Lloyd's List Intelligence

Construction law in 2024: key legal and industry developments

By Mathias Cheung

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Mathias has acted in cases including *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd* [2022] BLR 473, *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others* [2022] CILL 4773 and *Workman Properties Ltd v ADI Building And Refurbishment Ltd* [2024] CILL 5081. His recent international experience includes a public inquiry into alleged defective steelwork in a high-profile railway project in Hong Kong, an ICC arbitration relating to a combined cycle power plant in the Caribbean, an ad hoc arbitration regarding the design and construction of an offshore oil rig, and a Singapore International Arbitration Centre arbitration concerning a high-rise development in Cambodia.

Mathias is ranked as a leading junior in Construction and Energy by 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*.

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By Mathias Cheung

Introduction

This article summarises some of the key legal and industry developments in construction law in 2024, both in the UK and abroad.[1] *In the UK in particular, last year saw some highly anticipated judgments coming out of the appellate courts, as well as numerous interesting decisions from the Technology and Construction Court, all of which have a direct impact on construction, infrastructure and energy projects. This article provides a concise overview of recent developments in this dynamic legal landscape, as we move into another exciting year in 2025.*

As a construction practitioner, one often gets asked "what is construction law?" by aspiring lawyers and those who do not operate within the industry. Is it largely a matter of contract law, a collection of common law principles such as those dealing with negligence, or a web of statutory provisions governing construction, infrastructure and energy projects? The answer, of course, is that it is all of the above, and it is this ever-developing combination and interplay of all of those different facets of the law which make construction law such a rich body of learning, both in the UK and in other jurisdictions abroad.

Coming into the seventh year of this annual review of legal developments which are of interest to those in the construction, infrastructure and energy industries, one cannot help but reflect on the way in which principles of construction law have been shaped over the years by the courts' case law, through the all-embracing exercise of interpretation. As Lord Leggatt observed in a lecture at Keble College in Oxford in April 2024, "[c]ase law reasoning is an exercise of interpretation", and "[a]nalysing and reasoning from past cases is also best understood as a form of interpretation".[2] Parties are guided by what the courts do by way of interpretation in the cases which come before them, and the importance of this case law in guiding parties' actions and decisions in the future cannot be overstated.

It is important to remember that the significance of interpretation is not strictly confined to one area of law or another. Rather, as pointed out by Lord Sales in a recent lecture, "[w]hether it is in statutes, contracts or principles articulated in judicial decisions, the law is expressed in words. Courts interpret these words to ascertain their proper meaning", and it bears emphasis that "a particular provision is construed not just by reference to the specific object at which the statute or contract is aimed, but also by reference to the wider purposes served by the general common law".[3] This applies as much to the interpretation of a contract or statute as to the interpretation of principles dealing with the scope of tortious duties.

A robust understanding of the case law is therefore of crucial importance to legal practitioners and also industry stakeholders who grapple daily with the legal rights and obligations arising from construction, infrastructure and energy projects, because it sheds light on the proper interpretation of the relevant contractual framework, statutory regimes and/or common law principles which are applicable in a given context, and the key factors which drive those interpretations. The latter is especially important because no two cases are ever the same, and the judicial reasoning which can be discerned from the authorities is typically applied to another set of facts not so much as binary rules, but by way of analogy if not extrapolation.

[1] Previous annual reviews for the years 2017 to 2023 are available at www.i-law.com/ilaw/specialFeature.htm?querySector=Construction.

[2] Lord Leggatt, "Precedent in English Law", Harris Society Annual Lecture delivered at Keble College, University of Oxford on 26 April 2024, www.supremecourt.uk/uploads/speech_leggatt_240426_7d564b824b.pdf.

[3] Lord Sales, "Purpose in Law and in Interpretation", FA Mann Lecture delivered to Herbert Smith Freehills on 19 November 2024, www.supremecourt.uk/uploads/speech_lord_sales_191124_a899526ffe.pdf.

One example of the factors which motivate the courts' approach to legal interpretation is the notion of legal and commercial certainty. This was reiterated, for instance, in a Supreme Court decision back in 2023, where Lord Hamblen observed that "[c]ertainty and predictability are of particular importance in the context of English commercial law, all the more so given the frequent choice of English law as the governing law in international commercial transactions".[4] This, as one shall see in due course, is one of the running themes of some of the case law coming out of 2024. At the same time, there are many other wider policy objectives which clearly underpin the courts' decisions, often (although not always) working hand in hand with the interests of certainty.

This latest annual review of the key legal developments in 2024 therefore provides a concise overview of the latest judicial and legislative developments of the past year, In doing so, it draws out some of the notable patterns and objectives in the courts' reasoning, in order to provide more clarity to parties on the common legal issues which they encounter in the construction, infrastructure and energy industries, be it in the day-to-day management of projects here and abroad, or in the context of prospective or ongoing disputes.

Adjudication enforcement

Despite the increasing number of enforcement proceedings (especially those with a value below £100,000) being dealt with at the County Court level in order to help ease the caseload of the Technology and Construction Court (TCC), there continues to be a healthy number of significant adjudication matters being handled by the TCC in London and also in the Business and Property Courts District Registries. It is of some importance to the industry that this continues to be the case, for whereas County Court decisions do not get reported even if they raise an important point of practice or principle, TCC decisions are reported and carry precedential value for parties and practitioners when it comes to future disputes.

It is therefore encouraging to see that there have been a number of interesting TCC judgments in 2024 arising from adjudication enforcement proceedings, ranging from seminal decisions tackling the scope of the statutory adjudication regime under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), to cases demonstrating the TCC's continuing predisposition towards enforcing adjudication decisions when faced with arguments based on lack of jurisdiction and/or natural justice. It is essential for industry stakeholders and practitioners alike to keep abreast of these developments, not least because they carry important lessons for the conduct of future adjudications.

Scope of statutory right to adjudicate

One question which has vexed the construction industry over the past few years is whether a collateral warranty gives rise to a statutory right of adjudication under the HGCRA. This issue was first considered by Akenhead J in *Parkwood Leisure Ltd v Laing O'Rourke Wales & West Ltd*,[5] where he held based on the particular wording of the collateral warranty in question that the warranty was a construction contract under section 104 of the HGCRA, in circumstances where it related to both works already carried out and works to be carried out.

[4] *JTI POLSKA Sp Z o o and Others v Jakubowski and Others* [2023] UKSC 19; [2023] 2 Lloyd's Rep 64, at para 39.

[5] [2013] EWHC 2665 (TCC); [2013] BLR 589.

A similar question came before the TCC again in 2021 in *Toppan Holdings Ltd and Another v Simply Construct (UK) LLP,*[6] which concerned a collateral warranty executed some four years after practical completion and eight months after all defect rectification works had been completed by another contractor. This time, however, Deputy High Court Judge Martin Bowdery KC held that the collateral warranty in question was not a "construction contract" under the HGCRA, for "where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate".[7]

> Lord Hamblen disagreed that the reference to an agreement "for ... the carrying out construction of construction operations" under section 104(1) of the HGCRA could be read as synonymous with an agreement "in respect of" construction operations

The TCC's decision in *Toppan* was reversed by a majority of the Court of Appeal in *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP*,[8] which was previously analysed in the 2022 annual review. The leading judgment was given by Coulson LJ, who considered that the wording of the collateral warranty was "warranting that, not only have they carried out the construction operations in accordance with the building contract, but they will continue so to carry out the construction operations in the future".[9] In reaching this conclusion, Coulson LJ noted that any other result would be "counter-intuitive" and "unsatisfactory" because it "would make for considerable uncertainty" to have a warranty construed as a "construction contract" (or not) depending on whether a contractor executes the warranty before or after completion.[10]

Given the divergence of judicial opinions on this issue, it is perhaps unsurprising that the Supreme Court's judgment in *Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP (formerly Simply Construct (UK) LLP)*[11] was one of the most highly anticipated decisions in 2024, especially since the Supreme Court unanimously overruled the Court of Appeal's decision.

Lord Hamblen approached the issue essentially as a question of interpretation of the wording in the HGCRA and in the warranty. Fundamentally, Lord Hamblen disagreed that the reference to an agreement "for ... the carrying out construction of construction operations" under section 104(1) of the HGCRA could be read as synonymous with an agreement "in respect of" construction operations – rather, the natural and ordinary meaning of the word "for" indicated that the question was "whether the object or purpose of the agreement is the carrying out of construction operations".[12]

Based on the above reasoning, Lord Hamblen observed generally that:

> "... it is difficult to see how the object or purpose of a collateral warranty is the carrying out of construction operations. The main object or purpose of such a warranty is to afford a right of action in respect of defectively carried out construction work, not the carrying out of such work."

