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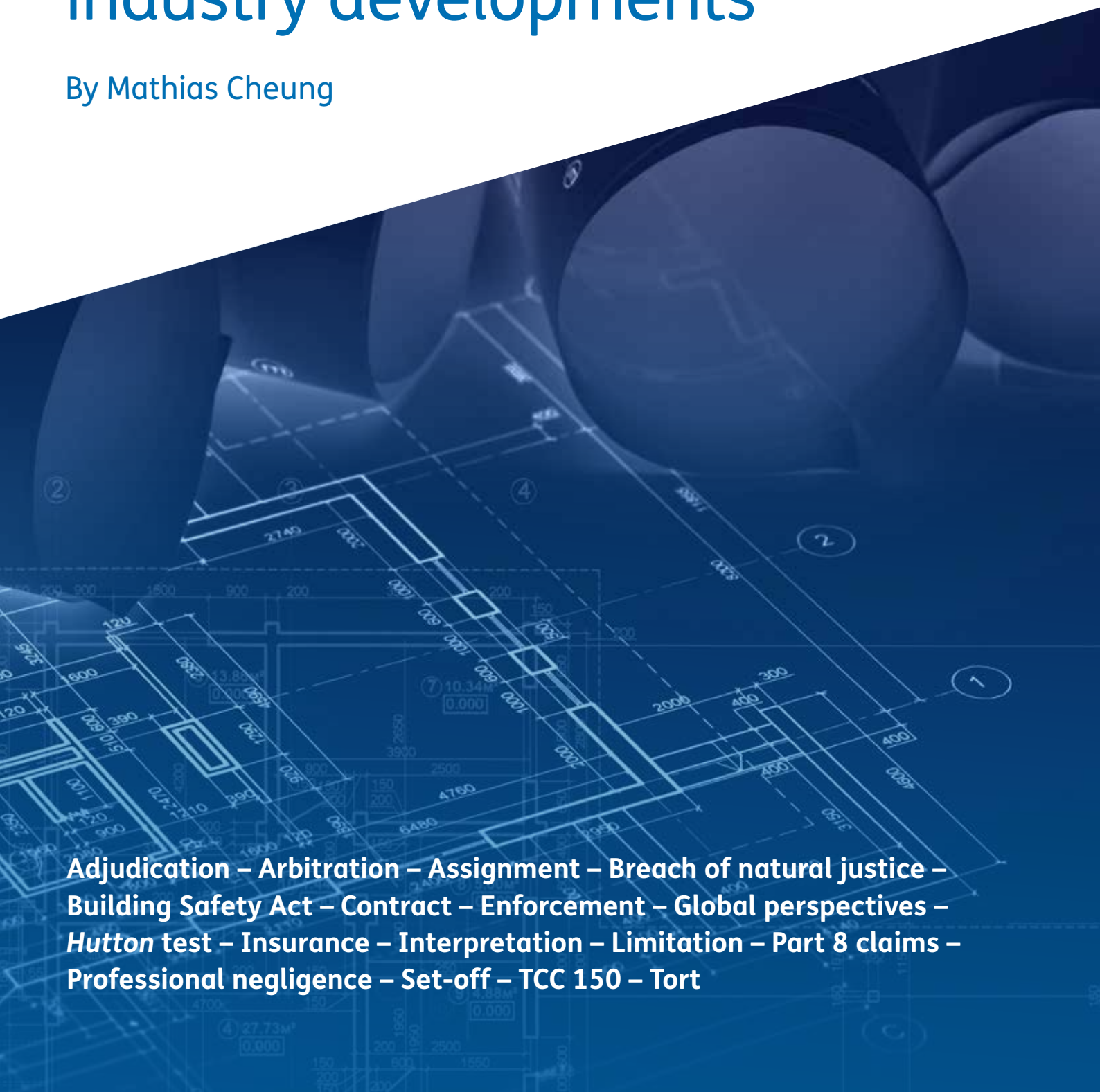
Construction law in 2023: a review of key legal and industry developments

By Mathias Cheung



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Mathias is ranked as a leading junior in Construction and Energy in Chambers & Partners (UK and Global) and Legal 500 (London Bar and Asia Pacific) and has been described as "head and shoulders one of the best juniors at the Bar" and "an absolute superstar". He is also the winner of the SCL Hudson Prize 2015 for his essay entitled "Shylock's Construction Law: The Brave New Life of Liquidated Damages?" and has been published in a number of journals including *The International Construction Law Review*.

Construction law in 2023: a review of key legal and industry developments

By Mathias Cheung

The year 2023 was a particularly special one for construction practitioners in the UK, not least because it was the 150th anniversary of the Technology and Construction Court (TCC). To match the significance of this occasion, there has been a string of important case law emerging from the courts which is sure to have broader ramifications for construction disputes generally. This article celebrates this momentous year by providing a concise overview of the most recent developments in the ever-evolving legal landscape both in the UK and abroad.

150 years of the TCC

Last year saw the industry-wide celebration of the 150th anniversary of the TCC (TCC 150). In substance, it was a celebration not just of the procedural and structural evolution of the TCC within the wider civil justice system, but also a nod to the repository of legal learning and authorities accumulated and handed down through the years in relation to construction, infrastructure, energy and information technology disputes. Very few (if any) jurisdictions, whether common or civil law, have so far managed to match the richness of the TCC's case law or the expertise of its judges.

In his speech on the TCC 150, Master of the Rolls Sir Geoffrey Vos noted the TCC's early beginnings as the Official Referees' Court, the great strides it has taken since and its future in the digital age.[1] Although there is still much room for improving the use of technology in the court to ensure that it stays relevant, modern and efficient for its users, Sir Vos was nonetheless optimistic that the TCC will continue in its important role in the years ahead:

> "The TCC has come a long way in the last 150 years. I am confident that the TCC and whole B&PCs [Business and Property Courts] will go from strength to strength in the next 150 years serving the interests of new generations of commercial parties. Those parties will undoubtedly trade and document their trading in very different ways. The TCC will surely accommodate those changes."[2]

Indeed, the vitality of the TCC and its consistent and varied case work are crucial to the continuing development of construction law in the UK, which in turn guides and shapes parties' everyday conduct and practices within the industry. Gaps in the law need to be filled, inconsistencies ironed out and ambiguities clarified in order to provide a stable and certain legal environment in which developers, contractors and construction professionals can operate. For that to happen, the TCC must continue to attract both domestic and international litigants and disputes, so that the court will keep on having the occasion to consider and address the most relevant legal issues.

A case in point is the steady rise of cladding disputes since the Grenfell Tower tragedy in 2017 followed by the sweeping legislative changes which came into force on 28 June 2022 under the Building Safety Act 2022 (BSA). 2023 was the first year of the implementation of the BSA, and the interpretation and application of the Act has already featured in various TCC disputes in the pipeline as well as a Court of Appeal decision which is now pending a further appeal to the Supreme Court. It is fundamental that the TCC and the appellate courts have

[1] Sir Geoffrey Vos MR, "Justice in the Digital Age", Speech on the 150th Anniversary of the Technology and Construction Court, delivered on 2 November 2023, at para 1, www.judiciary.uk/speech-by-the-master-of-the-rolls-justice-in-the-digital-age/.

[2] Ibid, at para 39.

the occasion to resolve important legal questions such as these so that the law does not remain stagnant but constantly adapts to meet the most pressing challenges in the construction, infrastructure and energy industry.

With that in mind, this latest annual review of the key legal developments in 2023 (together with the annual reviews of the previous years)[3] tracks the latest judicial developments and some of the most perceivable trends in construction law, while offering some light commentary on the implications of these recent judgments from an academic or practical perspective.

> It is fundamental that the TCC and the appellate courts have the occasion to resolve important legal questions such as these so that the law does not remain stagnant but constantly adapts to meet the most pressing challenges in the construction, infrastructure and energy industry

To this end, it is encouraging to note that in a lecture last year in Oxford, Lady Justice Carr (previously a TCC judge and now the first Lady Chief Justice) observed that "academics and judges have a constructive dialogue. Academics help judges not only understand what the law is, but also, from a variety of perspectives, what the law should be".[4] It is hoped that this review will form part of that constructive dialogue, as well as the day-to-day conversations among practitioners and stakeholders in the construction, infrastructure and energy industry generally, both in the UK and in other jurisdictions abroad.

[3] See previous annual reviews on i-law.com.

[4] Lady Justice Carr, "'Delicate plants', 'loose cannons' or 'a marriage of true minds'? The Role of Academic Literature in Judicial Decision-Making", Harris Society Annual Lecture, delivered at Keble College, University of Oxford, 16 May 2023, www.judiciary.uk/harris-society-annual-lecture-lady-justice-carr.

Adjudication enforcement

The past year has seen a series of important decisions, both in the TCC and the Court of Appeal, regarding the enforcement of adjudication decisions and the ever-increasing use of Part 8 claims as a means of resisting enforcement. This is testament to the continuing importance of adjudication as a means of alternative dispute resolution (ADR) in construction projects, almost 30 years since the introduction of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA).

A quick survey of the most recent decisions from 2023 discloses not only a continuation of some of the themes which have been explored in previous reviews, but also a number of interesting clarifications of and/or extrapolations from the principles canvassed in a few widely discussed decisions from a few years back, especially on the court's approach to Part 8 claims in the context of adjudication enforcement proceedings, and also the treatment of serial adjudications. It is therefore important for practitioners and industry stakeholders who regularly find themselves dealing with adjudications to bear in mind some of these latest developments.

Part 8 claims for resisting enforcement

Readers who have followed the previous annual reviews and who regularly grapple with adjudication enforcement proceedings will be more than familiar with *Hutton Construction Ltd v Wilson Properties (London) Ltd*,[5] in which Coulson J (as he then was) laid down the three-stage test for determining whether or not a defendant is entitled to resist summary judgment on the basis of a Part 8 claim, in circumstances where there is a dispute between the parties as to whether the issues are suitable for a Part 8 determination:[6]

> "In those circumstances, the defendant must be able to demonstrate that:
>
> (a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;
>
> (b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;

[5] [2017] EWHC 517 (TCC); [2017] BLR 344.

[6] Ibid, at paras 17 and 18.

(c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.

What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document."

Since *Hutton*, the court has applied the above test on various occasions, more often than not concluding that it is inappropriate to grant the substantive final declarations sought in an adjudication enforcement hearing because the issue is not sufficiently self-contained and/or not within one of the categories of cases identified by Coulson J. In practice, courts and parties have sought to apply the *Hutton* test in every case where final declaratory relief is being sought by a defendant in adjudication enforcement proceedings, whether or not a separate Part 8 claim has been commenced.

The general approach in adjudication enforcement applications with a Part 8 element was considered by the Court of Appeal in *A&V Building Solutions Ltd v J&B Hopkins Ltd*,[7] which involved a somewhat unusual set of facts. In that case, the responding party (J&B) commenced pre-emptive Part 8 proceedings against the referring party (A&V) while an interim payment adjudication was still ongoing, seeking declarations as to the invalidity of A&V's payment application and the validity of J&B's payment notice. A&V contended that the Part 8 claim was an impermissible abuse of process.

Coulson LJ began by emphasising that "the guiding principle behind construction adjudication" is "pay now, argue later",[8] and observing that "the TCC became increasingly wary of allowing Part 8 proceedings to be used to circumvent or undermine an ongoing adjudication".[9] This echoes previous warnings from the TCC against using Part 8 proceedings too liberally, which risks creating "ill-formulated and ill-informed decisions" by the court.[10]

Having made those cautionary remarks, Coulson LJ concluded that court proceedings remain open to parties to an adjudication, and that nothing in the HGCRA precludes a party from commencing a competing Part 8 claim during an ongoing adjudication, even though he regretted the "costly decision to set up two competing sets of proceedings".[11] In other words, J&B's conduct did not amount to an abuse of process, even though the Part 8 proceedings would have been redundant had the adjudicator decided in J&B's favour.

In practice, it appears that an early pre-emptive Part 8 claim, even if premature in some respects, is nonetheless more likely to be dealt with at an adjudication enforcement hearing than a late attempt to apply for declaratory relief. This is perhaps unsurprising from a logistical perspective. A late attempt to expand the issues to be dealt with at an enforcement hearing (either by starting a Part 8 claim only after enforcement proceedings are already on foot, or by seeking declarations without commencing Part 8 proceedings) is very likely to derail the process, given that the TCC would typically list a half-day hearing on an expedited basis upon receiving an enforcement application, and this would almost inevitably be insufficient to deal with a further claim for declarations. In contrast, if a pre-emptive Part 8 claim is brought before an enforcement claim, the parties could agree a suitable time estimate in advance and the TCC could list a longer hearing accordingly.

In practice, it appears that an early pre-emptive Part 8 claim, even if premature in some respects, is nonetheless more likely to be dealt with at an adjudication enforcement hearing than a late attempt to apply for declaratory relief

It is noteworthy that in *A&V*, Coulson LJ also reconfirmed that the correct approach in every case is to first determine the adjudication enforcement claim (and consider whether there are any conventional jurisdictional or natural justice grounds for challenging enforcement), before proceeding to address the Part 8 claim at the same hearing to the extent possible.[12] This approach received further judicial approval in *Sleaford Building*

7 [2023] EWCA Civ 54; [2023] BLR 219.
8 Ibid, at para 34.
9 Ibid, at para 36.
10 See eg *Merit Holdings Ltd v Michael J Lonsdale Ltd* [2017] EWHC 2450 (TCC); [2018] BLR 14, at para 22 and *Victory House General Partner Ltd v RGB P&C Ltd* [2018] EWHC 102 (TCC); [2018] BLR 133, at para 6.
11 *A&V*, at para 41.
12 Ibid, at para 38.

Services Ltd v Isoplus Piping Systems Ltd,[13] where Deputy High Court Judge Alexander Nissen KC cited and followed Coulson LJ's dicta in *A&V*.[14]

In *Sleaford*, the judge went on to consider the relevance of the three-stage *Hutton* test where a separate Part 8 claim had been commenced before the Part 7 enforcement proceedings, and where the parties had agreed that the two should be heard together. The judge clarified that in such circumstances, the *Hutton* test does not directly arise, as the court will proceed to make a final determination of the Part 8 claim at the same hearing provided that the questions raised are suitable for the Part 8 procedure (although the question of suitability requires consideration of factors which are analogous to those set out in the *Hutton* test):

> "Accordingly, where, as here, Part 8 proceedings have been issued and, importantly, it has been agreed between the parties that they should be heard together, the correct approach is to consider whether there is any defence to the Part 7 claim (ie as excess of jurisdiction or breach of natural justice) and, then, to go on and sort out the Part 8 claim … This requires an assessment of suitability for Part 8; if suitable, a determination of the merits at the hearing; and consideration of the extent to which the relief granted constitutes a final determination of the subject matter of the adjudication."[15]

On the facts, the judge concluded that the matters raised were not suitable for the Part 8 procedure. The defendant sought to raise declarations that there were conditions precedent to the milestone payment regime which the claimant had failed to comply with. This, the judge held, required a consideration of (among other things) how the conditions precedent were intended to operate in the absence of a prescribed valuation mechanism, whether the conditions had in fact been complied with, and whether there had been a waiver of any non-compliance, all of which was likely to require evidence to resolve substantial disputes of fact.[16]

The approach taken in *Sleaford* in respect of the scope of the *Hutton* test mirrors the reasoning in the slightly earlier 2023 decision of *Elements (Europe) Ltd v FK Building Ltd*,[17] where the TCC was similarly faced with competing arguments regarding the appropriateness of dealing with a Part 8 claim at an adjudication enforcement hearing. In this case, the Part 7 enforcement proceedings were issued first, followed by the Part 8 claim within a week, and the two were then listed by the TCC to be heard together.

