as interventionist and sailing dangerously close to the "no evidence rule" due to its conclusions on the damages order, that would be overly alarmist. The circumstances of the damage order were quite extreme, and the parties have not been given a fair opportunity to address the tribunal's proposed approach in the event that it concluded that the losses claimed were all insufficiently evidenced. All of this could have been avoided had the tribunal properly invited comments from the parties on this point during closing submissions, or in correspondence at any time before issuing the award. This is an important practice point for arbitrators both in Singapore and the rest of the world.

> These and other decisions of the Singapore courts have continued to provide a helpful point of comparison against English cases on similar issues, and they also serve to fill gaps in the English authorities where important construction law issues have not been the subject of recent judicial treatment

Apart from arbitration-related decisions, the Singapore courts have also delivered a number of instructive decisions on substantive contractual issues in construction disputes, some of which have already been discussed above. Another example is the case of *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd*,[228] where the Singapore High Court had to consider, inter alia, the extent to which the terms of a main contract were incorporated into a subcontract for electrical works by virtue of a "back-to-back" clause.

Kwek Mean Luck J observed that "it would only be the terms of the Main Contract that were within the general appreciation and knowledge of the parties, that could be incorporated by the back-to-back clause".[229] In other words, one could not simply assume that all the terms of a main contract had necessarily or automatically been incorporated. On the facts, the back-to-back clause in the revised quotation could not have had such an effect, since the defendant had not even seen the main contract at the time, and there was no indication that the main contract terms were accepted wholesale.[230]

On the evidence, the judge found that only the contract price and work scope of the main contract were within the general application and knowledge of the parties,

221 Ibid, at para 72.
222 Ibid, at para 81.
223 Ibid, at paras 97 to 99.
224 Ibid, at paras 101 and 102.
225 Ibid, at para 116.
226 Ibid, at para 117.
227 Ibid, at para 119.
228 [2022] SGHC 221.
229 Ibid, at para 24.
230 Ibid, at para 64.

especially since the defendant specifically relied on the overall contract price and price breakdown for its progress claims.[231] The other contended terms were not incorporated, as the evidence shows that the parties did not and could not reasonably have reached agreement on those terms.[232] This aptly illustrates the importance of analysing the parties' correspondence at and around the time of contract, in order to shed light on what the parties did or did not intend to incorporate into the contract.

These and other decisions of the Singapore courts have continued to provide a helpful point of comparison against English cases on similar issues, and they also serve to fill gaps in the English authorities where important construction law issues have not been the subject of recent judicial treatment. It is therefore no surprise that decisions of the Singapore courts are often cited in English courts and international arbitrations, and there is much to be gained from keeping abreast of developments in the Singaporean case law.

UAE

Turning to the Middle East, 2022 saw a number of notable developments in the arbitration scene in Dubai, after the DIFC-LCIA was abolished by Dubai Decree No 34 of 2021 in September 2021. In a joint press release on 28 March 2022, the Dubai International Arbitration Centre (DIAC) announced that the LCIA will administer all existing cases commenced and registered under the DIFC-LCIA on or before 20 March 2022 from London. Proceedings commenced on or after 21 March 2022 based on the DIFC-LCIA rules (and also cases commenced before then but not registered with DIFC-LCIA), will be registered and administered by the DIAC instead.

The above changes were implemented in conjunction with the introduction of the new DIAC Arbitration Rules 2022, which will apply to all arbitrations referred to the DIAC on or after 21 March 2022 (including those commenced by reference to the DIFC-LCIA Rules on or after that date). The new features of the DIAC Rules 2022 include the following:

- The default seat of arbitration is the DIFC unless otherwise specified by the parties, and the DIFC would have supervisory jurisdiction over arbitrations conducted under the new rules.
- A party can now submit a single request for arbitration in respect of claims arising out of multiple arbitration agreements, provided all parties agree to such consolidation or the tribunal so orders. Multiple arbitrations can also be consolidated into a single arbitration.
- Third parties can now be joined to existing arbitrations, again provided all parties agree to the joinder or the tribunal so orders on the basis that the third party may be a party to the arbitration agreement referred to in the request for arbitration.
- There can be expedited proceedings where the sums claimed/counterclaimed are no more than AED 1,000,000 (exclusive of interest and legal costs), if the parties agree in writing, or in cases of exceptional urgency. Parties can also apply for the appointment of an emergency arbitrator to obtain urgent interim measures.
- Legal fees are now expressly recoverable and can be awarded by an arbitral tribunal (in the light of a number of previous Dubai Court decisions annulling awards of costs).