It followed that the collateral warranty in question was not a "construction agreement" for the purposes of the HGCRA.[13] Lord Hamblen perceived this conclusion to be "in the interests of certainty", in the sense that "there is a dividing line which means that collateral warranties are generally outside the 1996 Act rather than everything being dependent on the wording of the particular collateral warranty in issue".[14] He considered that this would "assist those in the construction industry, and those advising them, to know where they stand".[15]

While both the Court of Appeal and the Supreme Court had in mind the interests of "certainty", it is noteworthy that Lord Hamblen's approach was in stark contrast to Coulson LJ's reasoning. Coulson LJ was very much influenced by what he considered to be "the intended purpose of the 1996 Act" of achieving "the availability of a swift and inexpensive adjudication procedure" to all parties in a construction project,[16] whereas Lord Hamblen was of the view that this

6 [2021] EWHC 2110 (TCC); [2021] BLR 705.
7 Ibid, at paras 26 and 27.
8 [2022] EWCA Civ 823; [2022] BLR 433.
9 Ibid, at para 62.
10 Ibid, at para 74.
11 [2024] UKSC 23; [2024] BLR 413.
12 Ibid, at paras 62 to 64.
13 Ibid, at paras 65 and 72.
14 Ibid, at para 78.
15 Ibid, at para 78.
16 Ibid, at para 41.

policy "does not assist in interpreting how it has drawn the boundaries of section 104(1)",[17] and that it was preferrable to leave it to the parties to voluntarily and expressly opt into adjudication under a warranty if desired.[18]

> Going forward, it is essential for parties wishing to have a right of adjudication under collateral warranties to say so in express terms, otherwise the provisions of the HGCRA would not automatically apply

Many within the construction industry have no doubt been operating on the assumption (based on *Parkwood* and the Court of Appeal's decision in *Abbey*) that collateral warranties generally give rise to a statutory right of adjudication under the HGCRA, and the Supreme Court's decision will mean that parties to most existing collateral warranties will no longer be able to avail themselves of the right to adjudicate. That being said, there is nothing preventing parties under such warranties from taking a commercial view and agreeing to ad hoc adjudications, not least as a means of avoiding litigation and resolving their disputes at lower costs. Going forward, it is essential for parties wishing to have a right of adjudication under collateral warranties to say so in express terms, otherwise the provisions of the HGCRA will not automatically apply.

The applicability of the statutory right to adjudicate depends not only on the nature of the agreement in question, but also on the nature of the cause of action being referred to an adjudication. In disputes relating to construction, infrastructure and energy projects, there are often concurrent causes of action in contract, tort and/or statute, and there have been different schools of thought as to whether section 108(1) of the HGCRA is wide enough to encompass all such claims.

For example, in *Hillcrest Homes Ltd v Beresford & Curbishley Ltd,*[19] HHJ Raynor QC took the view that an adjudicator had no jurisdiction to make declarations regarding misrepresentation and/or negligent misstatement, and that there was "considerable force" in the argument that the *Fiona Trust* principles[20] (which apply to the interpretation of arbitration clauses) were inapplicable to adjudication clauses. This was supported by the academic commentary in one of the leading construction law textbooks.[21]

On the other hand, in *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc,*[22] Lord Mance stated obiter that he was "very content" to proceed on the assumption that the *Fiona Trust* principles were applicable and that a coterminous tort claim can fall within the language of section 108(1) of the HGCRA. Akenhead J also took a similar view in *J Murphy & Sons v W Maher and Sons Ltd*[23] when deciding that an adjudicator had jurisdiction to determine whether there was a settlement agreement in relation to claims under a construction contract, and noted that the *Fiona Trust* principles have "a particular resonance" in the context of adjudication. Finally, Lord Briggs in *Bresco Electrical Service Ltd v Michael J Lonsdale (Electrical) Ltd*[24] was also of the view that the language of section 108(1) of the HGCRA should not be given a narrow meaning, in concluding that the single net balance created by the Insolvency (England and Wales) Rules 2016 was a claim which could be referred to an adjudication.

In *BDW Trading Ltd v Ardmore Construction Ltd*,[25] the TCC was confronted squarely with the question of the proper interpretation of section 108(1) of the HGCRA (and also the similarly worded contractual adjudication clause), in circumstances where the defendant argued, inter alia, that an adjudication decision should not be enforced because the adjudicator had no jurisdiction over a claim based on the Defective Premises Act 1972 (DPA).

After considering the earlier conflicting authorities (as outlined above), Joanna Smith J was of the clear view that the *Fiona Trust* principles were applicable to the statutory and contractual adjudication provisions.[26] Similar to Akenhead J in *Murphy*, she considered that *Fiona Trust* discouraged the linguistic distinctions which were previously drawn between different formulations of dispute resolution clauses which refer to disputes arising

17 Ibid, at para 61.
18 Ibid, at para 78.
19 [2014] EWHC 280 (TCC), at paras 50 to 52.
20 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254.
21 See *Hudson's Building and Engineering Contracts* (14th Edition, 2019), at para 11-022.
22 [2015] UKSC 38; [2015] BLR 503, at para 22.
23 [2016] EWHC 1148 (TCC); [2016] BLR 435, at paras 31 and 32.
24 [2020] UKSC 25; [2020] BLR 497, at para 41.
25 [2024] EWHC 3235 (TCC); [2025] BLR 14.
26 Ibid, at para 55.

"under", "out of" or "in connection with" the underlying contract.[27] The *Hillcrest* decision was not regarded as persuasive in this regard.[28]

Ardmore sought to contend that the contract was made before the *Fiona Trust* principles were laid down, such that the parties had in mind "a long-standing and well-recognised distinction" between the different expressions "under the contract" and "in connection with the contract". However, Joanna Smith J pointed out that "there was in fact no clarity or consistency prior to the date of that decision", and the reality was that "there was a live debate as to the true construction of these differing expressions", so there was no relevant factual matrix supporting a narrower interpretation.[29]

Reliance was also placed by Ardmore on the different wordings of the adjudication and arbitration provisions in the contract (the latter being said to be wider). Nevertheless, Joanna Smith J observed that it would make no commercial sense for the parties to restrict the scope of disputes to be considered by an adjudicator but not those to be referred to an arbitration (especially having regard to the purpose of adjudication and the HGCRA), and very clear words would be needed to achieve such a result.[30]

The above approach was seen as consistent with the business common sense which Parliament should be considered to have had in mind when enacting the HGCRA.[31] Joanna Smith J specifically observed that Akenhead J's decision in *Murphy* was "a careful and detailed analysis of the ways in which adjudication and arbitration are similar", and she was not convinced that there were any material distinctions between the purpose of an arbitration clause and the underpinnings of adjudication.[32] Insofar as it was proposed that there were materials in Hansard which suggested that section 108(1) of the HGCRA should be construed narrowly, that argument was not properly developed by Ardmore at the hearing.[33]

At the time of writing, permission is being sought by Ardmore from the Court of Appeal to appeal against Joanna Smith J's decision, and this has the potential of going all the way up to the Supreme Court due to the significance of the issue. If so, there may be scope for the Hansard argument to be developed more fully on appeal. This, in turn, may help determine whether the appellate courts prefer the *Fiona Trust* approach as in the TCC, or a strict emphasis on the statutory wording as in the Supreme Court's decision in *Abbey*.

Breach of natural justice

Where there are no arguable jurisdictional challenges in respect of an adjudication decision, disgruntled parties often resort to allegations of breach of natural justice as a tool to try and circumvent an unfavourable adjudication decision which is otherwise valid and binding (until the dispute is finally determined by the court) on the parties. The courts have long decried attempts to rerun an adjudication at an enforcement hearing under the guise of a natural justice argument, and there has been repeated emphasis that challenges based on a breach of natural justice should only be made in the plainest cases.[34]

There are successful challenges from time to time on grounds of breach of natural justice, such as in *AZ v BY*[35] where an adjudicator had sight of materials containing without prejudice settlement discussions. However, arguments based on breach of natural justice are rejected by the courts in robust terms in the overwhelming majority of cases, an example of which was the case of *Home Group Ltd v MPS Housing Ltd*[36] back in 2023 where the TCC rejected a natural justice challenge based on the volume of evidential materials, constraints of time and inadequate access to underlying quantum records.

> The courts have long decried attempts to rerun an adjudication at an enforcement hearing under the guise of a natural justice argument, and there has been repeated emphasis that challenges based on a breach of natural justice should only be made in the plainest cases

[27] Ibid, at para 56.
[28] Ibid, at para 79.
[29] Ibid, at paras 68 to 69.
[30] Ibid, at paras 76 to 79.
[31] Ibid, at para 58.
[32] Ibid, at para 65.
[33] Ibid, at para 66.

[34] See *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15, at para 87.
[35] [2023] EWHC 2388 (TCC); [2023] BLR 664.
[36] [2023] EWHC 1946 (TCC); [2023] BLR 474.

A very recent reminder of the TCC's approach can be seen in *Essential Living (Greenwich) Ltd v Conneely Facades Ltd*.[37] Those who have been following the previous annual reviews may recall O'Farrell J's decision in *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd*[38] in 2022, which concerned the extent to which an interim valuation adjudication was binding on the valuation of the same or substantially the same claims at the final account stage. That dispute was between Essential Living and a different trade contractor, Elements, which carried out the design, supply and installation of the modular units for the same project. This latest TCC decision arises from that same project, but between Essential Living and its specialist façade contractor, Conneely.