The claimant objected to the Part 8 claim on the basis that the defendant failed to show that the adjudicator's decision was obviously wrong, or that a document characterised by the adjudicator was on any view not capable of being described as such a document.[18] Constable J rejected this argument and proceeded to determine the Part 8 claim at the same hearing, emphasising that the examples given in *Hutton* were not intended to be applied as a "higher Part 8 test" or a closed list of further prerequisites to be met:

> "It is plain that para 18 of *Hutton* provided examples of obvious candidates of the types of situations where the guidance would easily be met … But the words in para 18 of *Hutton* were not intended in themselves to impose a further substantive requirement which must be met in order for a Part 8 applicant, proceeding in parallel with adjudication enforcement, to succeed on that application."[19]

Constable J's interpretation of *Hutton* is plainly correct. Indeed, the fact that para 18 of *Hutton* is no more than a list of indicative examples was further confirmed in *LJR Interiors Ltd v Cooper Construction Ltd*,[20] where HHJ Russen KC

13 [2023] EWHC 969 (TCC); [2023] BLR 422.
14 Ibid, at paras 43 and 44.
15 Ibid, at para 46.
16 Ibid, at paras 53 to 66.
17 [2023] EWHC 726 (TCC); [2023] BLR 323.
18 Relying on *Hutton* at para 18, as cited in *A&V* at para 31, and the TCC Guide at section 9.4.5.
19 *Elements*, at para 33.
20 [2023] EWHC 3339 (TCC); [2023] BLR 200.

considered a Part 8 claim based on a limitation defence against a payment application at an enforcement hearing and dismissed the enforcement claim on that basis,[21] even though it did not fall within the categories of examples given in *Hutton*. Nevertheless, the judge stressed the importance of ensuring that a Part 8 claim is raised as early as possible to ensure that there is sufficient time to deal with all matters at an enforcement hearing:

> "I conclude this judgment by repeating what Coulson J said in *Hutton v Wilson*, at paras 12 to 13, and is now made clear in para 9.4.3 of the TCC Guide, about the need for parties to address their collective minds to the appropriate listing arrangements and proper time estimate for a hearing at which arguments in support of final declaratory against the summary enforcement of an adjudication decision are to be advanced. … It is the responsibility of parties, legally represented or not, to ensure that all relevant issues for the court's determination are identified and addressed in good time before a hearing at which there is then time available for the judge to consider them and, if appropriate, give a decision on them."[22]

The above decisions provide clear and helpful guidance to parties which may wish to resist enforcement of an adjudication decision by way of a Part 8 claim for declarations. If a Part 8 claim is commenced pre-emptively (or at least very shortly after Part 7 enforcement proceedings have been brought), then the starting point is that the court will determine the enforceability of the adjudication decision and then proceed to determine the Part 8 claim, provided that the matters are suitable for the Part 8 procedure. The *Hutton* test does not arise directly, and on any view, the types of matters which can be dealt with at an enforcement hearing are not confined to those set out in *Hutton* at para 18.

However, parties must ensure that the issues requiring determination are clearly defined from an early stage, and that arrangements are made to list a hearing of an appropriate length. Above all, the court will refuse to grant the declarations sought if it considers that there is a substantial dispute of fact which cannot be fairly determined under the Part 8 procedure. A good illustration of this important caveat can be found in the recent case of *Berkeley Homes (South East London) Ltd and Another v John Sisk and Son Ltd*.[23] Although this was not an attempt by a party to resist enforcement of an adjudication decision, it is nonetheless instructive as the employer was seeking Part 8 declarations in respect of a number of points of contractual interpretation relating to the scope of the contractor's design responsibility.

Above all, the court will refuse to grant the declarations sought if it considers that there is a substantial dispute of fact which cannot be fairly determined under the Part 8 procedure

In *Berkeley Homes*, the court was asked to determine whether the employer's requirements (ER) contained any warranty that the design of the works would be completed to Royal Institute of British Architects (RIBA) Stage 4 and/or free of error/omission, and whether the contractor was contractually obliged to complete the RIBA Stage 4 design where there were inadequacies. The complication, however, was that the employer relied on the factual background in relation to the development of the design and the ER under a pre-construction services agreement, and the parties' understanding of the status of the design at the time of the contract. These facts were disputed by the contractor.

Deputy High Court Judge Neil Moody KC held that the issues raised were unsuitable for Part 8 determination because "the circumstances under which the design was developed and the ER drawn up are sharply disputed" and "this goes directly to the circumstances known to the parties at the time the contract was executed and the factual matrix and is hence relevant to the question of construction".[24] This was a substantial factual dispute which went beyond a short or narrow point of construction, especially since additional witness evidence and/or disclosure may be required.

Therefore, parties would do well to bear in mind that even points of contractual interpretation may, in a given context, involve a substantial dispute of fact which would make them unsuitable for determination using the Part 8 procedure. This, of course, depends very much on what is admissible or inadmissible as part of the factual matrix relevant to the question of contractual interpretation, and parties and their legal advisers must carefully consider this issue before embarking on a Part 8 claim for declarations, whether in order to overturn an adjudication decision or otherwise.

21 Ibid, at para 113.
22 Ibid, at para 116.
23 [2023] EWHC 2152 (TCC); (2023) 40 BLM 09 12.
24 Ibid, at para 47.

Serial adjudications

Serial adjudications are a fact of life for those involved in lengthy projects plagued with ongoing disputes regarding payments, delays and/or defects. This is hardly surprising considering the primary purpose of construction adjudications, which is to enable the interim determination of various ongoing disputes while a project is still on foot.

One of the pitfalls of serial adjudications, however, is that they often give rise to thorny conundrums as to whether a subsequent adjudicator has trespassed on an issue already determined by a previous adjudication, and whether a party is effectively having a second bite at the same cherry in a subsequent adjudication, either of which would frustrate the temporary finality of adjudication decisions which is fundamental to the statutory adjudication regime established by the HGCRA.

In this regard, those who followed the TCC's decisions in 2022 closely may recall Waksman J's judgment in *Sudlows Ltd v Global Switch Estates 1 Ltd*.[25] In that case, the parties engaged in a number of adjudications – specifically, in adjudication number five, the adjudicator (Mr Curtis) awarded extensions of time to Sudlows on the basis of certain relevant events (ie cabling and ducting issues for which Global Switch was responsible), and in adjudication number six, a subsequent adjudicator (Mr Molloy) awarded further extensions of time and also prolongation costs based on the same relevant events.

Waksman J held that the disputes in the two adjudications were not the same or substantially the same, such that Mr Molloy was not in fact bound by the prior decision of Mr Curtis, because: (a) they related to underlying extensions of time (EOT) for different periods; (b) there were new relevant materials and evidence which were not part of the dispute leading to the prior adjudication; and (c) this particular issue formed only one part of a wider final payment claim.[26]

The decision of Waksman J was appealed in 2023, and in *Sudlows Ltd v Global Switch Estates 1 Ltd*,[27] the Court of Appeal overturned the decision and instead concluded that the disputes in the two adjudications were the same or substantially the same, which meant that Mr Molloy had correctly decided that he was bound by Mr Curtis' prior decision.

Coulson LJ began with a review of the relevant TCC authorities on this subject[28] and a helpful summary of the overarching principles.[29] In particular, he emphasised that each case turns on its own facts, and that both adjudicators and the courts are asked to consider what is a common sense and fair result when determining whether the same or substantially the same claim is being re-adjudicated.[30]

As a useful (albeit not invariable) guide, Coulson LJ noted that "one way of at least testing whether the correct approach has been adopted is to consider whether, if the second adjudication is allowed to continue, it would or might lead to a result which is fundamentally incompatible with the result in the first adjudication".[31] Importantly, he pointed out that a court should be slow to interfere with an adjudicator's determination of whether he/she is bound by a prior decision "unless it concluded that it was clearly wrong", as repeated challenges to adjudication decisions should not be encouraged.[32]

Applying those principles to the facts, Coulson LJ held that Mr Curtis' prior findings on Global Switch's responsibility for the cabling and ducting issues were clearly binding on the parties and any subsequent adjudicator,[33] and that Global Switch's arguments in adjudication number 6 were an "unabashed challenge" to Mr Curtis' decision.[34] This result accords with common sense, as it would be artificial to say that Mr Curtis' decision was only binding as to the quantum of the EOT granted, but that the essential basis and component of that decision (ie the relevant events) were not binding and could be reopened in a subsequent adjudication.

Coulson LJ also observed that this was a somewhat unusual case where "the delay claim in adjudication six was the logical extension of the decision in adjudication five", as no other competing relevant events were being argued and the claim was for a further EOT for a different period arising from the same relevant events.[35] Moreover, insofar as Global Switch submitted new evidence regarding contractual responsibility for the cabling and ducting issues, that was simply "a development of the old" and "did not go to a new issue or give rise to any new line of investigation".[36]

25 [2022] EWHC 3319 (TCC); [2023] BLR 94.
26 Ibid, at para 71.
27 [2023] EWCA Civ 813; [2023] CILL 4865.
28 Ibid, at paras 46 to 54.
29 Ibid, at paras 55 to 59.
30 Ibid, at paras 56 and 58.
31 Ibid, at para 59.
32 Ibid, at para 65.
33 Ibid, at para 72.
34 Ibid, at para 73.
35 Ibid, at paras 81 to 83.
36 Ibid, at para 89.

> The continuing theme in Coulson LJ's decision is the concern not to "elevate form over substance", and that is perhaps the key message to take away

The *Sudlows* decision is enlightening in terms of the approach that the court and adjudicators should take when deciding the extent to which a prior adjudication decision is binding on the parties and a subsequent adjudicator. At the heart of the inquiry is the fundamental policy consideration of the temporary finality of adjudication decisions and the need to prevent the same claims from being re-adjudicated, while not shutting out new claims or defences. The continuing theme in Coulson LJ's decision is the concern not to "elevate form over substance",[37] and that is perhaps the key message to take away.

Another recurrent issue which parties to serial adjudications often encounter is the extent to which prior adjudication decisions can be relied on (if at all) to set off against a later adjudication decision which is being enforced. This often arises where, for commercial or strategic reasons, no enforcement proceedings have been brought in respect of the prior adjudication decisions.

The court has previously confirmed that in an appropriate case where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other, the court has the discretion to allow the decisions to be set off against each other. In *HS Works Ltd v Enterprise Managed Services Ltd*, for example, Akenhead J laid down the test in the following terms:

> "(a) First, it is necessary to determine at the time when the court is considering the issue whether both decisions are valid; if not or if it cannot be determined whether each is valid, it is unnecessary to consider the next steps.
>
> (b) If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.
>
> (c) If it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour."[38]

The question of set-off arose for consideration in *FK Construction Ltd v ISG Retail Ltd*,[39] where FK was seeking to enforce a "smash and grab" adjudication decision in its favour in the sum of £1,691,679.94, relating to application for payment number 16 dated 27 September 2022 (AFP16) in a project in Bristol known as Project Barberry. There were three other adjudication decisions under this project, two of which were also interim payment adjudications but were subject to the outcome of pending Part 8 proceedings. The third adjudication decision (the Molloy decision) related to the gross valuation of the subcontract works as at 28 February 2023 (which post-dated AFP16), and the net result was that FK's further entitlement under the subcontract was only £906,738.20.

The same parties were also engaged on another project in Essex known as Project Triathlon. In that project, there had also been three other adjudication decisions (the Triathlon decisions). The first decision determined that ISG was entitled to be indemnified by FK in the sum of £763,428.28 due to the termination of FK's subcontract, but FK challenged the enforceability of this decision on jurisdictional grounds. The second decision awarded the sum of £105,011.53 to ISG, and FK accepted that this was enforceable. The third decision awarded the sum of £801,819.13 to FK, and the enforceability of this decision was not challenged by ISG. The parties agreed that the net effect of the Triathlon decisions was that FK owed ISG a sum of £66,620.28 under Project Triathlon.

ISG therefore sought to resist enforcement of the adjudication decision relating to AFP16 by contending that the court should take into account the Molloy decision and the Triathlon decisions and order a set-off. Applying the principles laid down in *HS Works*, however, Joanna Smith J refused to do so on this occasion.

In relation to the Molloy decision, Joanna Smith J noted that "ISG falls at the first hurdle of validity" because FK had raised a jurisdictional challenge in respect of that decision and she was simply not in a position to determine

37 Ibid, at paras 75 and 77.

38 [2009] EWHC 729 (TCC); [2009] BLR 378, at para 40.

39 [2023] EWHC 1042 (TCC); [2023] 40 BLM 06 6.

whether the decision was valid and enforceable.[40] No argument had yet been heard on the enforceability of the Molloy decision, and the court "[could not] give effect to a decision that [was] not yet enforceable".[41] As the judge emphasised, unlike in previous cases such as *HS Works*, there were no separate proceedings in respect of the Molloy decision and so no scope for the court to determine its validity and enforceability, and that was very much "the end of the matter".[42]

For essentially the same reasons, Joanna Smith J refused to grant any set-off in respect of the Triathlon decisions, as at least one of those decisions was subject to a jurisdictional challenge which could not be determined by the court, and no separate proceedings had been issued to enforce any of those decisions.[43] This was consistent with her reasoning in relation to the Molloy decision.

Interestingly, Joanna Smith J observed that "it is accepted on both sides that the suggestion that an adjudication decision in relation to one construction project can be set off against an adjudication decision in relation to another construction project is entirely novel", and that this is "a point of some interest", but she refrained from deciding this point as it was unnecessary to do so given her findings.[44] Nevertheless, she indicated obiter that "this would appear to offend against the statutory requirement for immediate enforcement of an adjudicator's award",[45] even though there were express cross-contract set-off provisions in the subcontracts in question.

As a matter of principle, however, it is not immediately clear from the HGCRA or the relevant case law that it is impermissible to set off two adjudication decisions relating to the same parties but different projects. If the court has a discretion to set off two decisions which relate to the same parties and the same project, there is at least a respectable argument for saying that the same can apply in an appropriate case to two decisions relating to the same parties but different projects, provided that the validity and enforceability of both decisions are properly determined by the court in the usual way.

It is noteworthy that para 8(2) of Part I of the Scheme for Construction Contracts contemplates situations where parties can (by consent) appoint the same adjudicator to adjudicate at the same time on disputes under different contracts. If so, one might argue that the court should at least have the discretion to take into account the related adjudication decisions where appropriate in enforcement proceedings.

Given that this point has not been directly addressed by the courts so far, it would certainly benefit from clarification from the TCC in a future case. On any view, what is clear from the *FK Construction* decision is that if an unsuccessful party in an adjudication is to have any hope of relying on another adjudication decision (whether on the same or a different project) as a set-off, it must issue separate enforcement proceedings in respect of the other decision and have its enforceability determined at the same hearing. Otherwise, the court is not going to exercise its discretion simply because there have been serial adjudications and one party says it would be unfair to ignore the effect of the other adjudications.

40 Ibid, at para 37(a).
41 Ibid, at para 37(b).
42 Ibid, at para 37(c).
43 Ibid, at para 45(a) to (b).
44 Ibid, at para 45(d).
45 Ibid.

Breach of natural justice

One of the most common grounds invoked by an unsuccessful party to challenge the enforceability of an adjudication decision is breach of natural justice. This is despite the fact that the majority of such attempts fail in the end, given that the courts recognise that adjudications are intended to be rough-and-ready processes. As Dyson J (as he then was) noted in *Macob Civil Engineering Ltd v Morrison Construction Ltd*:

> "The timetable for adjudications is very tight ... Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand."[46]

For this reason, the Court of Appeal emphasised in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* that "[t]o seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense".[47]

That is not to say, however, that issues of natural justice can never give rise to a valid ground for refusing enforcement. For instance, the court has refused to enforce an adjudication decision where an adjudicator failed to disclose his involvement in another related adjudication which may have influenced his decision in the adjudication in question.[48]

The circumstances for a breach of natural justice to arise are, of course, not circumscribed by previous authorities, and it is interesting to see that in 2023, the court refused to enforce an adjudication decision in *AZ v BY*,[49] on the ground of apparent bias where without prejudice materials relating to pre-contractual negotiations had been wrongly disclosed by one party. In this case, the defendant, BY, sought Part 8 declarations to the effect that the without prejudice materials were inadmissible, such that the adjudication decision was unenforceable. The Part 8 issues were heard together with the Part 7 claim for enforcement.