The DIAC Rules 2022 reflect international good practice in modern arbitrations and will no doubt be welcomed by parties and their legal representatives. This, together with the transitional arrangements for ongoing arbitration proceedings commenced before 21 March 2022, is likely to provide increased confidence in the DIAC as an arbitral institution going forward, after the initial confusion arising from the abolition of the DIFC-LCIA.

In addition, the DIFC Courts have produced some instructive precedents over the past year, some of which have arisen from construction disputes and will be of interest to parties that are (or will be) involved in disputes in the region. First, in *Ledger v Leeor*,[233] the dispute concerned a contract for the construction of a 123-storey residential building in Dubai, which contained an arbitration clause referring to the DIFC-LCIA Rules and Dubai as the place of arbitration. Leeor, the contractor, commenced proceedings in the Dubai Court of First Instance, and Ledger applied to the DIFC Court for an anti-suit injunction.

Justice Michael Black observed that where there is an issue as to whether there is an agreement to arbitrate in the DIFC, it is necessary to demonstrate "a high degree of probability" that there is such an agreement[234] and if so, the *American Cyanamid* test for granting injunctions would be satisfied.[235]

231 Ibid, at para 67.
232 Ibid, at paras 70 to 76.
233 [2022] DIFC ARB-016.
234 Ibid, at para 40.
235 Ibid, at para 42.

The judge rejected the application in the end, as he was not satisfied that there was the requisite degree of probability, and in fact, the contract specified UAE law and Dubai law as the law of the arbitration agreement, which "could not realistically be interpreted as anything other than UAE Federal Law as modified or applied in Dubai".[236] Moreover, the reference to Dubai as the place of arbitration was at least as likely to be a reference to both the seat and the venue.[237] An attempt by Ledger to appeal to the DIFC Court of Appeal was also dismissed.[238]

It is clear, therefore, that there is a high threshold for the DIFC to exercise its jurisdiction to grant an anti-suit injunction against the Dubai Courts in favour of an arbitration, no doubt because it concerns judicial comity between the two court systems of Dubai. Whilst the DIFC Court may intervene in exceptional circumstances where there is a clear connection between the DIFC and the parties, property or transaction in question, that will be the exception rather than the rule. Ultimately, this is a timely reminder of the importance of clarity in arbitration clauses, and if parties intend the seat to be the DIFC, there is no substitute for saying so expressly.

Moving into substantive construction disputes, the DIFC Court's Technology and Construction Division handed down its first major judgment in September 2022 in *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC*,[239] which arose from the construction of a residential building in Dubai. The building contract was based on the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1999.

The dispute was primarily about delays on the project, with the employer claiming substantial liquidated damages and also general damages for further losses post-termination, such as lost sales income due to a diminution in value. The contractor counterclaimed for outstanding payments, sums paid out under a bond, and also prolongation costs.

Field J found that the contract was validly terminated by reference to the contractor's abandonment of the works, as a reasonable person knowing the background to the letter of termination would have well understood that the termination was not only by reason of the maximum amount of delay damages having been exhausted (as per sub-clause 15.2 of the contract) but also on the ground that the contractor had abandoned the works and the breach was considered to be irremediable.[240] He went on, however, to reject the bulk of the employer's claims, finding that it had caused the majority of the delays on the project after a detailed analysis of the delay experts' evidence.

There was also an interesting point of contractual interpretation, as the contract provided that the liquidated damages were without prejudice to the employer's entitlement to bring a general damages claim. The judge found this to be a difficult issue, but concluded in the end that "Sub-Clause 8.7 is concerned with delays occurring pre-termination even though they may result in a loss that only crystallises post termination", and "that the exclusionary words, read in context, contemplate claims for loss that does not result from delay pre-termination and claims for loss that results from delay that occurred post termination".[241] This meant that the employer was in any event not entitled to recover any lost sales income due to pre-termination delays.