The underlying dispute which was referred to an adjudication concerned defects in the brick slip cladding system installed by Conneely, which caused the bricks to delaminate from the façade. The adjudicator ultimately found in favour of the employer, Essential Living, and concluded that Conneely was liable for substantial damages in respect of the defective installations. In the enforcement proceedings, Conneely sought to argue that the adjudication decision was tainted by apparent bias.

Conneely's argument was based on the adjudicator's rejection of its disclosure request at the start of the adjudication. In short, Conneely had requested disclosure of materials relating to Essential Living's prior adjudication against Elements, on the purported basis that the prior adjudication touched on issues such as Elements' defective balcony installations which had a bearing on the causation of the façade defects, and that there was the potential of double recovery due to the sums previously recovered by Essential Living from Elements. This request was robustly rejected by the adjudicator, who described the suggestion of double recovery as "fanciful". Conneely therefore contended that the adjudicator was apparently biased because he pre-determined the issues without taking into account all of Conneely's evidence and submissions.

Deputy High Court Judge Adrian Williamson KC had little difficulty rejecting Conneely's arguments and granting summary judgment to enforce the adjudicator's decision. The judge was satisfied that the adjudicator's ruling was "was a perfectly appropriate disposal of the disclosure application" and "came nowhere near a breach of the rules of natural justice, let alone a serious breach", given that the *Elements* adjudication pre-dated the façade defects.[39] Importantly, he observed that there was no pre-determination on the facts because "[t]he door was left firmly ajar on both the substance of the dispute and the need for disclosure".[40]

> This is therefore a cautionary tale for unsuccessful parties in future adjudications – unless there is a very clear and serious case of breach of natural justice, it would be prudent not to attempt to resist enforcement on grounds which are, on a proper analysis, speculative or contrived

A fatal flaw in Conneely's case was that the materials from the *Elements* adjudication was eventually obtained and relied on by Conneely, but Conneely later abandoned the double recovery point anyway. This meant that the alleged breach of natural justice would not have made a material difference to the outcome in any event.[41] Even though Conneely sought to move the goalpost in its submissions and point to other findings in the adjudicator's decision as evidence of bias, the judge was of the firm view that the decision was "a very full and careful document" and the adjudicator had "fairly and thoroughly considered the issues before him".[42]

It is noteworthy that apart from granting summary judgment, the judge ultimately ordered Conneely to pay Essential Living's costs on the indemnity basis because "unmeritorious points have been raised" which delayed the payment of the sum awarded and took up a significant amount of the court's time, and the attack upon the conduct of a very experienced adjudicator was "wholly inappropriate".[43] This is therefore a cautionary tale for unsuccessful parties in future adjudications – unless there is a very clear and serious case of breach of

[37] [2024] EWHC 2629 (TCC); [2024] CILL 5077.
[38] [2022] EWHC 1400 (TCC); [2022] BLR 473.
[39] *Essential Living*, at para 13.
[40] Ibid, at para 13.
[41] Ibid, at para 17.
[42] Ibid, at para 18.
[43] Ibid, at para 29.

natural justice, it would be prudent not to attempt to resist enforcement on grounds which are, on a proper analysis, speculative or contrived.

Another interesting example of the TCC's approach to natural justice arguments can be found in *BDW Trading Ltd v Ardmore Construction Ltd*,[44] which has already been discussed above from the perspective of the scope of statutory/contractual adjudication. Another ground relied on by Ardmore to resist enforcement in that case was an alleged breach of natural justice due to the paucity and imbalance of documentation where the project was completed some 20 years ago and the heavy reliance on documents provided by BDW. This was a somewhat novel situation given the retrospective extension of the limitation period for historic DPA claims to 30 years by virtue of section 135 of the Building Safety Act 2022 (BSA).

Joanna Smith J began by reiterating that "the threshold for a valid natural justice challenge is high",[45] citing, inter alia, the Court of Appeal's dicta in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*.[46] She then set out a detailed and helpful summary of the principles from the authorities regarding allegations of breach of natural justice, focusing in particular on the courts' recognition of the inevitable limitations of the rough-and-ready process of adjudication.[47] This is very much consistent with the courts' conventional approach on adjudication enforcement claims.

The parties disagreed on the question of principle as to whether Ardmore had to show that the breach was in fact material to the outcome of the adjudication, or whether it was sufficient to show that it was potentially material to the outcome. BDW relied on Constable J's dicta in *Home Group* (which has been mentioned above) that a defendant must show that the breach "has led to a material difference in outcome".[48] Helpfully, Joanna Smith J clarified that the authorities indicate that it would be sufficient to show that the alleged breach had "a potentially significant effect" on the overall result of the adjudication.[49]

Although the court acknowledged that "the longer the period since the works in respect of which complaint is made, the more careful the court will need to be in scrutinising any complaint of unfairness",[50] the issue ultimately turned on the reason for Ardmore's lack of access to relevant documentation, and whether the disclosure process during the adjudication met the broad requirements of natural justice. On the facts of the case, Joanna Smith J concluded that there was nothing in the complaints raised by Ardmore.[51]

Joanna Smith J found on the evidence before her that Ardmore's record keeping over the relevant period was deficient, and "Ardmore's lack of documentation is not down to disposing of documents after any relevant limitation period had expired".[52] Indeed, given that BDW had been asking for documents relating to the cladding materials since 2019, Ardmore should have taken proper steps over the years to find and gather the relevant documentation, or at least taken up the offer to inspect the development before the remedial works commenced.[53]

> In general, the TCC will be slow to interfere with the way in which an adjudicator conducted the adjudication process, in circumstances where the adjudicator themselves considered that it was possible to determine the issues fairly and properly

Importantly, both prior to and during the adjudication, BDW had provided Ardmore with a significant amount of documentation by way of disclosure, and there was no basis for criticising BDW's approach to disclosure.[54] Insofar as there could have been documents in BDW's possession which went to Ardmore's defence to BDW's case on the deliberate concealment of the defects (as a ground for extending the relevant limitation period), that was considered to be "rather speculative evidence" which is very far from establishing any potentially significant effect on the outcome of the adjudication.[55]

[44] [2024] EWHC 3235 (TCC); [2025] BLR 14, at paras 88 to 142.
[45] Ibid, at para 88.
[46] [2005] EWCA Civ 1358; [2006] BLR 15, at para 86.
[47] *BDW*, at para 89.
[48] *Home Group Ltd v MPS Housing Ltd* [2023] EWHC 1946 (TCC); [2023] BLR 474, at para 50(2).
[49] *BDW*, at para 134.
[50] Ibid, at para 119.
[51] Ibid, at para 120.
[52] Ibid, at para 122.
[53] Ibid, at paras 123 and 124.
[54] Ibid, at paras 127 to 133.
[55] Ibid, at para 135.

These recent judgments all point towards the TCC's continuing approach towards the enforcement of adjudication decisions. In general, the TCC will be slow to interfere with the way in which an adjudicator conducted the adjudication process, in circumstances where the adjudicator themselves considered that it was possible to determine the issues fairly and properly.

Although arguments based on breaches of natural justice may seem at first blush to be sufficiently open-ended to allow parties to criticise the propriety of an adjudicator's decision, it is clear that such arguments are rarely successful save in the plainest and most serious cases. The most obvious risk of raising unmeritorious arguments of breach of natural justice, in addition to facing a court judgment published in the public domain, is an order for indemnity costs which would simply add to the bill of what the adjudicator has awarded. Careful thought is therefore required in every case before a party decides to challenge enforcement on natural justice grounds.

Scope of slip rule

The so-called "slip rule" in the context of adjudications allows an adjudicator "on his own initiative or on the application of a party [to] correct his decision so as to remove a clerical error or typographical error arising by accident or omission", pursuant to para 22A(1) of the Scheme for Construction Contracts (the Scheme). On this basis, adjudicators often make minor corrections after the decision has already been issued within the timescale prescribed by the Scheme.

The scope of this rule is relatively self-explanatory and does not give rise to any difficulties in most cases. However, in *McLaughlin & Harvey Ltd v LJJ Ltd*,[56] the nature of the adjudicator's correction to his decision came under scrutiny, and the TCC had to decide whether or not the said correction fell within the proper scope of the slip rule.

The dispute between McLaughlin (the main contractor) and LJJ (the mechanical and electrical sub-contractor) concerned delays to the works under the subcontract. The adjudicator ordered LJJ to pay liquidated damages in the sum of £808,000. After the decision was delivered to the parties, however, LJJ wrote to the adjudicator and made submissions to the effect that McLaughlin had already made deductions from previous interim payments in respect of liquidated damages, such that the decision should reflect the benefit which McLaughlin had already taken from those deductions. In the event, the adjudicator issued a revised decision which instead ordered payment of the sum of £808,000 "if not already allowed".