Constable J began with a detailed review and summary of the law on without prejudice privilege,[50] and emphasised that "once a communication is covered by without prejudice privilege, the court is slow to lift the cloak of that privilege unless the case for making an exception is absolutely plain".[51] One such exception is for the determination of whether an agreed settlement has been reached based on the without prejudice correspondence. However, if no such agreement has been reached, "the decision maker, having seen the without prejudice material, must then assess their own ability to go on to decide the remaining dispute fairly, in accordance with the principles which govern apparent bias and the rules of natural justice".[52]

The claimant, AZ, contended that a decision must be based primarily on the without prejudice material in order for a court to decline to enforce it. This was roundly rejected by Constable J, who emphasised that the threshold test was the apparent bias test as laid down in *In Re Medicaments and Related Classes of Goods (No 2)*.[53] The material only needs to objectively give rise to "a legitimate fear of partiality", in the sense that "the objective observer would consider that knowledge of one party's frank admissions as to the weakness of their legal case made under the cloak of without prejudice discussions gives rise to a legitimate fear that the adjudicator took the knowledge of a party's confessed weakness of their own case into account, possibly even only subconsciously".[54]

> It is well established that apparent bias is sufficient to give rise to a breach of natural justice, and such bias can be a material breach insofar as the adjudicator's decision might have been tainted and could have been different but for the influence of the inadmissible materials

This provides helpful clarification in respect of the threshold test applied by the court where an adjudicator's decision is said to be tainted by apparent bias. Whereas dicta in previous cases[55] suggest that the

46 [1999] BLR 93, at para 14.
47 [2005] EWCA Civ 1358; [2006] BLR 15, at para 87.
48 *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC); [2017] BLR 53.
49 [2023] EWHC 2388 (TCC); [2023] BLR 664.
50 Ibid, at paras 6 to 16.
51 Ibid, at para 16(6).
52 Ibid, at para 16(7).
53 [2001] EWCA Civ 1217, at para 85.
54 *AZ*, at para 20.
55 See eg *Ellis Building Contractors Ltd v Vincent Goldstein* [2011] EWHC 269 (TCC); (2011) CIL 3049, at para 29.

inadmissible material needs to form the primary basis of the decision in order for enforcement to be refused, Constable J has now clarified that the correct question to ask is whether there is, objectively, an appearance or risk of bias.

This makes logical sense – if a party has to demonstrate that the impugned material formed the primary basis of the decision, that would be tantamount to requiring evidence of actual bias. It is well established that apparent bias is sufficient to give rise to a breach of natural justice, and such bias can be a material breach insofar as the adjudicator's decision might have been tainted and could have been different but for the influence of the inadmissible materials.

On the facts of *AZ* (as far as they were discussed in the unredacted portions of the judgment), Constable J concluded that AZ was seeking to rely on without prejudice discussions to show that BY had conceded that AZ's contractual position was justified. This was not an admissible use of without prejudice materials, and it was not a case of a settlement agreement being reached which replaced the underlying dispute which was the subject of the negotiations.[56]

The judge went on to hold that there was a real possibility of unconscious bias, given that the without prejudice materials contained admissions which were not just prejudicial but related to the central issues in dispute (unlike cases where an adjudicator only knows about the fact of an offer). He said that there was "an inevitable question mark about whether the result of the adjudication, however inadvertently or subconsciously, was shaped by the adjudicator's knowledge of the concessions/admissions in relation to key aspects of the open dispute".[57]

The *AZ* decision is therefore a cautionary tale for parties to ongoing and future adjudications. The temptation is often great in an adjudication to "play fast and loose with the rules" and tactically deploy without prejudice materials because the procedure is less rigorous than in litigation. It is often hoped that if one throws enough mud then at least some will stick and influence the adjudicator's impression of the merits of the parties' respective cases. This is potentially a dangerous game to play, as it may render an otherwise valid adjudication decision (which the adjudicator may well have reached in any event even without the inadmissible materials) unenforceable. Parties would be well advised to consider, in every case, whether the material in question is cloaked by without prejudice or other privilege, and if so, whether one of the recognised exceptions to inadmissibility applies. Any approach would risk creating problems down the line at the enforcement stage.

A somewhat more novel argument of bias was raised in *Nicholas James Care Homes Ltd v Liberty Homes (Kent) Ltd*,[58] where the defendant contended that the adjudication decision should not be enforced because the adjudicator's requests for the payment of various deposits as security for his fees before the delivery of his decision amounted to an implicit threat to exercise a lien and/or manifest bias, in breach of the principles of natural justice. However, no such objections were raised by the defendant during the adjudication and the payments were eventually made, supposedly because it would have been "embarrassing" otherwise to object to the payments at the time.[59]

> If a party wishes to leave the door open for challenging the lawfulness of such terms at the enforcement stage, it must raise an objection and reserve its position at the time of the appointment and/or the payment requests, and even then, such contentions are likely to face an uphill struggle in court

Deputy High Court Judge Andrew Singer KC had little difficulty rejecting this argument. Although it is well established that an adjudicator is not entitled to exercise a lien in relation to their decision,[60] the judge held that the adjudicator's payment requests were "certainly tenacious and persistent, but would not be "properly construable by the reasonable observer as improper threats to impose a lien". He emphasised that

56 *AZ*, at paras 102 and 110.
57 Ibid, at para 124.
58 [2023] EWHC 360 (TCC); [2023] BLR 256.
59 Ibid, at para 19.
60 See eg *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC); (2007) 24 BLM 3 1, at para 81 and *Mott MacDonald Ltd v London & Regional Properties Ltd* [2007] EWHC 1055 (TCC); (2007) CILL 2481, at paras 77 and 78.

a complaint would and should have been made by the defendant at the time of payment if it intended to pursue an allegation of bias afterwards.[61]

The judge also noted that there is no authority for the proposition that an adjudicator is not entitled to obtain security for his/her fees during the adjudication.[62] This will be welcome news for adjudicators generally, although some may consider it prudent to include an express term for payment of deposits in the terms of appointment to avoid any argument later on. If a party wishes to leave the door open for challenging the lawfulness of such terms at the enforcement stage, it must raise an objection and reserve its position at the time of the appointment and/or the payment requests, and even then, such contentions are likely to face an uphill struggle in court.

It bears emphasis that the adjudicator in *Nicholas James* did not cross the line because he did not at any point suggest (at least not expressly) that the decision was being withheld due to the non-payment of the requested deposits. It was therefore difficult to prove on the evidence that there was a link between the payment requests and the delivery of the decision, let alone any apparent or actual bias with a material impact on the substance of the decision. This once again reinforces the high evidential threshold which a defendant would have to meet in order to successfully establish a breach of natural justice justifying a refusal to enforce an adjudication decision – save in the plainest of cases (such as in *AZ*), the court is reluctant to accede to such arguments.

"True valuation" adjudications

It is now well established that a paying party is immediately required under section 111(1) of the HGCRA to pay the "notified sum" by reason of its failure to issue a valid payment notice or pay less notice, and that it has to comply with this obligation first before embarking on a "true value adjudication".[63] This was further discussed and confirmed by O'Farrell J in 2022 in *Bexheat Ltd v Essex Services Group Ltd*,[64] which was covered in last year's annual review. In that case, the TCC held that there was no right to join a true valuation issue to a smash and grab adjudication relating to the notified sum issue.

In 2023, the court had another occasion to consider the scope and application of the above principles, in *Henry Construction Projects Ltd v Alu-Fix (UK) Ltd*.[65] In this case the sub-contractor terminated the contract at will and submitted a payment application post-termination in November 2022. The sub-contractor commenced a smash and grab adjudication in December 2022, and the adjudicator issued a decision dated 27 January 2023 concluding that the notified sum was due and payable due to the absence of a valid pay less notice.

In the meantime, however, the main contractor commenced a true value adjudication on 18 January 2023 while the smash and grab adjudication was still on foot. This was stayed until the adjudication decision on the notified sum, after which the stay was lifted and a true value adjudication decision was made in March 2023.

61 *Nicholas James*, at para 31.
62 Ibid, at para 32.

63 See eg *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448; [2019] BLR 1, at paras 107 to 111 and *M Davenport Builders Ltd v Greer and Another* [2019] EWHC 318 (TCC); [2019] BLR 241, at paras 21 to 25, 35 and 37.
64 [2022] EWHC 936 (TCC); [2022] BLR 355.
65 [2023] EWHC 2010 (TCC); [2023] CILL 4886.

The question, therefore, was whether this latter decision was enforceable in circumstances where the true value adjudication was commenced before the notified sum under section 111(1) of the HGCRA was paid.

District Judge Baldwin (sitting as a High Court Judge in Liverpool) applied the line of recent authorities referred to above, and held that the decision was unenforceable. He found that the payment obligation in respect of the notified sum arose on the final date for payment as per section 111(1) of the HGCRA, and not just after the smash and grab adjudication decision was made.[66] It followed that the adjudicator in the true value adjudication lacked jurisdiction ab initio, as the main contractor was "prohibited from embarking upon/not entitled to commence the true value adjudication on 18 January 2023 without first having discharged its immediate payment obligation".[67]

The *Henry* decision is another important reminder of the importance of the immediate payment obligation in respect of a notified sum, and the primacy of the principle of pay now, argue later. Where there is a dispute as to whether there is an immediately payable notified sum, a party which embarks on a true value adjudication before that issue has been determined runs the risk of commencing a premature adjudication which would result in an unenforceable decision. Where there is a genuine risk that a payment application is valid and is not the subject of a valid pay less notice, it might be a counsel of prudence to pay the potential notified sum first if a paying party intends to adjudicate on the true valuation of the payment application.

Contractual interpretation

Questions concerning contractual interpretation are inevitable for any construction practitioner. This is to be expected, given that almost every complex construction, infrastructure or energy project is based on an equally complex set of contractual documents, some of which are drafted within tight timescales and are therefore bound to include infelicities and ambiguities. Additionally, the interrelationship between related contracts under the same scheme or project also gives rise to interesting and sometimes difficult issues of construction. This is aptly illustrated by a number of decisions in 2023.

ADR clauses

Closely related to the topic of construction adjudication is the increasing prevalence of ADR clauses in complex construction and engineering contracts, whether based on standard forms or bespoke terms. In particular, bespoke multi-tier ADR clauses are often found in contracts in specialist infrastructure projects which are exempt from the statutory adjudication regime under the HGCRA, including but not limited to projects procured under the government's Private Finance Initiative (PFI).

Most readers will recall from last year's annual review, the discussion on Joanna Smith J's decision in *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd and Another*.[68] This was an unusual case where the TCC refused to give effect to a bespoke ADR clause in a PFI contract because it was too uncertain to be enforced. That decision was pending an appeal as we entered 2023 and culminated in the Court of Appeal's latest decision in *Kajima Construction Europe (UK) Ltd and Another v Children's Ark Partnership Ltd*,[69] which (perhaps unremarkably) upheld the TCC's decision.

The facts can be rehearsed quite succinctly. 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. The result would be that Children's Ark would be time-barred from issuing fresh proceedings in respect of its claims. The contended effect of the alleged non-compliance was therefore somewhat draconian, and

66 Ibid, at paras 31 to 33.
67 Ibid, at paras 35 and 36.
68 [2022] EWHC 1595 (TCC); (2022) CILL 4747.
69 [2023] EWCA Civ 292; [2023] BLR 271.

naturally, the court was anxious not to casually shut out a meritorious claim, especially if the claimant has not acted unreasonably.

Like Joanna Smith J in the TCC, Coulson LJ began with a summary of the relevant authorities.[70] He noted that "[w]herever possible, the court should endeavour to uphold the agreement reached by the parties",[71] but cautioned that this was not the inevitable approach when it comes to ADR clauses:

> "However, it should be noted that, in cases where there is a dispute about the enforceability of alternative or bespoke dispute resolution provisions which are being relied on to defeat or delay court proceedings, the courts have not shied away from concluding that such provisions may not be enforceable. This may be because clear words are needed to oust the jurisdiction of the court, even if only on a temporary basis."[72]

The contended effect of the alleged non-compliance was therefore somewhat draconian, and naturally, the court was anxious not to casually shut out a meritorious claim, especially if the claimant has not acted unreasonably

Turning to the ADR procedure in question, Coulson LJ described the liaison committee specified by the construction contract as "a fundamentally flawed body which could neither resolve a dispute involving Kajima 'amicably', nor could fairly provide a decision binding on Kajima in any event". In reaching this conclusion, he noted much of the same deficiencies as pointed out by Joanna Smith J in the TCC.

First, there was an absence of any Kajima representative on the liaison committee, and also an absence of any entitlement on its part to attend meetings, make representations or see documents, such that "actual, or at least perceived, bias would be inherent in the whole structure of the dispute resolution procedure if it was extended to a dispute between Children's Ark Partnership and Kajima".[73] Indeed, it would be somewhat artificial to describe the liaison committee as a form of ADR between Children's Ark and Kajima, when Kajima did not have any meaningful involvement in the process.

Secondly, Coulson LJ observed that it was impossible to tell what process was to be followed after a referral, what minimum participation was required of either party, or when it would come to an end.[74] This level of uncertainty was ultimately fatal to the ADR procedure, as "one party cannot commence court proceedings until that process has been concluded", and "[i]f it is not clear when that might be, the process is not enforceable".[75] Although the contract referred to a 10-day period for the liaison committee to meet and try to resolve the dispute after a referral, that was "purely aspirational" and did not provide for what would happen next if, say, the liaison committee required more time.[76]

Thirdly, even though Kajima's fall-back argument was that the condition precedent was limited to the making of the referral to the liaison committee, Coulson LJ was not persuaded that this was correct, as the question on appeal was the status and enforceability of the ADR procedure as a whole, as a condition precedent.[77] Importantly he stressed that "whilst the court has to endeavour to enforce the agreement between the parties, it should not overstrain to do so, so as to arrive at an artificial result".[78]

Therefore, the clear message from both the TCC and the Court of Appeal is that there is no automatic assumption that a court would necessarily take a more generous approach to the interpretation of an ADR clause, simply for the sake of trying to give effect to the parties' presumed contractual intention. There is a clear line to be drawn between contractual interpretation and contractual legislation, and if there are fundamental gaps or flaws in the drafting which create a patent uncertainty as to the intended effect of the contract, the court will not try to rewrite the contract for the parties based on what it considers to be reasonable or workable.

Coulson LJ also provided some instructive guidance on the exercise of the court's discretion under CPR r.11(1)(b) in the event of non-compliance with an ADR provision. This goes to the relief typically granted, especially whether it is more appropriate to grant a stay than to strike out a claim completely. It is noteworthy that

70 Ibid, at paras 38 to 44.
71 Ibid, at para 36.
72 Ibid, at para 37.
73 Ibid, at para 52.
74 Ibid, at paras 55 to 57.
75 Ibid at para 58.
76 Ibid, at paras 58 and 59.
77 Ibid, at para 69.
78 Ibid, at para 70.

neither counsel nor the court were able to find any case where proceedings brought in breach of an ADR clause were struck out.[79]

The important point to bear in mind is that no particular remedy is automatic or inevitable in such circumstances, as the right remedy will always turn on the facts of the case, but it is correct to say that a stay of proceedings would be the "usual" order where there is a non-compliance with an enforceable ADR procedure.[80]

On the facts of *Kajima*, Coulson LJ considered that the TCC in any event took into account the correct matters when refusing to grant a strike-out. Importantly, this was not a case where the claimant acted unreasonably, nor was it a case where a limitation period was in danger of being missed due to indolence or incompetence. Rather, both the NHS Trust upstream and Kajima downstream wanted to defer negotiations regarding liability or quantum until the completion of the fire-stopping remedial works.[81] Short of any unreasonable conduct or delay in the prosecution of the claim, it is clear that the court is very unlikely to strike out a claim on the basis of a non-compliance with an ADR clause.

> No particular remedy is automatic or inevitable in such circumstances, as the right remedy will always turn on the facts of the case, but it is correct to say that a stay of proceedings would be the "usual" order where there is a non-compliance with an enforceable ADR procedure

Interestingly, Coulson LJ also took into account the fact that the fire-stopping defects (which, if well-founded, the construction contractor was ultimately responsible for) were latent and therefore could not usually be identified unless and until there was a trigger for intrusive inspections.[82] This will be of interest to those involved in fire safety/cladding defects claims, as the court is likely to have a degree of sympathy with claimants in such disputes, and will be even less inclined to strike out an otherwise meritorious claim based on technical breaches of ADR procedures.

Parties should therefore think twice before seeking to strike out a claim based on an apparent non-compliance with an ADR provision. That is a step which, although not impossible, will probably require a relatively extraordinary set of facts in order to be accepted by the court. More generally, insofar as there is a known risk of the imminent expiry of a limitation period, it may be prudent for a claimant to issue protective proceedings and apply for a stay at the same time to comply with the ADR procedure (much like a stay to comply with the pre-action protocol), in order to minimise the risk of facing a contested application for a stay or strike-out.