Having rejected the employer's claims, the judge also refused to grant the extensions of time and prolongation costs sought by the contractor, and this turned on the effect of the notice requirements. The judge observed that the principle of good faith under the DIFC Contract Law did not preclude the employer from relying on the contractually agreed time-bars.[242] He also refused to follow the controversial *Gaymark* principle,[243] and preferred the approach of the TCC in *Multiplex Construction v Honeywell Control Systems.*[244]

The *Panther* decision in the DIFC Court adds to the rich depository of cross-jurisdictional jurisprudence on important construction law issues, and the fact that is heavily grounded in English law principles and authorities makes it a helpful reference point not just for disputes in the DIFC courts, but also TCC litigation in the UK and international arbitrations. One can expect to see more interesting judgments such as this in the years to come, and indeed, there is a pending appeal against some of Field J's findings in *Panther*, which will most likely be ripe for further discussion in next year's review.

236 Ibid, at para 44.
237 Ibid, at para 46.
238 [2022] DIFC CA 013.
239 [2019] DIFC TCD 003.
240 Ibid, at paras 77 to 81.
241 Ibid, at para 97.
242 Ibid, at para 71.
243 Ibid, at para 72.
244 [2007] EWHC 744 (TCC); [2007] BLR 195.

Concluding observations

The year 2022 will go down in history as a particularly memorable one for those within the construction, infrastructure and energy industry, primarily because of the enactment of the Building Safety Act 2022 and other related regulatory changes which have radically changed the legal landscape and risk profile of past and ongoing projects. It will also be remembered as the year of many significant (and very detailed) judgments from the TCC, most notably in *Martlet Homes* on disputes relating to fire safety defects, and in *Energy Works* on the challenges of designing and constructing power plants based on developing technology such as the gasification of municipal waste.

Despite the lingering effects of the Covid-19 pandemic, it is clear that judicial activity in the UK has not been damped in the slightest when it comes to disputes regarding construction, infrastructure and energy projects, and this has also extended to the courts of other jurisdictions such as Hong Kong, Singapore and Dubai. While the past year has seen the fulfilment of many of the judicial and legislative developments foreshadowed back in 2021, this is by no means the end of the narrative. Quite the contrary, in the grand and age-old tradition of the common law, the law will surely continue to grow and evolve in the year ahead, bringing with it fresh perspectives on problems old and new.

As already mentioned above, a number of decisions noted in this review are currently pending appeals. This includes *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* on the applicability of the statutory adjudication provisions to a post-completion collateral warranty,[245] for which the Supreme Court has granted permission to appeal. Depending on when the hearing is listed, it is possible that the Supreme Court's judgment will be handed down before the end of 2023.

The TCC's decision in *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd and Another*[246] has now been affirmed in a Court of Appeal decision handed down on 17 March 2023, which will be considered in more detail in the next annual review. This will be of wider relevance to many within the industry, given the prevalence of multi-tier dispute resolution clauses in modern building and engineering contracts. Parties and practitioners will undoubtedly welcome some further clarification on the principles relevant to the question of certainty and enforceability, especially since Joanna Smith J expressly disagreed with some of O'Farrell J's reasoning in the previous *Ohpen*[247] decision. Again, it is likely that the Court of Appeal will hand down its decision before the end of 2023.

Turning back to issues relating to cladding and fire safety defects, the Grenfell Tower Inquiry hearings (which have been the subject of previous reviews) finally came to a close in November 2022 after 400 days of evidence and circa 320,000 disclosed documents. Sir Martin Moore-Bick is now in the process of digesting the Phase 2 evidence and preparing a final report of his findings, although there is no estimated arrival date for the report just yet. This is something to keep an eye out for, as the report will cover a whole range of regulatory and professional issues, which will be highly relevant to those currently involved in disputes regarding cladding and fire safety defects (especially if the disputes concern materials similar to those used in Grenfell Tower).