McLaughlin sought to enforce the adjudicator's decision and obtain payment of the sum of £808,000, and the question arose as to whether the adjudicator's correction to his decision was valid and prevented an order for payment being made. Deputy High Court Judge Adrian Williamson KC held that "a 'clerical error' occurs where the (probably metaphorical nowadays) clerk or penman is given instructions by the author of a decision and writes them down wrongly",[57] and concluded that this was clearly not what happened on the facts. The adjudicator considered further submissions and concluded that there was a matter

[56] [2024] EWHC 1032 (TCC); [2024] BLR 427.
[57] Ibid, at para 20.

of substance which he had not adequately addressed, but "that is not something which the adjudicator is empowered to 'correct' under para 22A(1)".[58]

The judge further considered the nature and effect of the adjudicator's error. After considering Ramsey J's dicta in *O'Donnell Developments Ltd v Build Ability Ltd* that an adjudicator who makes an error of fact or law in purporting to correct a slip does not go to his jurisdiction,[59] the judge decided not to follow that dicta given that the issue was fact-sensitive, and in the case of *McLaughlin* specifically, the adjudicator was qualifying or clarifying his decision, and thereby exercising a power which he did not enjoy rather than simply exercising his power erroneously.[60]

> The slip rule should therefore be used sparingly, and never as a means of re-opening the substance of the dispute or making further legal submissions to the adjudicator

Notably, the judge observed that "if the adjudicator did have such powers, then in every adjudication the issue of a decision would not represent the end of the process, but merely herald further rounds of submissions from the losing party or, perhaps, both parties".[61] The TCC therefore had in mind the intention of the HGCRA and the policy of having certainty over the binding effect of an adjudication decision (even though that is subject to a final determination by the courts).

The slip rule should therefore be used sparingly, and never as a means of re-opening the substance of the dispute or making further legal submissions to the adjudicator. Equally, it is important that any submissions going to the merits of the claim and the relief to be granted must be made during the course of the adjudication, in order to ensure that those submissions are taken into account by the adjudicator when reaching his/her decision.

[58] Ibid, at para 21.
[59] [2009] EWHC 3388 (TCC), at para 35.
[60] *McLaughlin*, at paras 34 to 37.
[61] Ibid, at para 34(c).

Serial adjudications

Serial adjudications continue to be commonplace in the construction industry, as parties often have multiple disputes at different stages of a project, or they may decide to refer different aspects of an ongoing dispute to separate adjudications in bite-sized chunks. Given the inevitable time and costs involved in responding to serial adjudications, and the consequences of losing the adjudications, parties often want to find ways to prevent an adjudication from continuing.

The recent case of *Dawnvale Cafe Components Ltd v Hylgar Properties Ltd*[62] is one such example, where the question was whether a party was precluded from commencing a second adjudication as a result of a prior adjudication and the settlement of the related enforcement proceedings.

The story began with Hylgar obtaining an adjudication decision in 2021 determining that Dawnvale had repudiated the contract and that it was liable to repay an overpaid sum of £180,322.92 (plus VAT and interest) under the contract. The enforcement proceedings in respect of that adjudication decision were later settled by means of a Tomlin order, and the schedule to the order stated that "payment of the Settlement Sum is in full and final settlement of any and all claims ... arising from or in connection with these proceedings".

In 2023, Hylgar intended to commence a second adjudication to claim damages against Dawnvale for the repudiation of the contract. Dawnvale sought to nip this in the bud by seeking Part 8 declarations to the effect that the claim for damages for repudiation had in fact been settled as part of the previous settlement agreement arising from the enforcement proceedings, and/or that the dispute intended to be referred was the same or substantially the same as the dispute in the first adjudication.

Deputy High Court Judge Neil Moody KC approached the issue as one of contractual interpretation. In line with well-established principles, the focus was very much on the language used in the schedule to the Tomlin order, and he was careful to exclude from consideration inadmissible evidence as to the parties' subjective understanding of the order or earlier track-changed drafts of the order which formed part of the negotiations.[63]

[62] [2024] EWHC 1199 (TCC); [2024] BLR 557.
[63] Ibid, at para 18.

Looking at the wording of the Tomlin order, the judge considered that the words "these proceedings" clearly referred to the enforcement action in which the order was made, and that this interpretation was "straightforward and second nature to most lawyers".[64] He rejected the argument that the second adjudication or the parties' underlying disputes would become in some way part of "the proceedings" between the parties given the context of the order.[65]

Similarly, the judge held that the second adjudication was not a dispute "arising from" or "in connection with" the previous enforcement proceedings. He noted that "'arising out of' imports a causal relationship and a closer, more proximate relationship with the proceedings than 'in connection with'",[66] but on any view, the new claim for damages for repudiation did not have any causative relationship with or connection with the enforcement proceedings, and it would be "a very odd use of language to describe the new claim as 'connected with' the enforcement proceedings".[67]

For similar reasons, the judge further concluded that the dispute referred to the second adjudication was not the same or substantially the same as the dispute decided in the first adjudication. The first adjudication decided that Dawnvale was in repudiatory breach and that there was an overpayment based on the true valuation of the works. The second adjudication was in relation to the recoverability and value of heads of loss resulting from the repudiatory breach. There was no overlap at all, especially since the second adjudicator was not asked to revisit the finding that Dawnvale was in repudiatory breach.[68]

The *Dawnvale* decision is an important lesson for any party wishing to settle all extant and future disputes between the parties after an adjudication. The wording will need to be suitably phrased in order to be wide enough to capture all disputes between the parties, and not just the particular adjudication or enforcement proceedings in question. On the other hand, the court is going to give short shrift to any attempt to retrospectively broaden the scope of a narrowly worded settlement in order to prevent a different dispute from being adjudicated in the usual way.

It is not often that a party goes all the way to make an injunction application in order to attempt to restrain the other party from commencing adjudications. As O'Farrell J noted in *Marbank Construction Ltd v G&D Brickwork Contractors Ltd,*[69] "it is only in very rare cases that the court will interfere in the adjudication process by way of injunctive relief". Nevertheless, the recent case of *Beck Interiors Ltd v Eros Ltd*[70] is the latest illustration of an attempt to obtain such an injunction, where the parties' disputes arose from the fit-out of a Mandarin Oriental brand hotel in Hanover Square, and there were six adjudications between the parties arising from the fit-out contract.

> The courts will very rarely grant an injunction or a Part 8 declaration restraining a party from commencing one or more adjudications, even where the parties have had numerous previous or ongoing adjudications, unless there is a clear and fundamental issue which goes to the jurisdiction of an adjudicator

Adjudication number 1 was commenced by Beck in March 2024 and sought extensions of time in a period up to July 2022. Adjudication number 2 was commenced by Beck on 18 March 2024 and related to contractual responsibility for the smoke extract ventilation system in the basement which was contended to be a variation. Adjudication number 3 was commenced by Eros on 24 May 2024 regarding alleged defects in Beck's reporting and forecasting and pre-opening costs. Adjudication number 4 was commenced by Eros on 21 May 2024 and sought a determination of the true value of interim certificate number 47. Adjudication number 5 was commenced by Eros on 28 May 2024 and claimed liquidated damages in the sum of £8.6 million. Finally, Adjudication number 6 was commenced by Eros on 30 May 2024 and claimed approximately £15.5 million in additional financing costs due to delays in selling the

64 Ibid, at para 22.
65 Ibid, at para 23.
66 Ibid, at para 28.
67 Ibid, at para 30(d).
68 Ibid, at paras 36 to 39.

69 [2021] EWHC 1985 (TCC), at para 12.
70 [2024] EWHC 2084 (TCC); [2024] CILL 5053.

apartments. After failing to challenge the adjudicators' jurisdictions in each adjudication, Beck sought to restrain Eros from proceeding with the four ongoing adjudications and from commencing any further adjudications.

The TCC refused to grant any injunction in these circumstances. Jefford J observed that the burden in having to act in four adjudications was the product of the right to adjudicate at any time, and there was nothing which could be regarded as unconscionable, unreasonable or oppressive in Eros' approach in each of the adjudications.[71] While she recognised that there were added complications beyond the volume of materials in this case due to there being four adjudications, she emphasised that "the door to policing ongoing adjudications is one that should be opened sparingly, and only in exceptional circumstances, and these are far from being such circumstances".[72] Moreover, an injunction against any future adjudication would be "an extraordinary interference with the statutory right to adjudicate".[73]

Jefford J further observed that "Beck knows what its defences are in these adjudications and the adjudicators conducting them have determined timetables which they, at least, consider fair to Beck in putting forward those cases", and any potential points about natural justice could be raised in resisting enforcement.[74] Indeed, given that Beck could resist enforcement later (if there was any breach of natural justice) or have the dispute finally determined by the courts, there was no irremediable prejudice if the injunction was not granted.[75]

Therefore, the clear message from the TCC is that the courts will very rarely grant an injunction or a Part 8 declaration restraining a party from commencing one or more adjudications, even where the parties have had numerous previous or ongoing adjudications, unless there is a clear and fundamental issue which goes to the jurisdiction of an adjudicator. This is part and parcel of Parliament's intention when enshrining the right to adjudicate at any time in section 108 of the HGCRA. Care must therefore be taken to consider whether there are exceptional grounds for injuncting an adjudication before any such application is made to the TCC.

[71] Ibid, at paras 63 to 65.
[72] Ibid, at para 70.
[73] Ibid, at para 81.
[74] Ibid, at para 75.
[75] Ibid, at para 78.