Co-insurance policies in construction

The interpretation of separate but related contracts in the same project arose in *FM Conway Ltd v Rugby Football Union and Others*,[83] where the Court of Appeal had to construe the proper scope and coverage of a co-insurance policy in a construction project for the refurbishment of the Twickenham rugby stadium. This is a rare but significant decision from the court, for as Coulson LJ noted at the beginning of his judgment:

> "Co-insurance in the construction industry is common. But it has historically given rise to some potentially complex issues."[84]

In essence, the insurer (Royal & Sun Alliance Insurance plc) brought a subrogated claim against Conway for the costs of remediating damaged cables due to water ingress into the ductwork, for which it had indemnified under a co-insurance policy taken out by the employer, the Rugby Football Union. This policy was taken out under Option C of a JCT standard form contract, which provided for a joint names policy for specified perils and for all risks. Conway contended that it had the benefit of the co-insurance policy, and so the insurer/employer were precluded from bringing the claim against Conway.

Coulson LJ began with a comprehensive review of the case law,[85] including the seminal decision of the Supreme Court in *Gard Marine and Energy Ltd and Another v China National Chartering Company Ltd and Another*,[86] where Lord Toulson

79 Ibid, at para 82.
80 Ibid, at paras 91 and 92.
81 Ibid, at para 95.
82 Ibid, at para 96.
83 [2023] EWCA Civ 418; [2023] BLR 353.
84 Ibid, at para 1.
85 Ibid, at paras 38 to 53.
86 [2017] UKSC 35; [2017] 1 Lloyd's Rep 521.

stressed that the critical question was whether the underlying contractual scheme precluded any claim by one party against another for the insured loss, on the basis that the co-insurance policy would be the sole avenue for making good the relevant loss or damage.[87]

The judge then endeavoured to summarise the relevant principles, and noted that "where there is an underlying contract then, in most cases, it will be much the best place to find evidence of authority, intention and scope", even though that may not always provide the complete answer. Importantly, the mere fact that two parties are insured under the same policy does not necessarily mean that they are covered for the same loss and cannot make claims against one another.[88]

Applying those principles to the facts, Coulson LJ upheld the first instance decision of Eyre J and described it as "unassailable".[89] Looking at the JCT standard form as incorporated by reference into the letter of intent, the parties intended under the underlying contract to take out insurance cover based on Option C,[90] such that it was not intended that Conway should be insured against losses caused by its own default. Moreover, when ascertaining whether the employer had any authority or intention to obtain wider coverage, the letter of intent expressly prohibited any reference to previous correspondence or discussions, but in any event, it was impermissible to look at the early stages of pre-contractual negotiations and ignore the subsequent negotiations culminating in a different agreement.[91]

In light of the above, Coulson LJ had little difficulty finding that the waiver provision in the policy did not preclude a subrogated claim against Conway. He considered that it would be contrary to commercial sense, "[i]f Conway was not insured against losses caused by its own default, then it would be an extraordinary result if, because of a waiver of subrogation clause, it could achieve the effect of that cover by the back door".[92] The waiver would only be in respect of losses insured for the benefit of Conway.[93]

The *FM Conway* decision provides much needed clarity on a complex area of contractual interpretation. Not only does it confirm the applicable principles in respect of the interpretation of co-insurance policies specifically, it is also an illustration of how related instruments within an overall scheme of contracts have to be construed as a whole in order to ensure that each instrument is not taken out of context and given an uncommercial interpretation. Parties should therefore bear in mind that construction contracts and associated agreements (be it collateral warranties, insurance policies or the like) are not to be construed in isolation and must be read together wherever possible.

87 Ibid, at para 139.
88 *FM Conway*, at para 53.
89 Ibid, at paras 54 and 58.
90 Ibid, at paras 78 and 79.
91 Ibid, at paras 69 and 70.
92 Ibid, at para 104.
93 Ibid, at paras 105 and 106.

Assignment of claims

Assignments of the benefit of a contract and other choses in action are extremely common in the construction industry, especially in the context of assignments of subcontract/consultants appointments upon the termination of a main contract, and the assignment of a developer's interests under a construction contract to the subsequent purchasers of a development.

Following the 2020 decision of *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others*,[94] which reaffirmed the nature and effect of a legal assignment of the benefit of a contract, two important decisions in 2023 provide yet more food for thought on the effect of assignments.

First, in *USAF Nominee No 18 Ltd and Others v Watkin Jones & Son Ltd*,[95] the TCC had to consider whether a security agreement between the current long leaseholders of the development known as Jennens Court in Birmingham and Wells Fargo Bank NA effected a legal assignment of all interests in the long lease and any claims against the building contractor, Watkin Jones, under the relevant collateral warranties, such that the leaseholders had no cause of action against Watkin Jones.

Clause 2.1(a) of the security agreement provided for charges in favour of the bank in respect of all "assigned agreements" and "receivables" to the extent not validly and effectively assigned, and clause 2.1(c) provided that all assigned agreements and receivables were assigned to the bank by way of security. "Assigned agreements" were defined as including, inter alia, the long lease entered into by the claimants, and receivables included, inter alia, associated rights relating to the long lease such as claims under the collateral warranties and the Defective Premises Act 1972 (DPA). This much was common ground, and the question was whether the said assignment was absolute.[96]

Clause 7.5 of the security agreement required the claimants to collect all receivables and hold the proceeds on trust for the bank, and clause 7.6 restricted the claimants from entering into transactions to sell, factor, discount, transfer or dispose of any of the receivables. Finally, clause 19.1 provided for the redemption (by way of reassignment) of any assigned security assets upon the discharge of all the debts.

Waksman J noted that the security agreement did not include the word "absolutely" when referring to the assignment, but included the words "by way of security", although none of that was necessarily conclusive as the agreement must be construed in context.[97] Focusing on the express terms of the security agreement, the judge observed that the imposition of a charge as a fallback option absent a valid assignment was not a strong indication of an absolute assignment.[98] On the other hand, it was considered to be important that the security agreement did not require a notice of assignment to be given to the debtor,[99] and above all, the proceeds of any claim were to be paid into an unblocked general account over which the claimants had complete control.[100]

Given the above, the judge considered that the provision for "reassignment" of the security assets upon the discharge of the debt was neither here nor there, as were the express restrictions on the claimants against dealing inconsistently with the security assets.[101] The conclusion, therefore, was that there was no absolute assignment of the collateral warranties and all claims against Watkin Jones.[102]

As to the lease, Watkin Jones contended that there had been an absolute assignment of the equitable interest in the lease amounting to the creation of an equitable lease, such that the claimants no longer had any entitlement to bring a claim under the DPA. Waksman J held that there was no failed assignment of a legal interest giving rise to a transfer of the equitable interest in the lease,[103] and in any event, such an assignment (even if it existed) would not affect the claimants' right to bring a DPA claim.[104]

The *USAF* decision is pending an appeal to the Court of Appeal, so this is not the last word on the proper interpretation of the security agreement and the effect of the putative assignments. Indeed, given that the security agreement authorised the claimants to collect the proceeds and hold them on trust, and contemplated the need for reassignment of any assigned assets (where appropriate), there is a strong indication that there has been an absolute assignment of all receivables, and that the claimants no longer have any rights to those receivables except as trustee of all proceeds. This would be consistent with the creation of charges only as a fallback

94 [2020] EWHC 2537 (TCC); [2020] BLR 747.
95 [2023] EWHC 1880 (TCC).
96 Ibid, at paras 203 to 205.
97 Ibid, at paras 216 and 217.
98 Ibid at para 219.
99 Ibid, at para 220.
100 Ibid, at para 223.
101 Ibid, at paras 226 and 227.
102 Ibid, at para 231.
103 Ibid, at para 237.
104 Ibid, at para 244.

option in default of a valid assignment, which seems to be what the parties intended. Readers should therefore look out for the Court of Appeal's treatment of this issue.

The second decision from 2023 on the topic of assignment was *MW High Tech Projects UK Ltd v Outotec (USA) Inc and Another*,[105] which arose from the same project and dispute giving rise to the *Energy Works* preliminary issues decision in 2020 (as mentioned above) and forms the latest instalment in a long-running saga of disputes.

As some readers will no doubt recall, it was held in the preliminary issues decision that there was a valid assignment of the benefit of the entire Outotec subcontract from MW to EWH.[106] Thereafter, the parties went to full trial and EWH was substantially successful against MW.[107] Four days before judgment was formally handed down, EWH and MW reached terms of settlement on the main proceedings, and Outotec was served with a notice assigning the Outotec subcontract back to MW.[108]

Therefore, one of the issues which the TCC had to consider in the latest *MW High Tech* decision was whether the settlement reached between EWH and MW operated as a valid and effective reassignment of the Outotec subcontract back to MW, absent any prior consent from Outotec. HHJ Davies noted at the outset that "[t]he parties may agree in their contract that any assignment from A to C requires the previous consent of B to be effective so as to allow C to enforce the terms of the contract directly as against B".[109]

Clause 9.1 of the subcontract expressly provided that "the contractor" (which was defined as MW and/or its "permitted assigns") would not, without Outotec's prior consent, transfer any benefit or obligation under the subcontract to any other person. HHJ Davies held that clause 9.1 was "crystal clear in its effect", in that EWH as MW's permitted assign had no right to re-assign the subcontract back to MW without Outotec's prior consent.[110] Otherwise, EWH would effectively have a wider right to assign than was previously enjoyed by MW, which would be a surprising consequence absent clear words.[111]

HHJ Davies also rejected the argument that consent was deemed to be given by Outotec due to the fact that Outotec entered into the subcontract with MW in the first place. As the judge put it, "it is impossible [...] to see the act of entering into the subcontract containing this clause as amounting to an advance consent to re-assignment back to the original assignee",[112] and there was no basis for implying an additional exception to the need for prior consent to an assignment.

> It is essential that parties take proper legal advice before attempting to legally assign away the entire benefit of a contract, as the court will not be prepared to accept strained arguments as to the effect of an assignment in order to rescue a party from what is, in hindsight, a bad bargain

On this basis, there had not been an effective reassignment of the benefit of the subcontract back to MW, and MW could not pursue Outotec under the subcontract.[113] It also followed that MW had no right to claim against Outotec's parent company under a parent company guarantee, as the said guarantee was only in respect of Outotec's liability (if any) to MW for breaches of the subcontract, and given that Outotec was no longer liable to MW due to the ineffective reassignment, there was no basis for any claim under the parent company.[114]

The *MW High Tech* decision (together with the earlier preliminary issues decision in *Energy Works*) illustrates the pitfalls of not fully considering the implications of an assignment of the benefit of a contract and the requirements for effecting a valid assignment/reassignment. The dangers are plain to see – it could unwittingly leave a party without any recourse to recover its losses and/or pass down its liability to other parties upstream. It is therefore essential that parties take proper legal advice before attempting to legally assign away the entire benefit of a contract, as the court will not be prepared to accept strained arguments as to the effect of an assignment in order to rescue a party from what is, in hindsight, a bad bargain.

105 [2023] EWHC 2885 (TCC).
106 Ibid, at para 108.
107 *Energy Works (Hull) Ltd v MW High Tech Projects Ltd and Others* [2022] EWHC 3275 (TCC); (2022) CILL 4773, at para 6.
108 Ibid, at paras 853 and 854.
109 *MW High Tech*, at para 44(iv).
110 Ibid, at para 47.
111 Ibid, at para 48.
112 Ibid, at para 50.
113 Ibid, at para 51.
114 Ibid, at paras 64 and 65.

Professional negligence

Given the important role played by various professional consultants in construction, infrastructure and energy projects, it is unsurprising that many major disputes involve elements of professional negligence giving rise to interesting questions of interpretation regarding the contractual duties owed, some of which overlap with issues relating to the scope of common law duties of care. In 2023, the TCC and the Court of Appeal have each had the occasion to consider these types of issues in two respective judgments.

Scope of contractual duties

One thorny issue which frequently arises in professional appointments (as well as design and build contracts which impose equivalent design duties) is the nature and extent of the contractual design obligations owed where there are apparently inconsistent design standards imposed by different parts of a contract. One well-known illustration of this is the case of *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd and Another*,[115] where the dispute went all the way to the Supreme Court and a majority of the court held that where a section of the contract imposed two standards of design, the lower standard was a minimum requirement and the more rigorous requirement still had to be complied with.

This type of question arose again in *Lendlease Construction (Europe) Ltd v Aecom Ltd*,[116] which concerned the construction of a new oncology centre at St James's University Hospital in Leeds as part of a PFI project. Lendlease was itself found to be liable to the PFI project company upstream for various defects, and it was seeking to pass down its liability to its mechanical and electrical design consultant, Aecom. The judgment itself covered numerous interesting aspects of contract law and statutory limitation, but one of the issues concerned the applicable design standard under the appointment.

Clause 4.01 of Aecom's appointment imposed the usual standard of reasonable skill, care and diligence, but clause 1.01 required Aecom to "observe the employer's requirements and the project agreement and to ensure that it did not place Lendlease in breach of the said agreements". The question was: to what extent was Aecom obliged to achieve the outcome and performance criteria specified under those other agreements which were entered into upstream?

Eyre J referred to the *MT Højgaard* dispute noting that those cases turned on the particular contract terms in question and that, importantly, "cases where there is a contrast between express requirements for a specified design and for the achievement of specified performance criteria are very different from the circumstances of this case".[117] Those cases were therefore distinguishable in his view.

Looking at the appointment in question, Eyre J considered that the clauses in question were "not readily to be seen as laying down competing requirements for a specified design and for specified performance criteria",[118] and above all, the final sentence of clause 4.01 expressly provided that notwithstanding any other clause in the appointment, Aecom should not owe any greater duty than the use of reasonable skill, care and diligence. This latter provision had to be given effect to, and the net result was that Aecom was required to comply with clause 1.01 subject to the qualification in clause 4.01 as to the sufficiency of reasonable skill, care and diligence.[119]

> It is crucial for those signing up to design duties to make sure that they consider all the contractual requirements and standards in the round and satisfy themselves that they understand the implications of those requirements read as a whole

Eyre J emphasised that it was artificial to construe the appointment as imposing distinct warranties or requirements in this context, and that it was "better read as imposing a single standard".[120] In other words, the specific requirements/criteria in the ER and other industry standards expressly referred to – for example, the approved documents and the NHS' Health Technical Memoranda (HTM) – were "setting the context in which the question of what is required in order to perform with

115 [2017] UKSC 59; [2017] BLR 477.
116 [2023] EWHC 2620 (TCC).
117 Ibid, at para 134.
118 Ibid, at para 137.
119 Ibid, at para 139.
120 Ibid, at para 142.

reasonable care, skill, and diligence is to be addressed", and a failure to comply with the specified standards would amount to a failure to exercise reasonable skill, care and diligence absent any compelling explanation to the contrary.[121]

The conclusion reached by Eyre J in *Lendlease* is perhaps unsurprising given the express proviso in the appointment that Aecom did not owe any greater duty than the use of reasonable skill, care and diligence. Such a provision was conspicuously absent from the contract considered in *MT Hojgaard*. However, one cannot help but wonder whether the conclusion in *Lendlease* might have been different if the appointment did not include that express proviso. Eyre J's reasoning suggests not, but it is not immediately clear whether *MT Højgaard* is so readily distinguishable – after all, the central question in that case was whether, in light of a specific design life requirement for the foundations in the ER, MT was in breach of contract despite the fact that it used reasonable skill and care and adhered to international standards and good industry practice.[122]

The answer, perhaps, is that it is impossible to reach any meaningful conclusion in the abstract, as each case will inevitably turn on the particular contractual framework and provisions in question, and in these types of cases, context really is everything. The lesson for parties to future construction and engineering contracts is clear though. It is crucial for those signing up to design duties to make sure that they consider all the contractual requirements and standards in the round and satisfy themselves that they understand the implications of those requirements read as a whole. Insofar as there are any potential ambiguities or inconsistencies, it is better to clarify and iron them out at the pre-contractual stages, rather than post-contract when a dispute is already at the gates.