Parties and practitioners will undoubtedly welcome some further clarification on the principles relevant to the question of certainty and enforceability, especially since Joanna Smith J expressly disagreed with some of O'Farrell J's reasoning in the previous *Ohpen* decision

On the legislative front, with the key provisions of the BSA now in force, there is still the lingering question of the effect of section 38 of the Building Act 1984, which the government has previously committed to bring into force in order to impose civil liability on a person who commits a breach of a duty imposed by building regulations. Once this has been done, there will be an additional string to the bow of claimants who are seeking to pursue contractors for defective works which fail to comply with the building regulations, although this may only apply prospectively

245 [2022] EWCA Civ 823; [2022] BLR 433.
246 [2022] EWHC 1595 (TCC); (2022) CILL 4747; affirmed in [2023] EWCA Civ 292.
247 [2019] EWHC 2246 (TCC); [2019] BLR 576.

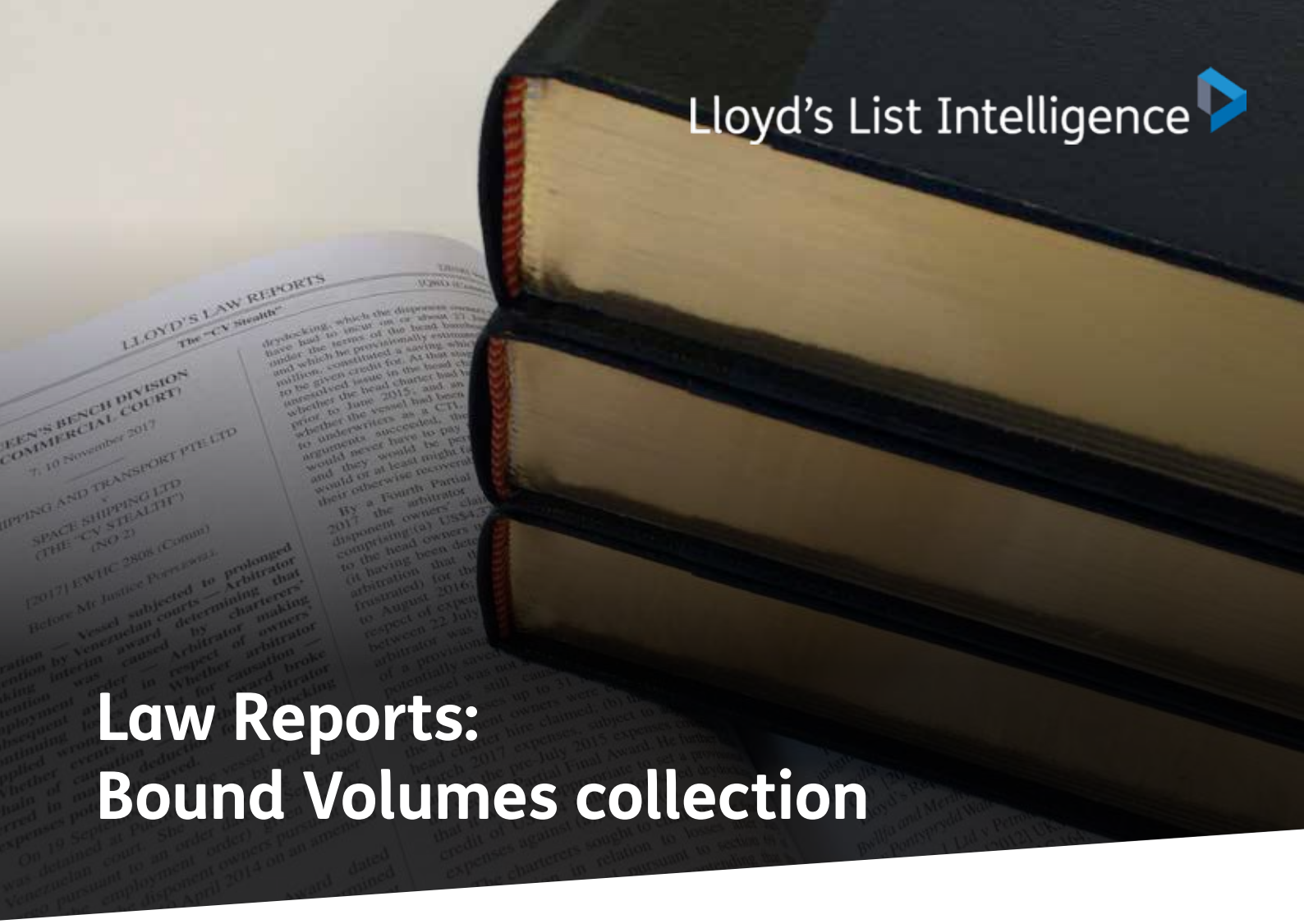
to breaches occurring after the commencement of section 38.[248] This is certainly something to pay close attention to, as a commencement order can theoretically land at any moment without much (if any) prior warning.