Contractual interpretation and Part 8 claims

Like adjudication decisions and issues of enforceability, difficult questions of contractual interpretation are a fact of life when it comes to construction, infrastructure and energy projects. This is hardly surprising given that many contracts for these projects are voluminous and complex, and they are often drafted/compiled within tight timeframes when parties simply wish to press on with the works as soon as possible. This inevitably gives rise to ambiguities and/or infelicities in the drafting which can culminate in thorny questions of interpretation.

In fact, many disputes referred to adjudications involve questions of contractual interpretation, be it a run-of-the-mill payment dispute or a complex claim regarding alleged variations to the works. For this reason, it is increasingly common for parties that are dissatisfied with an adjudicator's decision to seek final declarations on a point of contractual interpretation using the Part 8 procedure, in order to overturn what is perceived to be an erroneous decision by the adjudicator.

This growing overlap between adjudications and Part 8 proceedings in court has given rise to some important decisions over the years, and the past year was no exception. Moreover, even outside the context of adjudications, the courts have also had the occasion to deal with a number of interesting contractual issues which are of wider significance to commercial transactions generally. This section considers some of these latest developments.

Contractual termination

The contractual termination provisions under an amended JCT Design and Build Contract 2016 came under the spotlight in the Court of Appeal in *Providence Building Services Ltd v Hexagon Housing Association Ltd*.[76] The dispute arose from an attempt by the contractor, Providence, to terminate the contract upon a repetition of a specified default, that being repeated failures by the

[76] [2024] EWCA Civ 962; [2024] BLR 547.

employer, Hexagon, to pay the "notified sum" which had contractually fallen due in respect of interim payments.

In December 2022, Providence issued a default notice under clause 8.9.1 of the contract in respect of Hexagon's failure to pay the notified sum by the final date for payment, but this sum was eventually paid before the 28-day cure period under clause 8.9.3 had expired. In May 2023, however, Hexagon failed to pay another notified sum by the final date for payment, which led Providence to give notice to Hexagon to terminate the contract under clause 8.9.4. The issue was whether Providence was entitled in these circumstances to terminate the contract based on clause 8.9.4, which provided for a right to terminate the contract for a repetition of a specified default "[i]f the contractor for any reason does not give the further notice referred to in clause 8.9.3".

This was first referred to an adjudication in June 2023, and the adjudicator found in favour of Hexagon and concluded that the termination was invalid. Providence therefore brought a Part 8 claim for declarations to overturn the adjudicator's decision. At first instance, Deputy High Court Judge Adrian Williamson KC similarly rejected Providence's contentions and held that "clause 8.9.4 requires that a clause 8.9.3 notice could have been given but the Contractor has decided not to do so for whatever reason", but it does not envisage a right to give a clause 8.9.4 notice in circumstances where the right to give a clause 8.9.3 notice has never arisen.[77]

This came before the Court of Appeal in 2024, which took a very different view and reached the opposite conclusion. Stuart-Smith LJ started by emphasising that for a standard form contract, "the process of interpretation will ultimately depend upon an intense focus on the words used", and that "the interpretation is unlikely to be affected by the context in which the parties concluded their particular contract".[78] This confirms the court's approach when interpreting standard form contracts, which is important for parties to bear in mind in other disputes concerning one of the standard forms of building and engineering contracts frequently adopted in the industry.

With the above literal approach in mind, Stuart-Smith LJ focused sharply on the wording of clause 8.9.4 and considered that the language of the clause was "clear" and "broad enough to cover any state of affairs other than one where the contractor does give notice", such that "the natural meaning of the words in Clause 8.9.4 viewed on their own does not give rise to an inference or an implication that the contractor could have given a further notice but did not do so".[79] This is perhaps unsurprising, given that clause 8.9.4 is triggered if a termination notice has not been given for a prior default "for any reason", which is certainly broad enough to cover a situation where the previous breach was cured within the prescribed timeframe.

> The Court of Appeal's decision in *Providence* is a good illustration of the continuing importance attached by the courts to legal and commercial certainty, both in terms of the primacy of the natural and ordinary meaning of the contractual language and the practical outcome produced by the interpretation

Stuart-Smith J also considered the related provisions under the structurally similar clause 8.4 which governed termination for a contractor's default, and his view was that clause 8.4.3 reinforced his interpretation of clause 8.9.4. Although clause 8.4.3 did not use the words "for any reason", it nonetheless provided for the right to terminate for a contractor's repeated default if no termination notice was previously given for a specified default "whether as a result of the ending of any specified default or otherwise", which is similarly broad.[80]

It is worth noting that the interests of "certainty" played an important part in this case. Counsel for Providence emphasised that "Providence's interpretation has the advantage of certainty, without which the Parties would be left with the time- (and money-) consuming uncertainties of alleging and proving repudiatory conduct",[81] and Stuart-Smith LJ observed that despite there being other potential remedies for non-payment, "none provides a satisfactory and immediate solution to the typical case of late payment: each involves a measure of delay and, in the case of suspension or resorting to adjudication, additional cost and uncertainty for the contractor in pursuing them".[82]

[77] *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2023] EWHC 2965 (TCC), at para 19.
[78] *Providence* (CA), at para 25.
[79] Ibid, at para 29.
[80] Ibid, at paras 32 to 33.
[81] Ibid, at para 20.
[82] Ibid, at para 43.

The Court of Appeal's decision in *Providence* is a good illustration of the continuing importance attached by the courts to legal and commercial certainty, both in terms of the primacy of the natural and ordinary meaning of the contractual language and the practical outcome produced by the interpretation (here, the ability to resort to termination as a remedy for repeated non-payment, which would avoid the cost and uncertainty of a protracted dispute). At the same time, the interests of certainty are intimately linked to other underlying policy considerations such as the protection of cashflow and the promotion of efficient resolution of disputes.

It is noteworthy that the Supreme Court granted permission to appeal against the *Providence* decision on 25 November 2024, and so it will be interesting to see what the Supreme Court's final word would be on this important point of interpretation, especially given the popularity of the JCT suite of contracts in the construction industry.

Another interesting question of interpretation arose in a termination context in the Court of Appeal's decision in *Topalsson GmbH v Rolls-Royce Motor Cars Ltd*,[83] but this time concerning the operation of a contractual liability cap in respect of a claim for damages arising from Rolls-Royce's termination of a contract for the design, supply and maintenance of digital visualisation software due to delays by Topalsson. Unlike *Providence*, this was not a Part 8 claim arising from any prior adjudication, given that the dispute in question did not arise under a construction contract.

The key issue was whether a sum of €794,759 due from Rolls-Royce to Topalsson should be set off before or after applying the liability cap of €5 million to Rolls-Royce's claim for termination damages (which were assessed by the TCC in the sum of €7,962,323). At first instance, O'Farrell J held that the liability cap only applied after the netting off of the parties' respective claims/entitlements, such that Rolls-Royce was entitled to recover €5 million.[84]

The issue therefore turned on the wording of the liability cap. Coulson LJ considered that "[t]here is nothing in clause 20 which suggests that the cap only applies once the net financial position between the two parties has been calculated", and it would have been easy for the clause to say so if that were the intention.[85] Indeed, given that the clause referred to the "total liability" of either party to each other, he considered that "those words suggest a totting up, not a netting off",[86] and the intention was that there would be a calculation of two separate liabilities which are each capped at €5 million, before the two are set off against each other.[87]

Coulson LJ very much had in mind the risk that "if the claim for set-off was taken into account before the cap was applied, the result could be manipulated, so that the party with a right to set-off can avoid the consequences of the cap altogether",[88] and he relied on Lord Denning MR's dicta on a similar issue in *The Tojo Maru*.[89] Carried to its logical conclusion, Rolls-Royce could theoretically have claimed damages up to €5 million while separately withholding the contract sum of €9 million by way of set-off, and that was held to be a fatal flaw to Rolls-Royce's contentions.

Although Rolls-Royce sought to argue that parties do not give up their common law entitlements (in this case "the net loss" approach) without clear words, Coulson LJ held that the principle was irrelevant because it was purely a question of interpreting clause 20. In any event, he pointed out that the liability cap was inherently a limitation on the parties' common law entitlements, and it was "a commercial limit designed to promote certainty" and operated as "a blunt instrument".[90]

A further issue arose as to whether interest for late payment was caught by the liability cap. Coulson LJ held that clear words would be required for a liability to apply to interest for late payment, and given that the parties agreed that the contractual interest was a sole and substantial remedy for late payment, it would be odd to deny a party its entitlement to such a remedy by way of a liability cap.[91] Notably, Coulson LJ was concerned that any other interpretation would encourage non-payment of sums due,[92] and above all, he emphasised that "the cap was designed to promote certainty, and if interest for late payment was included within the cap, then the potential effect of any late payment would be uncertain".[93]

The notion of certainty therefore runs through the entirety of the *Topalsson* decision, and it is clear that certainty again plays a significant role in the court's reasoning when deciding between competing interpretations of a particular clause. Moreover, the interests of certainty are never considered in a vacuum, as there is almost always

83 [2024] EWCA Civ 1330; [2025] BLR 1.
84 *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWHC 1765 (TCC), at paras 329 to 332.
85 *Topalsson* (CA), at para 23.
86 Ibid.
87 Ibid, at para 24.
88 Ibid, at paras 28 to 31.
89 *N.V. Bureau Wijsmuller v The "Tojo Maru" (Owners)* [1969] 2 Lloyd's Rep 193, at 203.
90 *Topalsson* (CA), at para 33.
91 Ibid, at paras 66 to 68.
92 Ibid, at para 69.
93 Ibid, at para 65.

an interplay with other policy considerations (here, the avoidance of giving encouragement to parties to withhold or delay payments generally). Parties approaching any issue of contractual interpretation will therefore need to give careful thought to these factors when evaluating which side is likely to have the better argument if the dispute comes before the courts.