Scope of common law duty of care

The scope of a professional designer/consultant's duty of care at common law can give rise to even more difficult questions, as it is not based on what the parties have expressly legislated for, but rather what the law considers to be sufficiently foreseeable, proximate, and fair just and reasonable to impose on a party in a particular case.[123] Moreover, even if a particular issue arises in a construction context, the court's approach can have a much wider significance and impact on all professional negligence claims generally.

This was borne out by the widely discussed Court of Appeal decision in *URS Corporation Ltd v BDW Trading Ltd*,[124] which touched on a broad range of important legal issues and "had all the hallmarks of a three-day examination in construction law".[125] Readers may recall that the 2021 annual review covered the decision of Fraser J in *BDW Trading Ltd v URS Corporation Ltd and Another*[126] on URS' scope of duty in respect of what was described as "reputational loss", and the latest 2023 judgment relates in part to an appeal against Fraser J's decision.

One of the most important issues debated before the Court of Appeal was the scope of duty owed by URS (as the consulting engineers) to BDW in respect of the costs of remediating structural defects in two developments, in circumstances where BDW no longer had any proprietary interests in those developments. URS considered that the costs incurred by BDW were no more than "reputational loss", for which URS did not owe any duty of care to guard against.

The background facts were important. BDW was the developer for Capital East on the Isle of Dogs in London (completed between 2007 and 2008) and Freemens Meadow in Leicester (completed between 2005 and 2012). BDW's freehold interests in these properties had long since been sold off for value, with the last transfer being in May 2015. Structural defects attributable to URS' negligence were discovered in the two properties in or around 2019, after widespread investigations triggered by the Grenfell Tower disaster in June 2017.

Thereafter, BDW incurred significant costs carrying out investigations and remedial works, even though it was not liable to carry out any remedial works and had a complete limitation defence to any claim brought by the

121 Ibid, at para 143.
122 *MT Højgaard*, at para 27.
123 See eg *Caparo v Dickman* [1990] 2 AC 605.
124 [2023] EWCA Civ 772; [2023] BLR 437.
125 Ibid, at para 1.
126 [2021] EWHC 2796 (TCC); (2021) 39 BLM 01 1.

purchasers. The Court of Appeal had to consider whether these costs were losses which fell within the scope of URS' duty of care at common law, such that they could be recovered by BDW in tort.

In the event, the Court of Appeal upheld Fraser J's decision and rejected URS' case. Coulson LJ's starting point was that it was in fact a simple question with a simple answer. As he saw it, the "additional complications" raised by URS as to the need for a proprietary interest simply did not arise:

> "This was a standard duty imposed on a design professional which was co-existent with that professional's contractual obligations. The risk of harm was that, in breach of the professional's duty, the design of the buildings would contain structural defects which would have to be subsequently remedied. ... In such circumstances, it is impossible to conclude that the losses were somehow outside the scope of URS' duty."[127]

Since Coulson LJ considered the duty of care and harm in question to be perfectly conventional, he was of the view that the six-stage checklist laid down in *Manchester Building Society v Grant Thornton UK LLP*[128] and *Khan v Meadows*[129] did not have any direct application because the checklist was "primarily designed to analyse duties of care alleged to arise in novel situations which had not previously been considered by the courts, or where the type of loss claimed was unusual or stretched the usual boundaries imposed by the law".[130]

The potential difficulty with the above approach, however, is that it assumed and presupposed that the duty and loss being alleged in *URS* were perfectly conventional. That assumption or presupposition is itself controversial. The bulk of the previous case law dealt with circumstances where a professional consultant was held to be liable for remedial costs incurred by an existing owner of the property (or at least a previous owner who remained liable for such costs – for example, by virtue of contracts with the purchasers or current owners), whereas the claimant in *URS* no longer owned the property and was not under any extant liability to the current owners at the time of the remedial works.

This assumption pervaded Coulson LJ's reasoning in rejecting URS' contentions. Indeed, Coulson LJ went on to rely on, inter alia, the judgments in *Newton Abbott v Stockman,*[131] *GW Atkins Ltd v Scott*[132] and *St Martin's Property Corporation Ltd v Robert McAlpine Ltd,*[133] as authorities for the proposition that "it has long been the case that a builder who goes back to rectify defective work can recover the relevant cost, even if he was under no obligation to carry out such remedial works".[134] In particular, he took the view that *St Martin's* was "the highest possible authority for the basic proposition that a claim for defects does not always require a proprietary interest in order for the cost of the remedial works to be recoverable".[135]

It is noteworthy that the *St Martin's* decision established the principle of transferred loss in contract law, whereby the original developer as a party to the building contract could recover the remedial costs on behalf of the subsequent purchasers (who had no cause of action against the contractors), even though the developer no longer had any proprietary interest. Two justifications for this decision have been put forward – the narrow ground was that the developer contracted with the builder for the benefit of subsequent purchasers, and the broader ground was that the developer had an expectation interest under the contract (ie that the contractual obligations should be performed) which ought to be protected. These grounds were both firmly linked to the contractual nature of the claim.

However, Coulson LJ concluded that it was irrelevant that the *St Martin's* line of cases related to contractual rather than tortious claims, as he "[does] not consider that that makes any difference to the underlying principle".[136] In effect, this was an extension of the principle of transferred loss in contract law to tortious claims. This was potentially problematic, given that the measure of loss in tortious claims is inherently different from that in contractual claims, and the grounds justifying the *St Martin's* decision were not really transferrable to a tortious claim.

It is unfortunate that the Court of Appeal decision in *URS* did not at all consider the basis of the *St Martin's* decision and its applicability (if any) to tortious claims. It is therefore hardly surprising that the *URS* decision is being appealed to the Supreme Court (on this and other grounds), and that permission to appeal was granted by the Supreme Court in December 2023. Practitioners and stakeholders in the industry should therefore stay tuned for the hearing of the appeal and the decision of the Supreme Court, which will hopefully give further consideration to the conundrum canvassed above and provide authoritative guidance in this regard.

127 Ibid, at para 33.
128 [2021] UKSC 20; (2021) 38 BLM 07 1.
129 [2021] UKSC 21; [2021] Med LR 523.
130 *URS*, at para 35.
131 (1931) 47 TLR 616.
132 (1991) 7 Const LJ 215.
133 [1994] 1 AC 85.
134 *URS*, at para 48.
135 Ibid, at para 66.
136 Ibid, at para 50.

Limitation periods

Accrual of claims relating to negligent design

Where a contractual claim is brought against a designer for a breach of its design duties, the cause of action accrues on the date of the breach. This would, depending on the terms of the contractual appointment, typically be at the time when the design is completed or when the design is incorporated into the construction, which would be long before the practical completion of the works, unless there are good reasons for imposing a continuing duty to review the design during construction or even up to practical completion.[137]

Parties often plead that there is a continuing duty of review in order to try to postpone the accrual of a contractual cause of action against a designer and get around limitation issues. *Lendlease Construction (Europe) Ltd v Aecom Ltd*[138] (which has already been discussed above in the context of standard of design duties) was one such case. Here, Lendlease argued that Aecom had a continuing duty to advise or warn Lendlease or to review the state of the works, particularly in relation to the fire strategy and the configuration of the plant room (which were later found to be deficient).

Eyre J reviewed the relevant authorities in some detail[139] and helpfully summarised the applicable principles as follows:

> "[...] The determination in each case is to be based on the terms of the contract in question. Where the contractual obligation is solely that of providing a design the contract is unlikely to be interpreted as imposing an obligation on the designer to review the design after it has been supplied. Where there are duties going beyond the provision of a design there can be a contractual obligation to review the design. The extent to which the duties go beyond the provision of a design and the nature of the further duties will be highly relevant factors in considering whether there is a duty to review. Where there are such further duties the court can find that there is an obligation on the designer to review the design up to the time it is incorporated in the construction. In such cases the duty will be, as Ramsey J explained, the *New Islington* duty to review when there is a good reason such as would prompt a reasonably competent professional of the relevant discipline to engage in a review. A contract can be interpreted to provide for this same duty of review to continue up to the time of practical completion. However, this is a step further than the duty to review in the period between provision of the design and construction. [...]"[140]

A continuing duty to review a design, irrespective of the alleged extent, depends heavily on the terms of the contract in question and the factual circumstances which are said to trigger such an ongoing duty. It is certainly not in every case that a designer automatically owes a continuing duty to review its design and advise on its deficiencies

The above passage is worth citing (and reading) in full because it is a concise and helpful summation of the principles in what is a complex and often confusing area of law. The key point is that a continuing duty to review a design, irrespective of the alleged extent, depends heavily on the terms of the contract in question and the factual circumstances which are said to trigger such an ongoing duty. It is certainly not in every case that a designer automatically owes a continuing duty to review its design and advise on its deficiencies.

On the facts of *Lendlease*, Aecom owed obligations of review and coordination which continued after the provision of its design, but it was not acting as an architect responsible for overseeing the construction works.[141] In those circumstances, there was no basis for requiring Aecom to effectively "oversee the work of others to ensure that there was compliance with the HTM", or to "review the work of others with a view to providing Lendlease with unsolicited advice as to the compliance of such work with the applicable standards".[142]

137 See eg *New Islington & Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] BLR 74 and *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC); [2007] BLR 293.
138 [2023] EWHC 2620 (TCC).
139 Ibid, at paras 158 to 167.
140 Ibid, at para 168.
141 Ibid, at para 169.
142 Ibid, at para 170.

Even if there was such a continuing duty to review the design up to construction, the breach would have accrued at the very latest when the plant room was constructed.[143] There was no good reason triggering a duty to review the design after construction, and no such reason was pleaded or proven.[144] Although Lendlease sought to rely on a later instruction to Aecom to revise the fire strategy as a trigger, by that time Lendlease was relying on its own judgement and that of building control, such that it did not give rise to any further duty on Aecom to advise or warn.[145] It followed that Lendlease's claims against Aecom were time-barred.[146]

The *Lendlease* decision is a sobering reminder of the difficulties that a party will face in trying to establish a continuing duty to review the design after it has been completed and/or up to the point of construction, whether by way of a so-called duty to warn or otherwise. Indeed, as Coulson LJ noted back in 2022, this type of argument is "almost always raised by claimants in order to try and avoid limitation difficulties" but "the notion has fallen out of favour in recent years".[147]

It may be that parties will increasingly find it less attractive to argue a continuing duty to review a design as a basis for salvaging an otherwise dead contractual claim, and instead focus their efforts on tortious causes of action, at least where it is possible to postpone the expiry of limitation based on the date of damage (which is when a claim in tort accrues) and/or late knowledge of a latent defect (based on sections 14A and 14B of the Limitation Act 1980). That, of course, is not without its own set of problems, as outlined in the further discussion below.

143 Ibid, at para 170.
144 Ibid, at para 172.
145 Ibid, at paras 205 to 212.
146 Ibid, at paras 219 to 227.
147 *Cameron Taylor Consulting Ltd and Another v BDW Trading Ltd* [2022] EWCA Civ 31; [2022] BLR 183, at para 47.

Accrual of tortious claims

Those familiar with professional negligence claims arising from latent defects in construction, infrastructure and energy projects will know that the question of when damage occurs in order to accrue a tortious cause of action is not straightforward and often plagued with difficulties, especially since the authorities do not all speak with the same voice on this issue.

This has been the position since the well-known House of Lords' decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*,[148] which held that the cause of action in relation to a latent defect only accrues when physical damage occurs to the building.[149] Although Parliament sought to ameliorate the implications of this ruling on undiscovered or undiscoverable physical damage by enacting the Latent Damage Act 1986 and introducing sections 14A and 14B into the Limitation Act 1980, this did not completely resolve the problem.

There is still an awkward tension between *Pirelli* and subsequent authorities – on the one hand, it has been established since *Murphy v Brentwood District Council*[150] that a claim for defect remedial costs is a case of pure economic loss (and not loss arising from physical damage to the property). On the other hand, *Pirelli* (which was a pre-*Murphy* decision) is still the binding authority for the proposition that a tortious claim for defect remedial costs accrues when physical damage occurs.

The inconsistency between these two lines of authority is apparent, and it has given rise to difficulties in cases where the defects are purely latent and have not caused any physical damage, such as in *Tozer Kemsley & Milbourn (Holdings) Ltd v J Jarvis & Sons Ltd and Others,*[151]

148 [1983] 2 AC 1.
149 Ibid, at pp 16 to 18.
150 [1991] 1 AC 398, overruling *Anns v Merton London Borough Council* [1978] AC 728.
151 (1983) 4 Con LR 24.

Chelmsford District Council v TJ Evers and Others[152] and *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd*.[153] In those cases, the courts remained bound by *Pirelli* but sought to overcome the issue by finding that the damage was suffered at the latest when the defective building was handed over (ie upon practical completion).

The opportunity for the courts to grapple with (and reconcile) these conflicting principles of tort law arose in the important decision of *URS Corporation Ltd v BDW Trading Ltd*,[154] which has already been featured above when discussing the scope of a professional consultant's duty of care in tort. One of the issues considered by the Court of Appeal in *URS* was the timing of the accrual of BDW's cause of action. If the cause of action only accrued upon knowledge of the defect/loss, then no cause of action in tort could have accrued before BDW disposed of its proprietary interest in the two developments, and no claim in tort could then be brought.

Coulson LJ began his analysis with a review of the authorities on this subject, including cases on defective buildings with physical damage (for example, *Pirelli*),[155] cases on defective buildings without physical damage (for example, *Tozer*, *Chelmsford* and *New Islington*)[156] and other cases not relating to construction defects.[157] He considered that "the authorities establish that, if there was an inherent design defect which did not cause physical damage, the cause of action accrued on completion of the building",[158] and that "knowledge of the existence of a cause of action having accrued is irrelevant" except where the liability was truly contingent.[159]

On this basis, Coulson LJ rejected URS' arguments and held that BDS' causes of action accrued at the latest when the developments were practically completed.[160] Although he acknowledged that "the result in *Pirelli* might have unfair consequences for claimants who might have had no reasonable way of discovering the damage caused by the defect", that was ameliorated when the Latent Damages Act 1986 was passed.[161] To have a tortious claim accrue on the claimant's knowledge of the problem could make the issue of limitation "more complicated than it is already and lead to significantly later accrual of the cause of action", as it might undermine the 15-year longstop period for tortious claims and the operation of sections 14A and 14B of the Limitation Act.[162]

Coulson LJ candidly accepted obiter that "there are some difficulties with *Pirelli*" as it was decided based on a misapprehension which has since been corrected in *Murphy*, and the House of Lords wrongly assumed that a defective design would inevitably give rise to physical damage,[163] such that "even in cases where there is physical damage, *Pirelli* needs careful consideration".[164] Coulson LJ stopped short of tackling that issue head-on (because the issue of physical damage did not arise in *URS*) but considered that *Tozer* and *New Islington* provided an adequate solution by having a cause of action for a negligent design accrue upon practical completion.[165]

> Coulson LJ appears to have oversimplified the position when purporting to bring uniformity to the accrual of tortious causes of action and the accrual of contractual causes of action in cases of negligent design

Interestingly, Coulson LJ observed that this result would be consistent with the accrual of a contractual cause of action because the breach "[was] generally taken to be on practical completion at the latest, when any design defect became irremediable", and was also consistent with the accrual of a cause of action under section 1(5) of the DPA. He was therefore reinforced by the fact that the accrual of the causes of action in contract, tort and the DPA would be the same in this type of case.[166]

Although there is some initial attraction in the simplicity of this approach, there remains an uneasy tension beneath the surface. First, the correctness of *Pirelli* (which has been repeatedly called into question) has still not been resolved, and different dates of accrual will apply depending on whether the defect manifests itself in some physical damage. This is arbitrary and inconsistent with

152 (1984) 25 BLR 99.
153 [2001] BLR 74.
154 [2023] EWCA Civ 772; [2023] BLR 437.
155 Ibid, at paras 69 to 83.
156 Ibid, at paras 84 to 88.
157 Ibid, at paras 89 to 102.
158 Ibid, at para 88.
159 Ibid, at para 102.
160 Ibid, at para 105.
161 Ibid, at para 108.
162 Ibid, at para 109.
163 Ibid, at para 115.
164 Ibid, at para 116.
165 Ibid, at paras 117 to 124.
166 Ibid, at para 130.

the post-*Murphy* position that defect claims are claims for pure economic loss. The *Pirelli* judgment is therefore ripe for reconsideration, and this will need to be done at the highest judicial level given that *Pirelli* is a decision of the House of Lords.