> There is still the lingering question of the effect of section 38 of the Building Act 1984, which the government has previously committed to bring into force in order to impose civil liability on a person who commits a breach of a duty imposed by building regulations

Finally, it is worth noting the Law Commission's recent consultation on proposed reforms to the Arbitration Act 1996, which concluded in December 2022. The consultation raised some important issues for consideration, such as the need for a separate duty of independence for arbitrators, the potential addition of a power to summarily dispose of issues or claims, and the court's jurisdiction to make orders against third parties to an arbitration agreement. On the other hand, there were some conspicuous gaps in the topics covered, such as the absence of any discussion on litigation funding. The Law Commission's formal recommendations are expected in mid-2023, and it will be interesting to see whether the government decides to implement any of those recommendations.

All in all, the year of 2022 has been one of recovery and renewal, as the world emerged from the shadows of the Covid-19 pandemic and returned to the normal current of life. Whilst we will all continue to grapple with various legal, political and economic problems in the weeks and months ahead, there is ample cause for optimism, if one simply looks back at the previous years and the way in which the industry and the law have always risen to meet brand new challenges at record pace. The defining feature of continued success is not the absence of problems, but the ability to find the right solutions at the right time. That is what the law and the machinery of justice seek to achieve. As long as we keep aspiring to that objective, there will continue to be an ever-growing body of case law and learning that will help guide the industry along the way.

[248] See eg Lord Rodger's discussion of retroactive legislation in *Wilson and Others v Secretary of State for Trade and Industry* [2003] UKHL 40, at paras 186 to 192.



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APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2022 judgments analysed

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP [2022] EWCA Civ 823; [2022] BLR 433

Advance JV (A joint venture between Balfour Beatty Group Ltd and MWH Treatment Ltd) v Enisca Ltd [2022] EWHC 1152 (TCC); [2022] BLR 605

Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 936 (TCC); [2022] BLR 355

Bilton and Johnson (Building) Co Ltd v Three Rivers Property Investments Ltd [2022] EWHC 53 (TCC); (2022) CILL 4661

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC); [2022] BLR 528

C v D [2022] HKCA 729; [2022] Lloyd's Rep Plus 104

Candey Ltd v Bosheh and Another [2022] EWCA Civ 1103

CEF and Another v CEH [2022] SGCA 54

Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd and Another [2022] EWHC 1595 (TCC); (2022) CILL 4747

DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd [2022] SGHC 221

Employer v Consultant and *Employer v Contractor A and Others* and *Contractor A v Subcontractor* [2022] HKCFI 887

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others [2022] EWHC 3275 (TCC); (2022) CILL 4773

Essential Living (Greenwich) Ltd v Elements (Europe) Ltd [2022] EWHC 1400 (TCC); [2022] BLR 473

Hip Hing Construction Company Ltd v Hong Kong Airlines Ltd [2022] HKCFI 622

Hirst and Another v Dunbar and Others [2022] EWHC 41 (TCC)

John Graham Construction Ltd v Tecnicas Reunidas UK Ltd [2022] EWHC 155 (TCC); [2022] BLR 402

Ledger v Leeo [2022] DIFC ARB-016

Levi Solicitors LLP v Wilson and Another [2022] EWHC 24 (TCC)

Liverpool City Council v Vital Infrastructure Asset Management (Viam) Ltd (in administration) [2022] EWHC 1235 (TCC); [2022] BLR 619

Lumley v Foster & Co Group Ltd and Others [2022] EWHC 54 (TCC)