Payment provisions

A typical problem with building and engineering contracts is ambiguities in the parties' interim payment mechanism, and the courts are frequently asked to rule on the interpretation of payment provisions which might seem to be uncertain at first sight. The recent decision of the TCC in *Morganstone Ltd v Birkemp Ltd* is one such case,[94] and it raised the question of whether a subcontractor had a continuing entitlement to interim payments after the dates contained in a payment schedule ran out.

The subcontract in question contained a payment schedule setting out the dates on which each interim application was to be made, and this schedule original contained payment application dates up to 28 February 2022. This was later updated by the parties to cover payment applications for the rest of 2022, but no further payment application dates were ever agreed for 2023. For those who have dealt with similar issues before, these facts may seem reminiscent of the well-known Court of Appeal judgment in *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*.[95]

In *Morganstone*, clause 10 of the subcontract contained a detailed payment mechanism with default payment application dates, due dates and final dates for payment, which could be calculated by reference to the provisions in clause 10 without the payment schedule. The payment schedule dates were a bespoke amendment to clause 10, by virtue of a manuscript amendment alongside clause 10 which stated *"PAYMENT SCHEDULE TAKES PRECEDENCE"* in red ink. The parties were in dispute as to whether a payment application made after the dates in the payment schedule had run out was contractually valid.

> In *Balfour Beatty*, the payment mechanism was defined solely by reference to the payment schedule dates, such that the Court of Appeal could not accept that the relevant payment dates could be implied or otherwise left open for a tribunal to determine post-contract

The matter came before HHJ Keyser KC as a Part 8 claim for declarations, after an adjudicator had decided that £202,076 was due from Morganstone to Birkemp based on the latter's interim payment application. The judge cited the well-known authorities on the objective approach to contractual interpretation, and then noted that *Balfour Beatty* was "a case that turned on the precise terms of the partiers' agreement", and that "[t]he question before me concerns the extent and limits of the agreement between Morganstone and Birkemp".[96] The focus was therefore on the particular provisions adopted by the parties in question, and very much with a view to preserving the commercial certainty of the parties' bargain.

In *Balfour Beatty*, the payment mechanism was defined solely by reference to the payment schedule dates, such that the Court of Appeal could not accept that the relevant payment dates could be implied or otherwise left open for a tribunal to determine post-contract, as "[b]oth parties needed to know with certainty what were the applicable dates".[97] In other words, the need for certainty militated in favour of refusing to go beyond the agreed payment schedule on that particular set of facts.

In contrast, clause 10 of the subcontract in *Morganstone* provided a fully workable payment mechanism – that mechanism was subject only to the manuscript amendment, which HHJ Keyser KC construed as meaning that "in the case of conflict between the monthly payment schedule and clause 10 ... the monthly payment schedule would take precedence", but "once the schedule and any further agreed schedule ended, there was nothing to displace the timetable provided by clause 10".[98]

[94] [2024] EWHC 933 (TCC); [2024] BLR 361.
[95] [2016] EWCA Civ 990; [2017] BLR 1.
[96] *Morganstone*, at para 36.
[97] *Balfour Beatty*, at para 37 (Jackson LJ).
[98] *Morganstone*, at para 37.

Unlike in *Balfour Beatty*, therefore, the TCC in *Morganstone* could give effect to the natural and ordinary meaning of clause 10 and provide certainty to the parties as to the subcontractor's right to apply for interim payments generally. Indeed, the court is naturally inclined to give a commercial interpretation to the payment mechanism and not to shut a contractor out for applying for interim payments, as the right to stage payments is at the very heart of the policy behind the statutory regime introduced by the HGCRA. This is another illustration of how the notion of certainty is intrinsically linked to other substantive policy considerations when undertaking an interpretative exercise (here, the preservation of contractors' cash flow).

Another noteworthy instance of the TCC interpreting payment-related provisions in the past year is the case of *My Contracts Ltd v 74 Hamilton Terrace Freehold Ltd*,[99] which concerned an amended JCT Design and Build Contract 2016 and a bespoke provision dealing with the payment of façade remedial costs incurred by the employer as a result of the collapse of the original façade caused by the contractor. Those provisions required the employer to notify the contractor of the façade costs incurred by no later than four months after the date of the contract.

The parties' dispute regarding the façade costs was referred to an adjudication, and the adjudicator decided that the employer's updated notice of the façade costs was validly served in compliance with the prescribed time limit. The contractor therefore brought a Part 8 claim for a declaration as to the interpretation of the notice requirement and the employer's non-compliance.

The employer's argument, in essence, was that the four-month time limit had to be extended in order to account for the public holidays which fell within that four-month period, and also to enable the notice to be received on a working day. In support of this contention, the employer relied on clause 1.5 which provided that where an act had to be done within a specified period of days, a day which was a public holiday shall be excluded.

Deputy High Court Judge Adrian Williamson KC rejected the employer's argument and held that clause 1.5 could not be used to re-write the bespoke four-month period which the parties had agreed, especially since clause

[99] [2024] EWHC 2896 (TCC).

1.5 dealt with a "period of days" whereas the time limit in question is a period of "months".[100] The parties could have easily said that the four-month period excluded public holidays, but they did not do so.[101]

> The *My Contracts* judgment is a timely reminder of the courts' approach to the exercise of interpretation. It is intensely focused on the language used by the parties (especially in standard form contracts), although taking into account the background context where appropriate

In reaching this conclusion, the judge was mindful that "[t]he court does not make contracts for the parties. Its role is limited to interpreting what the parties have agreed".[102] He also took into account the fact that "Business Day" was a defined term in the contract, but specifically did not use this term when defining the four-month time limit.[103] In all the circumstances, the judge held that the updated notice served by the employer was one day late and therefore invalid.[104] Therefore, when it comes to ambiguities in the computation of dates for payment notices, parties would be well-advised to take a conservative approach and avoid serving anything last minute, in order to avoid ending up in the unfortunate situation which the employer in *My Contracts* was faced with.

More generally, the *My Contracts* judgment is a timely reminder of the courts' approach to the exercise of interpretation. It is intensely focused on the language used by the parties (especially in standard form contracts), although taking into account the background context where appropriate. Importantly, the courts do not seek to impose on the parties a bargain which it considers to be fair or reasonable. Once again, this is to ensure that there is certainty in what the parties have voluntarily signed up under the contract.

[100] Ibid, at paras 8 and 9.
[101] Ibid, at para 9.
[102] Ibid, at para 22.
[103] Ibid, at para 23.
[104] Ibid, at para 24.

Notice requirements

Closely related to payment provisions is the topic of notice requirements for contractors' claims. A particularly notable case from the past year is the decision of the Inner House of the Scottish Court of Session in *FES Ltd v HFD Construction Group Ltd*,[105] concerning the interpretation of the notice requirements for loss and expense claims in clauses 4.20/4.21 of the Standard Building Contract with Quantities for use in Scotland (which is substantially the same as clauses 4.20/4.21 of the JCT standard form contracts frequently used in England and Wales). In essence, the question was whether the notice requirements in clauses 4.20/4.21 amounted to a condition precedent for loss and expense claims.

The issue arose in a claim for a "declarator" (the Scottish equivalent of a Part 8-type declaration) which was brought by the contractor. Lord Carloway began by citing the well-established principles of interpretation, noting that "the contract has been prepared by skilled professionals" such that "it may be appropriately interpreted principally by textual analysis".[106] On this approach, the wording of clause 4.20 was clear, as it stated expressly that entitlement to loss and expense was "subject to ... compliance with the provisions of clause 4.21".

Lord Carloway observed that there was simply "no ambiguity in the wording" and "no need to analyse what may be regarded as commercial common sense", such that the extraneous material "cannot override the plain meaning of the words used".[107] In other words, the Court of Session was not prepared to allow wider questions of commercial fairness or extrinsic evidence to override the natural and ordinary meaning of the language used, as that would otherwise undermine certainty. This is helpful clarification on the status of the JCT notice provisions for loss and expense claims, and although this is a Scottish decision which is not strictly binding on the English courts, it is likely to be persuasive.