Secondly, Coulson LJ appears to have oversimplified the position when purporting to bring uniformity to the accrual of tortious causes of action and the accrual of contractual causes of action in cases of negligent design. As noted above in the discussion of the *Lendlease* decision, a contractual claim for negligent design typically accrues at the time when the design is completed and the breach has crystallised, and not upon practical completion, unless there is a continuing duty to review the design.[167] The supposed uniformity is therefore likely to be misconceived.

Thirdly, unlike a contractual claim, some form of actional damage is a key element of a claim in tort, hence the different rule on accrual. The accrual of a contractual cause of action based on the date of breach would therefore be a false analogy in any event. For a tortious claim, the crucial question is when did the claimant first suffer an actional loss or damage? In the case of a negligent design, that has to be answered with respect to the pure economic loss suffered, ie either the diminution in value of the property or the costs of reinstatement as a result of the defect. The adoption of the date of practical completion as the accrual date for this type of pure economic loss seems, at least instinctively, somewhat artificial.

Given the controversy surrounding the applicable legal principles on the accrual of a tortious claim for negligent design, it comes as no surprise that the Supreme Court has granted permission to appeal against the *URS* decision and will be considering, inter alia, the correctness of *Pirelli* with a panel of seven Justices of the Supreme Court. This is set to be one of the most significant cases on the law of negligence in recent times.

In the meantime, it appears that Coulson LJ's decision in *URS* has been (and will be) taken by the courts as the correct legal position, unless the Supreme Court later decides to overturn or modify the conclusion. This can be seen in *Vinci Construction UK Ltd v Eastwood and Partners Ltd and Others*,[168] where the TCC had to consider (on a strike-out/summary judgment application) whether an

[167] *Lendlease Construction (Europe) Ltd v Aecom Ltd* [2023] EWHC 2620 (TCC), at para 223.

[168] [2023] EWHC 1899 (TCC); [2023] BLR 490.

additional claim in negligence brought by the specialist sub-contractor (Snowden) against the consulting engineers (GHW) for the defective design of an overlay concrete slab was statute-barred.

GHW contended that the relevant damage was the pure economic loss consisting of Snowden's exposure to a claim by Vinci in respect of the defective slab in the warehouse, whereas Snowden argued that the relevant damage was its financial liability to Vinci arising out of physical damage (cracking) to the slab. The issue, therefore, was when did the cause of action in tort actually accrue, depending on how one characterised the damage in question?

Shortly after the hearing in *Vinci*, the *URS* decision was handed down by the Court of Appeal. O'Farrell J noted that "on the current state of the law, the date of accrual of a cause of action in this case turns on the proper characterisation of the loss; if characterised as a physical damage case, the cause of action would accrue on the date of damage; if characterised as an economic loss case, the cause of action would accrue by the date of completion".[169]

On the facts of *Vinci*, the outcome did not strictly depend on the interpretation and application of *URS*, as O'Farrell J held that physical damage had occurred to the warehouse floor more than six years prior to the date of 7 May 2021, when GHW and Snowden entered into a standstill agreement, as the contemporaneous documents and photographs showed that physical damage (cracking) had occurred by March/April 2015 at the latest, without requiring further expert evidence on this issue.[170] Therefore, applying *Pirelli*, the cause of action accrued prior to May 2015, and would have been time-barred but for the operation of section 14A of the Limitation Act (which, on the facts, Snowden had a real prospect of successfully relying on).[171]

The fact that the TCC in *Vinci* was concurrently considering and applying the principles debated in *URS* even while the appeal in *URS* was pending demonstrates the wider significance of the *URS* decision, and the impact which (as it currently stands) it will have on ongoing and future cases. It is hoped that the Supreme Court will in due course provide a thorough consideration of these issues, and restore much-needed clarity to an area of law where an authoritative restatement of the applicable legal principles has long been overdue.

169 Ibid, at para 43.
170 Ibid, at paras 44 to 52.
171 Ibid, at paras 72 and 73.

Impact of retrospective extension of limitation for DPA claims

The significance of the *URS Corporation Ltd v BDW Trading Ltd*[172] judgment extends beyond matters relating to tortious claims in negligence. Another important issue which arose for consideration in *URS* was the scope and wider implications of section 135 of the BSA (inserting a new section 4B into the Limitation Act), which retrospectively extended the limitation period for DPA claims which accrued before June 2022 to 30 years.

The effect of section 135 was discussed in last year's review, and less than a year after the entry into force of the BSA, its retrospective effect has already been the subject of judicial consideration in the Court of Appeal's decision in *URS*, and will be further considered by the Supreme Court in due course. In this regard, the first issue which was argued before the Court of Appeal was whether the retrospectivity of section 135 of the BSA applied to the rights of parties involved in ongoing litigation prior to the entry into force of the BSA.

Coulson LJ noted that "[t]he starting point – and, in some ways, the end point – must be the ordinary linguistic meaning of the words used in section 135(3)",[173] which provides that the extended limitation periods introduced by section 135(1) of the BSA are "to be treated as always having been in force". The statutory language, in his view, "could not be any clearer".[174] Importantly, he noted that section 135(6) contained "an express carve-out" for a DPA claim which had been finally determined or settled before the BSA came into effect, and the absence of any other express exceptions was said to be "fatal" to URS' argument.[175]

In these circumstances, Coulson LJ considered that the case law regarding the presumption against the retrospective application of a statute to a defendant's accrued rights (such as a limitation defence) did not apply, because the BSA was sufficiently clear and express in its effect.[176] He was also not persuaded that section 135 of the BSA amounted to any implied repeal of section 9 of the Limitation Act, and in any event, he considered that the wording of section 135(3) took precedence and meant that the extended limitation period had always been in force and there was never any accrued right as to the original limitation defence.[177]

172 [2023] EWCA Civ 772; [2023] BLR 437.
173 Ibid, at para 161.
174 Ibid, at para 162.
175 Ibid, at paras 164 and 168.
176 Ibid, at paras 165 and 166.
177 Ibid, at para 167.

Finally, Coulson LJ observed that there was no clash with Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR), as section 135(5) of the BSA preserves ECHR rights and allows the courts to dismiss an action if that is necessary to avoid a breach of a defendant's ECHR rights.[178] On this basis, he rejected URS' case that BDW should be precluded from adding the DPA claim by way of a pleading amendment.[179]

While Coulson LJ's conclusion may seem unremarkable in the light of the express wording of section 135(3) of the BSA, at least at first blush, it is hard to deny that the court's reasoning leaves one with a sense of unease about the apparently absolute nature of the retrospectivity introduced by Parliament on this occasion, including in disputes where parties have embarked on ongoing legal proceedings, pleaded their cases and taken significant procedural steps on the basis of accrued claims and defences.

In particular, the Court of Appeal did not seem to grapple with the nature and scope of the principle of implied repeal (which is a well-established concept in constitutional/administrative law with well-defined limits), and the suggestion that there was never any accrued limitation defence because section 135(3) of the BSA provides that it is to be treated as always having been in force seems to be circular and tautologous, as it presupposes that section 135(3) does apply to accrued limitation defences in ongoing litigation on its true and proper construction.

Further, the Court of Appeal did not give very detailed consideration to the potential ECHR implications of extending the retrospectivity of section 135 of the BSA to all ongoing legal proceedings. One might argue, for example, that section 135(5) of the BSA specifically requires the courts to consider this question carefully and determine whether the retrospective application of section 135 of the BSA to accrued limitation defences in ongoing litigation would be contrary to Article 6 (and indeed Article 1 of the First Protocol) of the ECHR. It is therefore not an issue which can simply be dismissed out of hand, and it will be interesting to see how the Supreme Court approaches this question with the benefit of full argument from both parties.

The impact of the retrospectivity of section 135 of the BSA does not end there. A related issue is the implications of section 135 of the BSA for contribution claims relating to liability under the DPA. In *URS*, this arose for consideration because BDW also sought to add a contribution claim based on the Civil Liability (Contribution) Act 1978 (CLCA), in respect of BDW's liability due to potential claims from third parties under the DPA.

At the outset, Coulson LJ held that BDW did not have to wait until a claim had actually been made by a third party before having an accrued right to bring a contribution claim under the CLCA:

> "So, as a matter of simple statutory interpretation, I consider that the right to make a claim for contribution – the accrual of the cause of action – is established when the three ingredients in section 1(1)(a) of the [CLCA] can be properly asserted and pleaded. Is B liable, or could be found liable, to A? Check. Is C liable, or could be found liable, to A? Check. Are their respective liabilities in respect of the same damage suffered by A? Check. If those three ingredients are capable of being pleaded, then there is a cause of action for a contribution. The making of a formal claim by A against B is not required by the [CLCA]."[180]

With that in mind, the follow-on question was whether BDW was liable or potentially liable to individual purchasers at the time when the remedial works were carried out in 2020. This was relevant because, pursuant to section 1(2) of the CLCA, a contribution claim can be brought after the claimant has ceased to be liable in respect of the damage, but only if the claimant was liable immediately before it made (or was ordered or agreed to make) the payment in respect of which the contribution was sought. URS therefore contended that before BDW incurred the remedial costs, it had already ceased to be liable to individual purchasers due to the expiry of limitation.

> This is of much wider significance to the industry as a whole, given that numerous consultants and contractors will now potentially be exposed to a raft of contribution claims in respect of DPA claims based on the approach taken in *URS*

178 Ibid, at para 170.
179 Ibid, at para 171.
180 Ibid, at para 202.

Coulson LJ rejected this argument in the end, on the basis that the primary liability for the purposes of a contribution claim should be assessed "when the contribution is sought, which would in practical terms be at the time of the trial", and in this case, the BSA was in force at the time of trial such that there was no question of the claim ever being statute-barred given the retrospective effect of section 135(3) of the BSA.[181]

The net effect of the conclusion reached in *URS* is that contribution claims can be brought in respect of DPA claims revived by section 135 of the BSA, even though the BSA did not seek to amend the CLCA, and section 1(2) of the CLCA was clearly designed to preclude contribution claims where the claimant has already ceased to be liable to the third parties before it made a payment (pursuant to a judgment/award or an agreed settlement) for which contribution is being sought.

This is a somewhat striking result when one considers that in *URS*, BDW incurred the remedial costs in 2020 at a time when it was no longer liable to the individual purchasers and for which no contribution claim could have been brought (or even expected to be brought), but it can now seek a contribution simply because the BSA has come into force. This is of much wider significance to the industry as a whole, given that numerous consultants and contractors will now potentially be exposed to a raft of contribution claims in respect of DPA claims based on the approach taken in *URS*.

The Court of Appeal's treatment of the issue of contribution in *URS* also forms part of the pending appeal to the Supreme Court. Therefore, it would be a mistake for parties to assume that they have heard the last word on the interplay between the BSA, DPA and the CLCA, and it remains to be seen to what extent the Supreme Court is prepared to extend the retrospectivity of the BSA, in circumstances where many parties may have very little (if any) access to documentary records or viable witnesses relating to projects which were completed 30 years ago but become the subject of substantial litigation.

[181] Ibid, at paras 217 and 218.

Global perspectives

The extensive legal developments in the UK during 2023 were matched by judicial and legislative trends abroad, particularly in jurisdictions such as Hong Kong SAR, Singapore and UAE, where there were no shortages of construction and infrastructure disputes (both litigation and arbitrations). Some of the most noteworthy highlights are summarised below in a comparative context and to inform those who are engaged in cross-border construction, infrastructure and energy disputes.

Hong Kong SAR

The Hong Kong government has long contemplated introducing new legislation to provide for security for payment and adjudication in construction projects, akin to the HGCRA in the UK. In particular, as noted in the annual review for 2021, the Development Bureau had issued Technical Circular (Works) No 6/2021 introducing security of payment provisions into public services contracts.

The Technical Circular also indicated at the time that a Construction Industry Security of Payment Bill (the Bill) was in the pipeline, and on 28 November 2023, the Legislative Council's Panel on Development confirmed that the Bill was being finalised, and that the current intention is to pass the Bill in 2024 and bring it into force by 2025.

The Hong Kong government has long contemplated introducing new legislation to provide for security for payment and adjudication in construction projects, akin to the HGCRA in the UK

This Bill will cover public as well as private construction contracts, including contracts and subcontracts for works, services and supply of materials in relation to construction works, insofar as the value of those contracts/subcontracts meets the specified threshold. This will be subject to certain exclusions, such as construction contracts for existing residential buildings,

and works to existing non-residential buildings which do not require approval and consent from the Buildings Department.

Much like the HGCRA, the Bill proposes to abolish "pay when paid" provisions, introduce a statutory right of suspension on the basis of non-payment, and implement a statutory adjudication regime for the resolution of payment disputes. Notably, the Bill proposes that a default timeframe of 55 working days for adjudications (which is longer than the 28-day timeframe for adjudications in the UK), and adjudications for wider disputes such as EOT claims will be implemented in phases, starting with public contracts.

One of the immediate questions which arises is the availability of sufficiently qualified and experienced adjudicators in Hong Kong, and also the availability of specialist legal practitioners who can advise on and assist with adjudications, given that this is all somewhat novel. The Hong Kong International Arbitration Centre (HKIAC) and other professional bodies in Hong Kong will certainly have an important role to play in making the new regime work.

> There will also be ample room for the cross-fertilisation of the English and Hong Kong adjudication regimes, with the substantial body of TCC case law on issues of jurisdiction and natural justice which arise on the enforcement of adjudication decisions

Moreover, given that UK construction practitioners have accumulated a significant amount of adjudication experience and know-how over the course of almost 30 years, it is likely that parties in Hong Kong can also consider seeking the advice and support of solicitors and counsel based in the UK (in the same manner as in arbitrations). There will also be ample room for the cross-fertilisation of the English and Hong Kong adjudication regimes, with the substantial body of TCC case law on issues of jurisdiction and natural justice which arise on the enforcement of adjudication decisions.

Apart from the proposed new legislation, Hong Kong continues to be an important centre of domestic and cross-border arbitration in the region, and there have been a number of interesting arbitration-related judgments which were handed down by the Hong Kong courts in 2023.

Last year's review reported on the decision in *C v D*,[182] where the Hong Kong Court of Appeal confirmed that a failure to comply with a multi-tier dispute resolution procedure which operated as a condition precedent to arbitration proceedings was an issue which went to admissibility and not the tribunal's jurisdiction, such that it did not affect the validity of the referral of the dispute to an arbitration or the enforceability of an arbitral award.

The parties subsequently appealed to the Hong Kong Court of Final Appeal, which culminated in the further judgment of *C v D*[183] in 2023. As is expected by most arbitration practitioners, the Court of Final Appeal had little difficulty upholding the Court of Appeal's decision, noting that the same approach and distinction between issues of jurisdiction and issues of admissibility have been adopted in other common law jurisdictions,[184] including in the UK in cases such as *Republic of Sierra Leone v SL Mining Ltd*[185] and *NWA and Another v NVF and Others*.[186]

In reaching this conclusion, Cheung CJ emphasised[187] that there is a presumption that questions of compliance with pre-arbitration conditions are non-jurisdictional as they are not objections to the tribunal's authority per se:

> "When considering an objection relating to a pre-arbitration condition, it is necessary first to construe the arbitration agreement. It is open to the parties expressly to agree that compliance with such a condition is amenable to review by the court. If the agreement so provides, the issue of reviewability is obviously resolved. However, the court will require unequivocally clear language to arrive at that conclusion. That is because it would be contrary to all normal expectations to find that such was the parties' intention. They have opted to submit their disputes to an arbitral tribunal rather than a court for resolution. It would be surprising to discover that they intend to have a court involved and to undergo two rounds of decision making to determine whether a pre-arbitration condition has been met."[188]

182 [2022] HKCA 729; [2022] Lloyd's Rep Plus 104.
183 [2023] HKCFA 16; [2023] LMCLQ 18.
184 Ibid, at paras 29 to 44.
185 [2021] EWHC 286 (Comm); [2022] 2 Lloyd's Rep 458.
186 [2021] EWHC 2666 (Comm); [2022] 1 Lloyd's Rep 629.
187 *C v D*, at paras 49 and 50.
188 Ibid, at para 47.