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813 (TCC); (2022) CILL 4729

ML Hart Builders Ltd (in liquidation) v Swiss Cottage Properties Ltd [2022] EWHC 1465 (TCC)

Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC [2019] DIFC TCD 003

Ser Kim Koi v GTMS Construction Pte Ltd and Other [2022] SGHC(A) 34

Shanghai Xinan Screenwall Building & Decoration Co Ltd v Great Wall Technology Aluminium Industry Pte Ltd [2022] SGHC 58

Solutions 4 North Tyneside Ltd v Galliford Try Building 2014 Ltd [2022] EWHC 2372 (TCC)

Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd [2022] EWCA Civ 153; [2022] BLR 268

The Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC); (2022) 39 BLM 02 10

Thio Keng Thay v Sandy Island Pte Ltd [2022] SGHC 69

Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC); (2022) CILL 4762

Van Oord UK Ltd v Dragados UK Ltd [2022] CSOH 30; [2022] BLR 373

Judgments considered

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm); [2011] BLR 384

Arnold v Britton and Others [2015] UKSC 36; (2015) 32 BLM 07 6

Bates v Post Office (No 3) [2019] EWHC 606 (QB); (2019) CILL 4313

British Glanzstoff Manufacturing Co Ltd v General Accident, Fire & Life Assurance Corp Ltd [1913] AC 143

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

Davies & Davies Associates Ltd v Steve Ward Services (UK) Ltd 2021] EWHC 1337 (TCC); [2021] BLR 542

De Beers UK Ltd (Formerly The Diamond Trading Co Ltd) v Atos Origin IT Services Ltd [2010] EWHC 3276 (TCC); [2011] BLR 274

DSVG Façade Ltd v Conneely Façades Ltd [2018] EWHC 4005 (TCC)

Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC); [2021] BLR 687

Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 1581 (TCC)

Global Switch Estates 1 Ltd v Sudlows Ltd [2020] EWHC 3314 (TCC); [2021] BLR 111

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

Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC); [2015] BLR 704

Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814; [2005] BLR 437

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 33

Hitachi Zosen Inova AG v John Sisk & Son Ltd [2019] EWHC 495 (TCC); (2019) CILL 4302

Jawaby Property Investment Ltd v The Interiors Group Ltd [2016] EWHC 557 (TCC); [2016] BLR 328

Jerram Falkus Construction Ltd v Fenice Investments Inc (No 4) [2011] EWHC 1935 (TCC); [2011] BLR 644

Kinli Civil Engineering Ltd v Geotech Engineering Ltd [2021] HKCFI 2503

Mailbox (Birmingham) Ltd v Galliford Try Building Ltd (formerly known as Galliford Try Construction Ltd) [2017] EWHC 1405 (TCC); [2017] BLR 443

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest) [2013] EWCA Civ 200; [2013] BLR 265

Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd (1973) 71 LGR 162

MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494

Multiplex Construction v Honeywell Control Systems [2007] EWHC 744 (TCC); [2007] BLR 195

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

NWA and Another v NVF and Others [2021] EWHC 2666 (Comm); [2022] 1 Lloyd's Rep 629

Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC); [2019] BLR 576

Optimus Build Ltd v Southall [2020] EWHC 3389 (TCC)

Pakistan International Airline Corp v Times Travel (UK) Ltd [2021] UKSC 40; (2021) 38 BLM 09 1

Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd [2013] EWHC 2665 (TCC); [2013] BLR 589

Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm); [2022] 2 Lloyd's Rep 458

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

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC); [2017] BLR 189

T v B [2021] HKCFI 3645

Toppan Holdings Ltd and Another v Simply Construct (UK) LLP [2021] EWHC 2110 (TCC); [2021] BLR 705

Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29; [2021] BLR 555

Van Oord UK Ltd v Dragados UK Ltd [2021] CSIH 50; (2021) 38 BLM 10 8

Walter Lilly & Co Ltd v Mackay and Another [2012] EWHC 1773 (TCC); [2012] BLR 503

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

Yam Seng Pte (a company registered in Singapore) v International Trade Corp [2013] EWHC 111 (QB); [2013] BLR 147