The conclusion in *FES* that the notice requirements operate as a condition precedent and a time-bar is very much in keeping with the interest of certainty, so that both parties know the consequences of failing to notify a claim timeously. Further, the notice requirements serve the purpose of requiring a contractor to notify claims

[105] [2024] CSIH 37; (2024) 42 BLM 01 5.
[106] Ibid, at para 24.
[107] Ibid, at paras 27 and 28.

promptly within a limited time span, which would enable the employer to properly determine the claim and have access to the necessary contemporaneous information to do so – this goes hand in hand with the notion of certainty, and prevents a contractor from ambushing an employer with an avalanche of claims long after the event.[108]

The *FES* decision is also an illustration of how self-contained declarations can be obtained from the court to finally determine the status of certain contractual notice requirements. That case can be usefully contrasted with *ISG Retail Ltd v FK Construction Ltd*,[109] where a roofing and cladding sub-contractor, FK, was awarded an extension of time of 188 days in an adjudication, and the main contractor, ISG, sought to overturn that result by seeking Part 8 declarations to the effect that FK had failed to comply with the notice requirements for extension of time claims.

> ISG's attempt to resolve the question of compliance with notice requirements at a Part 8 hearing (which is fundamentally a factual dispute) was therefore fatal to its attempt to obtain Part 8 declarations on the interpretation of the notice requirements

In the event, Deputy High Court Judge Neil Moody KC refused to deal with the questions raised under the Part 8 procedure. The judge noted that "[t]he question as to whether clause 9(5) is a condition precedent is one of pure construction and so in principle it should be capable of determination on a Part 8 basis", but in this particular case, FK also relied on other clauses for separate entitlements to extensions of time and prolongation costs, and those clauses were not addressed by ISG.[110]

Above all, the judge considered that the question of non-compliance with the notice requirements was likely to give rise to a substantial dispute of fact and was unsuitable for the Part 8 procedure.[111] The same applied to FK's arguments of estoppel/waiver in respect of the notice requirements, which were arguable and had real prospects of success.[112] In the circumstances, the judge declined to decide the construction points in the light of the impediments to the determination of the other issues which formed an important part of the Part 8 proceedings.[113]

ISG's attempt to resolve the question of compliance with notice requirements at a Part 8 hearing (which is fundamentally a factual dispute) was therefore fatal to its attempt to obtain Part 8 declarations on the interpretation of the notice requirements. In contrast, the issue in *FES* was confined to the contractual status of the notice requirements as conditions precedent, and the court had little difficulty making a declaration on that self-contained question. The *ISG* decision is thus a timely reminder of the importance of formulating a Part 8 claim for declarations carefully, so that there is no room for the defendant to argue that the questions raised give rise to a substantial dispute of fact.

The interpretation of notice requirements for claims for delay-related losses and the contractor's compliance with those requirements arose for determination in a Part 7 claim in *Tata Consultancy Services Ltd v Disclosure and Barring Service*,[114] which concerned delays and defects under an agreement for the management of the manual Disclosure and Barring processes and the development of a new IT system to digitise those processes. One of the issues was whether the notice requirements in the agreement amounted to conditions precedent.

Constable J considered the well-known decisions on the interpretation of notice requirements and then summarised the relevant factors, noting that "the requisite 'conditionality' may be achieved in a number of different ways using different words and phrases when construed in their ordinary and natural meaning", and it is unnecessary to use the words "condition precedent", although the clearer the articulation, purpose and feasibility of the requirement, the more consistent it will be with being a condition precedent.[115]

On the wording of clause 5.6 of the agreement, Constable J considered that it clearly made the notice requirements a condition precedent because it stated that there would

[108] Ibid, at para 26.
[109] [2024] EWHC 878 (TCC); [2024] BLR 377.
[110] Ibid, at paras 24 and 25.
[111] Ibid, at paras 28 to 34.
[112] Ibid, at paras 41 to 45
[113] Ibid, at para 26.
[114] [2024] EWHC 1185 (TCC).
[115] Ibid, at paras 74(4), (6) and (7).

be no liability to compensate for delays "unless [Tata Consultancy Services] has fulfilled its obligations set out in, and in accordance with clauses 5.1, 5.2 and 5.3".[116] Importantly, he held that the language of clause 5.6 was wide enough to cover both contractual loss and expense and also general damages at common law, noting that "a construction which requires a contractor to notify the employer only for the purposes of a contractual right to compensation, but allows the same claim on the same facts to be advanced at common law without having given notice is uncommercial".[117]

The latter finding will be of wider interest to parties to other construction contracts, as contractors frequently attempt to circumvent contractual notice requirements for loss and expense by arguing that they do not apply to a claim for general damages. Ultimately, however, the conclusion in *Tata* was based on the particular wording in that contract, and as Constable J acknowledged, the effect of notice requirements in each case "will ultimately turn on the precise words used, set within their contractual context".[118]

It bears emphasis that notice requirements are not confined to the delay-related claims considered in the cases discussed above. When it comes to variations to the works, many building contracts expressly provide that a written instruction or change order is required in order for there to be a valid variation giving rise to an entitlement to additional costs. This issue was briefly considered by Jefford J in *Vainker and Another v Marbank Construction Ltd and Others*,[119] in the context of the requirements relating to instructions and variations under an amended JCT Standard Building Contract Without Quantities 2011.

Jefford J construed the various provisions iteratively.[120] As a starting point, she noted that the contract administrator was empowered to instruct a variation, and clause 3.14 provided that if any instructions were given otherwise than in writing, then either the contractor or the contract administrator would have to confirm in writing. Clause 4.2 then provided that the contract sum shall not be adjusted except in accordance with the contract, and clause 5.2.2 provided for the valuation of "all Variations required by the Architect Contract Administrator's Instructions or subsequently sanctioned by him in writing".

Much like *FES*, the focus in *Vainker* was very much on the language of the standard form contract adopted by the parties, and the TCC's interpretation of the relevant provisions was very much with a view to providing certainty to the parties as to what does and does not amount to a variation

Taking all of those provisions together, Jefford J concluded that "only Variations instructed in writing or confirmed in accordance with clause 3.12 fall to be valued under clause 5.2.1 and the value added to the Contract Sum", and that "[t]here are no other provisions in the Contract which would permit adjustment of the Contract Sum".[121] Nevertheless, she acknowledged that "the written instruction or confirmation of an instruction does not have to be in any particular form", and depending on the facts, "an e-mail or the issue of a drawing may be sufficient writing".[122]

The court in *Vainker* provided welcome clarity on the JCT variation provisions, as the status of the requirement of a written instruction is often disputed by parties in adjudications from past experience. Much like *FES*, the focus in *Vainker* was very much on the language of the standard form contract adopted by the parties, and the TCC's interpretation of the relevant provisions was very much with a view to providing certainty to the parties as to what does and does not amount to a variation. Otherwise, an employer is at risk of facing numerous unnotified variations and a massive bill at the end of the project, which is contrary to the certainty intended by a typical lump-sum contract.

[116] Ibid, at para 75.
[117] Ibid, at para 79.
[118] Ibid, at para 74(1).
[119] [2024] EWHC 667 (TCC).
[120] Ibid, at paras 689 to 691.
[121] Ibid, at para 692.
[122] Ibid, at para 694.

Design obligations

Another area which is ripe for potential disputes is design obligations. Even under the most straightforward design and build contract, there is still scope for ambiguities and inconsistencies as to what does or does not fall within a contractor's obligation to complete the design of the works, and also the standard to which a design has to be completed. A classic example of this is the case of *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd and Another*,[123] which was discussed in the annual review for 2017 and went all the way up to the Supreme Court.

More recently, *Workman Properties Ltd v ADI Building And Refurbishment Ltd*[124] was another decision arising from a Part 8 claim for declarations. The dispute concerned the scope of a contractor's design obligations under an amended JCT Design and Build Contract 2016 in respect of the tender design prepared by the employer's consultants and incorporated into the Employer's Requirements. The TCC also had the opportunity to provide further guidance on the suitability of an issue for the Part 8 procedure.

At para 1.4 of the Employer's Requirements, the employer, Workman, stated that "significant design has been developed to date which has been taken to end of RIBA Stage 4 with some parts of contractor specialist design elements together with Services design to Stage 4 (i) …". In the event, the tender design had not actually been fully developed up to RIBA Stage 4/BSRIA Stage 4(i), and the contractor, ADI, contended that this was in breach of para 1.4 of the Employer's Requirements which amounted to a contractual warranty by Workman.

ADI eventually obtained an adjudicator's decision which concluded that there was indeed a breach of warranty sounding in damages, and that the additional design works were in any event a "change" which entitled ADI to additional costs, extensions of time, and loss and expense. Workman sought to overturn the adjudicator's decision by way of the Part 8 proceedings, but ADI argued throughout that the Part 8 procedure was unsuitable because the parties' pre-contractual discussions and the nature of the tender design deficiencies were all part of the relevant factual matrix which could only be determined at a full Part 7 trial.

HHJ Stephen Davies rejected ADI's contentions in a detailed judgment which was in keeping with the courts' conventional approach to contractual interpretation based on the parties' objective intention. As a starting point, HHJ Davies rejected the unsuitability argument, noting that ADI had failed at any stage to identify any particular facts included within its witness evidence or otherwise which were relevant to the issue of interpretation and which were disputed facts going beyond what was contained in the contractual or contemporaneous documents.[125] The judge emphasised that "[i]t is not for the claimant, still less for the court, to scrabble around in the undergrowth of the defendant's evidence to identify any such particular facts".[126] This is in line with the courts' consistent rejection of parties' attempts to introduce uncertainty into the interpretative exercise by reference to parties' pre-contractual negotiations and subjective intentions.