Cheung CJ's opinion was also reinforced by the fact that the Hong Kong Arbitration Ordinance (Cap 609) only contemplated specific grounds for challenging the enforceability of an arbitral award. All of these (except for grounds of public policy) went to the lack of parties' consent to the tribunal's jurisdiction over the relevant subject matter (for example, because the arbitrators were not appointed in accordance with the contract, or the arbitrators ruled on a matter which went beyond the reference to arbitration).[189] Compliance with pre-arbitration conditions was simply not such an objection.

Parties engaging in arbitrations in Hong Kong can therefore be reassured that the Hong Kong courts are still very much pro-arbitration, and they would be astute not to allow a party to rely on technical breaches of pre-arbitration conditions to frustrate the arbitration procedure or avoid the consequences of an enforceable arbitral award.

The pro-arbitration approach of the Hong Kong courts can also be seen in *Employer v Contractor*,[190] which arose from an arbitration in respect of a final account dispute in a construction project. The employer applied for leave to appeal seven points of law under section 6 of Schedule 2 to the Hong Kong Arbitration Ordinance, all of which related to the arbitrator's application of particular contractual provisions to the facts and the evidence (for example, whether the contract conditions precluded entitlements relating to delays caused by a utility undertaking, and whether extensions of time constituted a sole remedy for delays under the contract).[191]

In order to obtain leave to appeal, the employer had to demonstrate that the arbitrator's decision on the question was "obviously wrong", or that the question was one of general importance and was at least "open to serious doubt". This is well-established in the authorities of the Hong Kong courts.

Mimmie Chan J emphasised at the outset that whichever test applied, "the threshold is high and it has to be demonstrated to the court, quickly and easily, without meticulous argument on the application for leave to appeal, that the decision of the tribunal cannot be right, or that there are serious doubts as to its correctness".[192] This is important given that applications for leave to appeal are normally decided on paper without a hearing, and it is also "consistent with the approach of the courts, of respecting the autonomy of the tribunal and the finality of arbitral awards", with a "consistent theme of minimal curial intervention".[193]

On the facts, Mimmie Chan J considered that the employer had to show that the arbitrator's decision was obviously wrong,[194] and she went on to reject each of the points of law raised by the employer, finding that the arbitrator's decision was neither obviously wrong nor open to serious doubt.[195] The judge considered that although the arbitrator may not have expressed himself clearly at times, it was clear that he had considered both parties' factual and expert evidence, ruled on the correct interpretation of the contractual provisions and applied them to the evidence which he accepted.

The Hong Kong courts will have very little sympathy with an attempt by an unsuccessful party in an arbitration to have a second bite at the cherry by framing the arbitrator's factual findings as points of law and relitigating the dispute in court. This would be contrary to the fundamental purpose and spirit of arbitration, which is to provide parties with a private forum for the final determination of their disputes based on the parties' mutual agreement. The courts will read an arbitral award generously and in a commercial way, and will not be combing through an award to find faults which can be reopened in court.

> The Hong Kong courts will have very little sympathy with an attempt by an unsuccessful party in an arbitration to have a second bite at the cherry by framing the arbitrator's factual findings as points of law and relitigating the dispute in court

An interesting example of the court refusing to enforce an arbitral award on public policy grounds can be found, however, in *Song Lihua v Lee Chee Hon*,[196] where the Hong Kong Court of First Instance found that one of the three arbitrators had failed to act in accordance with

189 Ibid, at paras 52 to 54.
190 [2023] HKCFI 2911.
191 Ibid, at para 5.
192 Ibid, at para 7.
193 Ibid, at para 10.
194 Ibid, at para 8.
195 Ibid, at paras 12 to 71.
196 [2023] HKCFI 2540.

the fundamental principles of due process and natural justice, because he attended by video conferencing facility but did not meaningfully participate.

Mimmie Chan J began by stressing that "[i]n Hong Kong, audi alteram partem is a fundamental principle of natural justice which is recognised and enforced", and under section 46(2) of the Hong Kong Arbitration Ordinance, parties to an arbitration must be treated with equality, and the tribunal is required to be independent, to act fairly and impartially and to give parties a reasonable opportunity to present their cases.[197] Importantly, these rules must not only be applied, but "must be seen by the objective reasonable observer to have been applied".[198]

The facts in this case give a particularly stark example of an arbitrator who did not properly hear the parties. The court reviewed the video recordings of the hearing, and noted that during much of the hearing, the arbitrator in question was moving from one location to another and even left his premises, without giving his undivided attention to the hearing:

> "[...] it is quite obvious that essentially for the second half of the hearing, commencing approximately one hour 36 minutes after the start of the second hearing, Q had scarcely been stationary for more than one minute (apart from the last part of the video when he was inside a car). The video clearly showed the background of Q's various locations, and it could be observed that he had moved from one room of the premises to another, at times talking to and/or gesturing to others in the room. [...]"

Mimmie Chan J concluded that there was "no apparent justice and fairness" when a member of the tribunal was not hearing or focused on hearing the parties, as an objective observer would have reasonable doubts as to whether the arbitrator had already made up his mind and was not interested in what the parties had to say, and also whether the award could actually be supported by the evidence.[199] Crucially, the court applied its own standards and law and was not deterred by the fact that the Mainland Chinese court did not set aside the award.[200] This was sufficient to render the award unenforceable on grounds of public policy.

While *Song* was an extreme case and such conduct would not be expected from most arbitral tribunals, it is nonetheless a salutary reminder that there are fundamental minimum standards of fairness and due process which arbitral tribunals must adhere to, and that an award is not immune from attack if a tribunal falls substantially below such minimum standards.

It is clear that the Hong Kong courts are striking an appropriate balance between the pro-arbitration and pro-enforcement approach on the one hand, and the need to intervene in appropriate cases when called for. The decisions discussed above are not only relevant authorities for those involved in arbitrations in Hong Kong, but also helpful case studies for English practitioners working on domestic and other international arbitrations, as the principles applied by the Hong Kong courts are very much consistent with those under English law.

Singapore

Singapore also continues to be an important hub for the resolution of international commercial disputes in Southeast Asia, both in arbitrations and increasingly in the Singapore International Commercial Court (SICC). This was supported by a number of developments in 2023.

First, on 22 August 2023, the Singapore International Arbitration Centre (SIAC) published for consultation the Draft 7th Edition of the SIAC Rules. The consultation concluded on 21 November 2023. When finalised, the new 7th Edition of the SIAC Rules will replace the current SIAC Rules (2016). A number of important changes are likely to be introduced.

One of the key highlights is that the SIAC Rules will provide more opportunities for parties to adopt simplified or alternative procedures to save time and costs. For instance, the claims cap for the expedited procedure will be increased from SG$6 million to SG$10 million to enable more parties to adopt that procedure, and a new streamlined procedure will be introduced for claims up to SG$1 million, which would enable parties to have a dispute determined by a sole arbitrator within three months of the constitution of the tribunal. Moreover, the SIAC Rules will introduce a procedure for the preliminary determination of certain issues (similar to a preliminary issues trial in the TCC) within 45 days of the filing of an application.

197 Ibid, at paras 15 and 16.
198 Ibid, at para 17.
199 Ibid, at paras 51 and 52.
200 Ibid, at para 53.

Further, the SIAC Rules will introduce a new "SIAC Gateway", which is an electronic case and document management system (similar to the CE-File system used by the UK courts) and will allow the centralised management and storage of case documents. This is likely to improve the efficiency and user-friendliness of an arbitration conducted under the SIAC Rules.

Another measure to encourage the choice of Singapore as a forum for dispute resolution is the introduction by the SICC of a new model clause allowing parties to expressly designate the SICC as having supervisory jurisdiction over Singapore-seated international arbitrations. The SIAC has also updated its model arbitration clauses to incorporate the SICC model clause.

This may well prove to be attractive to many parties, as the SICC consists of a bench of renowned judges from common law and civil law jurisdictions alike, including former Justice of the UK Supreme Court, Lord Neuberger, and also former judges of the English High Court. This can prove to be particularly helpful in cases where the contract and/or the arbitration agreement in question is governed by laws other than Singapore law (for example, English law). It is also noteworthy that the cost regime in the SICC is more generous and allows a successful party to recover reasonably costs incurred.

Indeed, the SICC has increasingly produced interesting and instructive judgments on arbitration-related matters in recent years. One such example is the decision of *CZT v CZU*[201] in 2023. In this case, the unsuccessful party (the supplier of certain defective material packages) sought to set aside the arbitral award, and it applied for the production by the tribunal of the records of its deliberations, on the basis that the majority of the tribunal attempted to conceal the true reasons behind the award and lacked impartiality.

The SICC rejected the disclosure application. Chua Lee Ming J (delivering the judgment of the SICC) observed that arbitration proceedings are confidential, and even if this is not provided for by the applicable arbitration rules, "the confidentiality of arbitration proceedings has also found expression as an implied obligation of law".[202] As to arbitrators' records of deliberations, the default position based on international case law and commentaries is also that they are confidential and protected against disclosure, and "it can scarcely be argued otherwise" because such confidentiality exists as an implied obligation in law.[203]

The judge noted that there can be exceptions to the confidentiality of deliberations where "the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations". However, it would take a very compelling case to overcome these policy reasons and it would only be found in "the very rarest of cases" (for example, allegations of corruption which have real prospects of success).[204]

On the facts, the judge held that it was irrelevant whether the majority's decision may be wrong, as that was not even a ground for setting aside the award.[205] Further, the bare allegations that the true reasons for the award could be found in the deliberations and were concealed from the award had no evidential basis.[206] It was impermissible for a party to seek disclosure in order to investigate allegations, as that would be "nothing more than a fishing expedition".[207]

The result in *CZT v CZU* is hardly surprising, but it serves as a good illustration of the SICC's robust approach and its application of internationally recognised principles of arbitration when exercising its supervisory jurisdiction. Parties which opt for the SICC as the supervisory court of a Singapore-seated arbitration will therefore find that its approach is strongly reminiscent of the pro-arbitration culture found in other well-established common law and civil law jurisdictions.

Beyond the SICC, the Singapore courts have also delivered a number of noteworthy judgments in 2023 specifically on construction disputes, dealing with a number of issues which are often encountered in construction projects in the UK and worldwide.

First, in *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd,*[208] the Appellate Division of the Singapore High Court considered whether a contractual requirement for written instruction of a variation operated as a condition precedent which precluded a variation claim. This is a question which frequently arises in other jurisdictions, and indeed, there has been considerable debate in the UK since the Supreme Court's decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[209] regarding "no oral modification" clauses.

In *Vim*, the sub-subcontract's variation clause stated that variation works "shall be carried out only with written

201 [2023] SGHC(I) 11. For further analysis see [2024] LMCLQ 12.
202 Ibid, at para 41.
203 Ibid, at paras 43 and 44.
204 Ibid, at paras 52 and 53.
205 Ibid, at para 64.
206 Ibid, at paras 65 and 70.
207 Ibid, at para 67.
208 [2023] SGHC(A) 2.
209 [2018] UKSC 24; [2018] BLR 479.

instruction", and Quentin Loh SJ (delivering the judgment of the court) considered that the clause was "not drafted in a stringent manner requiring strict compliance failing which a variation claim will fail". It did not state the consequence of non-compliance, and unlike some other contracts, there was no requirement to give written confirmation of a verbal instruction.[210]

In any event, the judge noted that a contractual notice requirement could be disapplied on the basis of a waiver or estoppel,[211] and on the facts, he held that the sub-contractor's written comments on the sub-sub-contractor's variation claims made it clear that the claims were disallowed due to the "back-to-back" mechanism which required the main contractor's approval upstream. Given the sub-contractor's awareness of the notice requirements, "[its] silence amidst the passage of time indicates [...] that there had been a voluntary relinquishment of this right".[212]

> It is clear that the Singapore courts take a slightly more relaxed and common-sense approach to questions of waiver or estoppel, and it may provide some food for thought to parties and judges if a similar case arises in the TCC

The *Vim* decision provides an interesting comparison against the approach of the English courts, where there has been a recent tendency to give strict effect to contractual formality requirements and only allow a defence of waiver or estoppel in exceptional cases, particularly where the Supreme Court in *Rock Advertising* emphasised that "something more would be required" than the informal promise itself.[213] It is clear that the Singapore courts take a slightly more relaxed and common-sense approach to questions of waiver or estoppel, and it may provide some food for thought to parties and judges if a similar case arises in the TCC.

Secondly, in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*,[214] the Appellate Division affirmed the first instance court's decision that the liquidated damages could not be enforced due to the employer's acts of prevention and in the absence of an extension of time in the letter of intent, and that the liquidated damages did not restrict the quantum of the employer's entitlement to general damages.[215]

This is notably different from the position in the UK, where there is case law to the effect that a liquidated damages clause which has been rendered unenforceable can nonetheless operate as a cap on general damages for delay.[216] It is therefore interesting to see the distinction drawn by the Singapore courts between the purpose of liquidated damages (as a genuine pre-estimate of loss) and the purpose of general damages (as compensation for actual loss suffered), which form the basis of the conclusion not to cap the general damages by reference to the rate of liquidate damages.

The *Crescendas* decision is also interesting for its pragmatic approach to the quantification of losses, particularly net revenue rental income post-completion. The Appellate Division accepted that the claimant had "attempted its level best to prove its loss and the evidence is cogent",[217] and in particular, the employer adduced a significant amount of empirical data including market data of comparable buildings and market trends. The court also confirmed that post-completion net revenue rental loss in a building which was expected to be let out was a loss which arose naturally from the breach of contract or in the usual course of things, falling within the first limb of the rule in *Hadley v Baxendale*.[218]

The Appellate Division also accepted the multi-year model of computation put forward by the employer, which computed the difference between the projected net rental revenue it would have earned had there been no delay and the actual net rental revenue it had earned, over the span of multiple years stretching from the period of the delay to the years thereafter. This was because the development would have taken a few years to reach stabilised occupancy, and the lost leases would have been for multiple years, such that the losses were incurred over multiple years.[219] The evidence led in this case and the Singapore court's approach will no doubt be instructive for those seeking to claim similar losses in future disputes.

210 *Vim*, at paras 32 to 35.
211 Ibid, at para 37.
212 Ibid, at para 44.
213 *Rock Advertising*, at para 16.
214 [2023] SGHC(A) 9.
215 Ibid, at para 34.
216 See eg *Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC); [2021] BLR 687, at paras 98 to 117.
217 *Crescendas*, at para 161.
218 Ibid, at para 103.
219 Ibid, at paras 105 and 106.

UAE

Turning to the Middle East, the UAE remains an important centre for the resolution of construction disputes (often by arbitration) arising from projects in the region. In particular, the Dubai International Finance Centre (DIFC) and the Abu Dhabi Global Market (ADGM) are the dual pillars of arbitration activities in the UAE.

After the DIFC-LCIA [London Court of International Arbitration] was abolished by Dubai Decree No 34 of 2021 in September 2021, the Dubai International Arbitration Centre (DIAC) took over all arbitration proceedings commenced on or after 21 March 2022, and it has quickly grown into the leading arbitral institute in the region. In a continuing effort to boost its appeal as an arbitral institute, the DIAC replaced its former executive committee with the Arbitration Court in February 2023, which comprises well-known local and foreign arbitration practitioners.

Further, in June 2023, the DIAC appointed Mr Robert Stephen (formerly the registrar of the DIFC-LCIA) as its new registrar. These ongoing developments are likely to further cement the role of DIAC and increase its ever-growing case load. There is little doubt that Dubai continues to be one of the most attractive hubs for dispute resolution in the Middle East.

This is further reinforced by legislative changes the UAE has introduced to its arbitration law, namely Federal Decree Law No 6 of 2018 (Federal Arbitration Law). The amendments were brought in by Federal Decree Law No 15 of 2023, which came into force on 16 September 2023. There are a number of noteworthy changes to the previous law.

First, Article 10 of the Federal Arbitration Law has been amended, such that individuals with supervisory roles in arbitral institutes can sit as arbitrators in proceedings administered by those institutes, provided that they meet the prescribed conditions. This increases the pool of available arbitrators which can be called upon to constitute a tribunal.

Article 28 of the Federal Arbitration Law has also been amended to accommodate parties wishing to conduct arbitral hearings remotely, as arbitral institutes are now obliged to provide the necessary technology and facilities to enable a hearing to be conducted remotely. This is in keeping with the post-Covid trend of conducting hearings (mostly procedural/interim hearings but also main evidential hearings) remotely, often in order to save time and costs by avoiding the need for party representatives to travel to the hearing venue.

> Parties should be aware of the potential pitfalls of not clearly specifying the seat of an arbitration in the UAE, as there is room for confusion and an ambiguity in the arbitration agreement may lead to undesirable results

Finally, Article 33 of the Federal Arbitration Law has been amended, so that the entire arbitration proceedings (and not just hearings) are expressly considered to be confidential. This is an important provision, as it removes any doubt as to the scope of the confidentiality of arbitration proceedings (an issue which arises not infrequently, as one can see in the Singapore case of *CZT v CZU* discussed above). Parties often elect to go to arbitration because of its confidentiality, and the UAE clearly recognises this as a fundamental principle which has to be safeguarded. Overall, the recent legislative changes serve to strengthen the UAE's pro-arbitration track record and bring it in line with established international practices.

However, parties should be aware of the potential pitfalls of not clearly specifying the seat of an arbitration in the UAE, as there is room for confusion and an ambiguity in the arbitration agreement may lead to undesirable results. For instance, in *Abu Dhabi Court of Cassation Case No 1045 of 2022*, the Court of Cassation considered whether an ICC arbitration in relation to a construction contract was seated in Abu Dhabi or the ADGM.

The Court of Cassation noted that Article 1 of the Federal Arbitration Law provided that the supervisory court is the federal or local court within whose jurisdiction the arbitration is held. The International Chamber of Commerce (ICC) opened a representative office in the Abu Dhabi Global Market (ADGM), such that the ICC arbitration in question was considered to be held in the ADGM. On this basis, it was held that the ADGM courts would have jurisdiction over any claims or applications arising from the ICC arbitration.

This is a rather surprising decision, given that the seat of the arbitration is seldom linked to the location of the arbitral institute's office. It is unclear whether a different conclusion may be reached by another court in the future, but what is clear is that parties which agree to arbitrate in the UAE should endeavour to be very express and specific when stipulating the seat of the arbitration, in order to avoid any unexpected surprises when it comes to applying for interim relief or enforcement of an award in the courts of the intended seat.

Moving away from arbitration-related developments, some readers will remember from last year's annual review, the discussion of the first major judgment of the DIFC Court's Technology and Construction Division (TCD) in 2022, namely *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC*.[220] This was primarily a delay dispute under a FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1999.

The TCD's decision was appealed to the DIFC Court of Appeal, culminating in a further judgment in *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC*[221] in May 2023. Like the TCD's judgment, the latest Court of Appeal decision contains some interesting discussion regarding issues often encountered in common law jurisdictions, especially in relation to delay claims.

First, the Court of Appeal considered the effect of the second paragraph of FIDIC sub-clause 20.1, the requirement to provide a detailed claim within a 42-day period, and concluded that the requirement of a detailed claim was not a condition precedent, even though it "gives teeth to the requirement to service such a claim and to do so within the required time".[222] This is because "[s]uch a construction would give rise to the risk of satellite litigation and is both undesirable and unnecessary".[223]

Secondly, the Court of Appeal considered when time begins to run for the purpose of the initial claim notice, which has to be given within a 28-day period. Interestingly, the Court of Appeal held that time starts running from the moment the contractor is aware of the event or circumstance giving rise to the claim. In doing so, the court departed from the well-known decision of Akenhead J in *Obrascon Huarte Lain SA v Attorney General for Gibraltar*,[224] which held that a notice under sub-clause 20.1 can be made either prospectively for a delay which has not been incurred or retrospectively once the delay has actually started to be incurred:

> "The construction advanced by Akenhead J would mean that in, say, a three-year project, if an event occurred during the first year which resulted ultimately in the works overrunning by a month or two after the time for completion in year three – and there would be no actual delay to the time for completion until then – then the 28-day notice under sub-clause 20.1 would only have to be given within 28 days of the moment in year three when Time for Completion passed without the works being completed. That would render sub-clause 20.1 – which is designed to ensure that claims are notified and dealt with swiftly – entirely ineffective for its purpose."[225]

Thirdly, the Court of Appeal rejected the contractor's argument that where no extension of time could be granted due to a non-compliance with notice requirements, the employer's act of prevention would nonetheless set time at large and preclude a claim for liquidated damages. This is commonly known as the *Gaymark* argument, based on the Australian decision of the same name.[226] The court considered that it was simply wrong to say that an extension of time provision is somehow "disabled" because of non-compliance with a notice requirement.[227]

Moreover, such an approach would effectively "enable the contractor to pick and choose whether or not to invoke the extension of time provision, knowing that if he did not give the proper notices then he would be free of any obligation to complete the works by a specified date and of having to pay liquidated damages for delay",[228] which made no commercial sense. In the court's view, "*Gaymark* stands alone" and does not represent the law as applied in the DIFC (or indeed in any other jurisdiction).[229]

As a last resort, the contractor sought to rely on implied obligations of good faith under the DIFC Contract Law to argue that it would be unconscionable for an employer to recover liquidated damages where the delays are attributable to acts of prevention. The Court of Appeal similarly rejected this argument, in the same way that the prevention principle was held to have no application here:

220 [2019] DIFC TCD 003.
221 [2022] DIFC CA 016; [2023] BLR 552.
222 Ibid, at para 41.
223 Ibid, at para 39.
224 [2014] EWHC 1028 (TCC); [2014] BLR 484, at para 312.
225 *Panther*, at para 45.
226 *Gaymark Investments Pty v Walter Construction Group Ltd* [1999] NTSC 143.
227 *Panther*, at para 54.
228 Ibid, at para 55.
229 Ibid, at para 57.

It will be interesting to see whether the reasoning in the *Panther* case will be taken into account by a TCC judge in future, where a case turns on the interpretation of whether a compliant notice has been given under FIDIC sub-clause 20.1

> "The obligation of good faith in Articles 57 and 58 of the DIFC Contract Law is concerned with the implication of terms into a contract and the mode of performance by the contracting parties. Nowhere does it suggest that the contracting parties should not be held to their bargain, as set out in the contract, or that the courts should get involved in re-writing the contract for the parties so as to achieve some balancing or re-balancing of equities between them or to redress what one party claims to be an unfair consequence of the terms which have been agreed. [...]"[230]

The DIFC Court of Appeal's decision in *Panther* is a fascinating case study, as it largely followed conventional principles of English law on a number of issues on the one hand (such as the strict effect of the notice requirement in sub-clause 20.1 and the rejection of the *Gaymark* principle and good faith arguments) but departed from the well-known dicta in *Obrascon,* which have long been taken as authoritative statements of the law. It will be interesting to see whether the reasoning in the *Panther* case will be taken into account by a TCC judge in future, where a case turns on the interpretation of whether a compliant notice has been given under FIDIC sub-clause 20.1.

Meanwhile, construction practitioners in the UK would do well to keep a close eye on cases coming out of the DIFC's TCD and Court of Appeal. Such decisions are likely to be of interest, given that the DIFC judges frequently consider and apply English case law, and sometimes go further than the authorities to develop the law in a different direction. It is yet another illustration of how the boundaries between different jurisdictions are starting to blur when it comes to construction law, and there is room for a significant degree of cross-fertilisation in the years to come.

230 Ibid, at para 61.

Concluding observations

As one can see from the discussions above, 2023 has seen a number of very important judgments whose impact will be felt not just by the construction industry but by parties to contractual and tortious disputes generally. Some were the natural culmination of appeals against decisions which have already been noted in the previous years, with good examples being *Kajima*[231] and *URS*.[232] It has been enlightening to be able to track the evolution of the dispute and the legal principles as these cases progress through the court hierarchy.

In particular, the Court of Appeal's decision in *URS* is arguably one of the most significant decisions of 2023 (if not of all time), as is apparent from the discussion above of the issues arising from Coulson LJ's judgment. Indeed, it is fair to say that there will be no shortage of important issues to be considered and addressed on the appeal to the Supreme Court, and very rarely has a single case encompassed so many issues which will have a direct and critical impact on parties' legal liabilities in the construction industry generally. The hearing before the Supreme Court is likely to take place in late 2024, with a decision expected around early 2025.

USAF[233] is also pending an appeal. Given the prevalence in modern times of assignments of assets or receivables under facility/security agreements and also under factoring agreements as a means of regulating cash-flow, guidance from the Court of Appeal on the proper interpretation of the type of assignment provisions encountered in *USAF* will help future parties to adopt the correct contractual language in order to achieve the intended outcome. The Court of Appeal is likely to hear this appeal later in 2024, so this will be one to watch in the coming months.

On fire safety issues, Sir Martin Moore-Bick's Phase 2 report in the Grenfell Tower Inquiry is expected to be published in 2024. The Phase 2 hearing ended in November 2022, and it is apparent that the compilation of the report has been a herculean task given the substantial volume of evidence heard. Stakeholders in the construction industry will no doubt be eager to see the report, especially those who are currently involved in the ever-growing torrent of claims relating to cladding and other fire safety defects.

231 *Kajima Construction Europe (UK) Ltd and Another v Children's Ark Partnership Ltd* [2023] EWCA Civ 292; [2023] BLR 271.
232 *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772; [2023] BLR 437.
233 *USAF Nominee No 18 Ltd and Others v Watkin Jones & Son Ltd* [2023] EWHC 1880 (TCC).

In this regard, with the BSA now having been in force for over a year, 2023 has already seen the first First-tier Tribunal (Property Chamber) ruling granting a remediation order in relation to fire safety defects.[234] The Upper Tribunal (Lands Chamber) has also considered the application of the BSA,[235] albeit that was confined to the provisions relating to the interplay between the consultation requirements under section 20 of the Landlord and Tenant Act 1985 and Schedule 8 of the BSA regarding service charge. One can expect more decisions regarding the interpretation and application of the BSA to come in 2024 and beyond, including the Supreme Court's decision in *URS* in due course.

Another noteworthy development in terms of building safety is the introduction in 2023 of the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023, as supported by the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023. Those within the construction industry have been grappling with the requirements for the new Gateway 2 and Gateway 3 building control application processes for higher-risk buildings, and although the government and the Health and Safety Executive have issued various guidance,[236] parties will need to observe how the building safety regulator interprets and applies the new regulations, especially on the consideration of attached buildings and the requirements for the Gateway 2 and 3 applications.

Last but not least, it is noteworthy that the Law Commission published its final report on the proposed reforms to the Arbitration Act 1996 in September 2023, with a draft bill for putting the changes into effect. The key amendments include: a new presumption that the governing law of the arbitration agreement is the law of the seat absent an express choice; an express power for arbitrators to summarily dispose of an issue; restrictions on a re-hearing by the court of jurisdictional issues determined by an arbitral tribunal; extensions to the courts' supervisory powers; a general duty on arbitrators to disclose conflicts of interest; and stronger immunity for arbitrators in relation to application for removals and resignations. It is possible that the bill will be introduced into Parliament for passage later in 2024, in which case there will be a race to get it enacted before the next general election.

With so many pending developments, it is no hyperbole to say that 2024 will likely bear witness to another flurry of activity in the fast-moving field of construction law, both legislatively and judicially. The construction, infrastructure and energy industries have come a long way since the Covid-19 pandemic and although old challenges are replaced by new ones, perhaps one of the most admirable features of the construction law landscape in the UK is its ability to adapt and evolve. Taking stock of the wealth of case law from 2023 and the seminal cases which are going to be considered in 2024, one can say with much confidence: it is an exciting time to be a construction practitioner.

234 *Waite and Others v Kedai Ltd* (Case Ref LON/00AY/HYI/2022/0005 & 0016).
235 *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC).
236 See www.gov.uk/guidance/criteria-for-being-a-higher-risk-building-during-the-occupation-phase-of-the-new-higher-risk-regime and www.hse.gov.uk/building-safety/assets/docs/regime-overview.pdf.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2023 judgments analysed

A&V Building Solutions Ltd v J&B Hopkins Ltd [2023] EWCA Civ 54; [2023] BLR 219

AZ v BY [2023] EWHC 2388 (TCC); [2023] BLR 664

Berkeley Homes (South East London) Ltd and Another v John Sisk and Son Ltd [2023] EWHC 2152 (TCC); (2023) 40 BLM 12

C v D [2023] HKCFA 16; [2023] LMCLQ 18

Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2023] SGHC(A) 9

CZT v CZU [2023] SGHC(I) 11; [2024] LMCLQ 12

Elements (Europe) Ltd v FK Building Ltd [2023] EWHC 726 (TCC); [2023] BLR 323

Employer v Contractor [2023] HKCFI 2911

FK Construction Ltd v ISG Retail Ltd [2023] EWHC 1042 (TCC); [2023] 40 BLM 06 6

FM Conway Ltd v Rugby Football Union and Others [2023] EWCA Civ 418; [2023] BLR 353

Henry Construction Projects Ltd v Alu-Fix (UK) Ltd [2023] EWHC 2010 (TCC); [2023] CILL 4886

Kajima Construction Europe (UK) Ltd and Another v Children's Ark Partnership Ltd [2023] EWCA Civ 292; [2023] BLR 271

Lendlease Construction (Europe) Ltd v Aecom Ltd [2023] EWHC 2620 (TCC)

LJR Interiors Ltd v Cooper Construction Ltd [2023] EWHC 3339 (TCC); [2023] BLR 200

Nicholas James Care Homes Ltd v Liberty Homes (Kent) Ltd [2023] EWHC 360 (TCC); [2023] BLR 256

Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC [2022] DIFC CA 016; [2023] BLR 552

Sleaford Building Services Ltd v Isoplus Piping Systems Ltd [2023] EWHC 969 (TCC); [2023] BLR 422

Song Lihua v Lee Chee Hon [2023] HKCFI 2540

Sudlows Ltd v Global Switch Estates 1 Ltd [2023] EWCA Civ 813; [2023] CILL 4865

URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772; [2023] BLR 437

USAF Nominee No 18 Ltd and Others v Watkin Jones & Son Ltd [2023] EWHC 1880 (TCC)

Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd [2023] SGHC(A) 2

Vinci Construction UK Ltd v Eastwood and Partners Ltd and Others [2023] EWHC 1899 (TCC); [2023] BLR 490

Judgments considered

Anns v Merton London Borough Council [1978] AC 728

BDW Trading Ltd v URS Corporation Ltd and Another [2021] EWHC 2796 (TCC); (2021) 39 BLM 01 1

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

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

Cameron Taylor Consulting Ltd and Another v BDW Trading Ltd [2022] EWCA Civ 31; [2022] BLR 183

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

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

Chelmsford District Council v TJ Evers and Others [1984] 25 BLR 99

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

Cubitt Building & Interiors Ltd v Fleetglade Ltd [2006] EWHC 3413 (TCC); (2007) 24 BLM 3 1

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

Ellis Building Contractors Ltd v Vincent Goldstein [2011] EWHC 269 (TCC); (2011) CILL 3049

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others [2020] EWHC 2537 (TCC); [2020] BLR 747

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

Gard Marine and Energy Ltd and Another v China National Chartering Company Ltd and Another [2017] UKSC 35, [2017] 1 Lloyd's Rep 521

HS Works Ltd v Enterprise Managed Services Ltd [2009] EWHC 729 (TCC); [2009] BLR 378

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

Khan v Meadows [2021] UKSC 21; [2021] Med LR 523

Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20; (2021) 38 BLM 07 1

M Davenport Builders Ltd v Greer and Another [2019] EWHC 318 (TCC); [2019] BLR 241

Merit Holdings Ltd v Michael J Lonsdale Ltd [2017] EWHC 2450 (TCC); [2018] BLR 14

Mott MacDonald Ltd v London & Regional Properties Ltd [2007] EWHC 1055 (TCC); (2007) CILL 2481

MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd and Another [2017] UKSC 59; [2017] BLR 477

Murphy v Brentwood District Council [1991] AC 38

New Islington & Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd [2001] BLR 74

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

Obrascon Huarte Lain SA v Attorney General for Gibraltar [2014] EWHC 1028 (TCC); [2014] BLR 484

Oxford Architects Partnership v Cheltenham Ladies College [2006] EWHC 3156 (TCC); [2007] BLR 293

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

Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1

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

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

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

Sudlows Ltd v Global Switch Estates 1 Ltd [2022] EWHC 3319 (TCC); [2023] BLR 94

Tozer Kemsley & Milbourn (Holdings) Ltd v J Jarvis & Sons Ltd and Others (1983) 4 Con LR 24

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