Further, HHJ Davies took the view that it was not appropriate to defer the issues of interpretation to a full trial of all the other issues relating to breach, causation and loss. While ADI argued that the parties had already had two adjudications on this matter and there was no real urgency for a Part 8 determination, HHJ Davies observed that "it would be to the advantage of both parties to know now what their contractual rights and liabilities are as regards this discrete design responsibility point, at a time when there is plainly still significant scope for dispute going forwards in relation to this contract".[127] The TCC was therefore keen to provide guidance to parties so that they can conduct their future affairs with certainty and predictability.

Turning to the substantive question of interpretation, HHJ Davies concluded that "all of the relevant contract terms point firmly towards the claimant's case", as there were numerous provisions in the contract which provided that ADI was to "complete the design for the works" and be "fully responsible in all respects for the design of the Works", and the standard JCT provisions entitling a contractor to a "change" for inadequacies in the Employer's Requirements have been heavily amended.[128] Although para 1.4 of the Employer's Requirements pointed in the other direction, "the words used in that second section are nowhere near sufficient to require the other unequivocal contract provisions to be read as so heavily qualified".[129]

[123] [2017] UKSC 59; [2017] BLR 477.
[124] [2024] EWHC 2627 (TCC); [2024] CILL 5081.
[125] Ibid, at para 26.
[126] Ibid, at para 27.
[127] Ibid, at para 52.
[128] Ibid, at paras 77 to 84 and 95.
[129] Ibid, at para 97.

In the end, HHJ Davies was not prepared to accede to ADI's contended interpretation, which not only displaced the certainty provided by the unambiguous express provisions, but also meant that "the defendant had no obligation to ... satisfy itself that it could safely, as design and build contractor, proceed straight to construction stage without checking that the existing design was sufficient and adequate for that purpose".[130] The *Workman* judgment is thus another clear example of the principle of certainty at work, and also its interplay with the court's consideration of the practical consequences of allowing a contractor to complete the design without checking whether it is safe and adequate.

> *Workman* is a salutary reminder that an attempt to derail a Part 8 claim by adducing irrelevant evidence at great cost is likely to be heavily criticised by the courts

It is noteworthy that in *Workman*, HHJ Davies provided some helpful guidance to parties regarding the resolution of fundamental differences regarding the suitability of the Part 8 procedure. In his view, "it would be sensible to apply to the court for directions as to whether the case should continue as a Part 8 claim in full or modified form or be directed to continue as a Part 7 claim which would, of course, have a major impact on directions and listing".[131] This is an important practice point which would be relevant to any practitioner/party dealing with a dispute about the suitability of the Part 8 procedure, as questions of suitability are often left to be dealt with at the start of the Part 8 hearing.

In the event, because ADI had always maintained the position that there was a substantial dispute of fact relevant to the issues raised, and this continued all the way up to the substantive Part 8 hearing, ADI adduced a significant volume of witness evidence which resulted in a substantial amount of costs (£227,182.55) being incurred for a one-day hearing – a point which did not escape HHJ Davies' attention.[132] This case is therefore a salutary reminder that an attempt to derail a Part 8 claim by adducing irrelevant evidence at great cost is likely to be heavily criticised by the courts.

Force majeure

Before leaving the topic of contractual interpretation, it is worth briefly considering the much-discussed Supreme Court decision of *RTI Ltd v MUR Shipping BV*,[133] which was a contractual dispute over a force majeure clause in a charterparty for the continuous bulk carriage of bauxite shipments from Guinea to Ukraine. As a result of US sanctions, the charterer was unable to make timely payments in US dollars, and the shipowner gave a force majeure notice and suspended performance. The Supreme Court therefore had to consider whether the proviso in the force majeure clause that the event "cannot be overcome by reasonable endeavours from the Party affected" meant that the shipowner should have accepted payment in some other currency (euros) which would have furnished it with substantially the same benefit.

Lord Hamblen and Lord Burrows began their judgment by summarising the key principles militating in favour of the shipowner's case, including the principle that "freedom not to contract includes freedom not to accept the offer of a non-contractual performance of the contract",[134] and "[t]he need for clear words to be used for there to be any contractually required change to the parties' rights".[135] Above all, they reiterated the importance of certainty in commercial contracts,[136] and pointed out that "[i]t is not unmeritorious or unjust to insist on contractual performance, all the more so if being precluded from doing so would introduce uncertainty contrary to the expectations of reasonable business people".[137]

With the above principles in mind, the Supreme Court unanimously held that the "reasonable endeavours" provision did not operate to require the shipowner to

[130] Ibid.
[131] Ibid, at para 14.
[132] Ibid, at para 15.
[133] [2024] UKSC 18; [2024] 1 Lloyd's Rep 621; (2024) 41 BLM 07 1.
[134] Ibid, at para 42.
[135] Ibid, at para 46.
[136] Ibid, at para 47.
[137] Ibid, at para 58.

accept non-contractual performance, and that such a provision was only "geared towards achieving contractual performance: it is concerned with reasonable efforts to overcome the sanctions by achieving payment in US dollars".[138] This is the clearest expression in recent times of the continuing importance of promoting certainty and predictability in parties' contractual bargain.

While some may question the fairness of allowing the shipowner to reject payment in a different currency in circumstances where the charterer offers to bear any additional costs or exchange rate losses, it is the wider consideration of potential uncertainty and unpredictability in this and future disputes (for example, the "underlying purpose" of the contract which the alternative performance is said to fulfil, and whether the alternative performance causes any material "detriment" to the other party) which drove the Supreme Court to its ultimate conclusion that the better view is to adhere strictly to the parties' contractual bargain.[139]

Although *RTI* did not arise from a construction dispute, force majeure clauses are very common in standard form construction and engineering contracts, and the reasoning of the Supreme Court in *RTI* is equally applicable to the operation of "reasonable endeavours" clauses in construction and engineering contracts – such provisions cannot be relied on to force a counterparty to accept non-contractual performance. More generally, this case is yet another good illustration of the running theme of certainty which weaves through the courts' determination of questions of interpretation, both in the construction context and in commercial disputes generally.

[138] Ibid, at para 57.
[139] Ibid, at paras 49 to 54.

Defective works and building safety

Since the entry into force of the BSA in June 2022, claims under the DPA have received a significant amount of renewed interest and taken on a real importance in many disputes regarding defective works, especially where the contractual and tortious claims are affected by limitation issues. Many such claims are in respect of fire safety/ building safety defects, but not exclusively, as one can see from the case law in the past year.

DPA claims

The judgment in *Vainker and Another v Marbank Construction Ltd and Others*[140] is mentioned above in the context of the requirement of written instructions for variations. At its heart, however, the case was about contractual, tortious and DPA claims regarding numerous defects in the construction of a residential property in Strawberry Hill, Twickenham. This culminated in a 154-page TCC judgment which bears reading in full for anyone dealing with multi-partite defect claims.

For present purposes, the parts of the judgment which deal with principles relating to DPA claims are particularly pertinent. Jefford J started by citing the principles laid down in the seminal decision of *Rendlesham Estates plc and Others v Barr Ltd*[141] which remains the leading authority on DPA claims.[142] From there, four principal lessons can be drawn from *Vainker*, which go further than the previous case law, taking the particular example of Jefford J's analysis of the defective glass balustrades.

First, there has been some debate in academic and judicial commentary as to whether a breach of the duty under section 1(1) of the DPA gives rise to strict liability.[143] A threshold issue of the duty under section 1(1) of the DPA is that the works have to be carried out in a workmanlike or

[140] [2024] EWHC 667 (TCC).
[141] [2014] EWHC 3968 (TCC); [2015] BLR 37.
[142] *Vainker*, at paras 39 and 40.
[143] Compare *Harrison v Shepherd Homes* [2011] EWHC 1811 (TCC) at paras 144 to 153 and *Keating on Construction Contracts* (12th Edition) at para 15-004, which indicate that the DPA gives rise to strict liability; and *Jackson & Powell on Professional Negligence* (9th Edition) at para 9-038 and *Rendlesham* at paras 55, 60 and 74, which suggest that it is a composite duty.

professional manner, and so a party seeking to establish a breach of section 1(1) has to show that the works were not so carried out. In *Vainker*, Jefford J considered that the architect failed to exercise reasonable care because it failed to notice a defect which should have been obvious during inspections (ie that toughened but not laminated glass balustrades were installed), which meant that the architect did not do its work in a professional manner and was liable under the DPA.[144] This analysis is substantially the same as in a negligence claim, and strongly suggests that liability under the DPA is not strict.

Second, the categories of defects which can render a dwelling unfit for habitation are open-ended. In *Vainker*, Jefford J concluded that the use of toughened but not laminated glass balustrades without a handrail rendered the house unfit for habitation, because "if it is damaged or fails there is nothing else to hold on to or inhibit a fall".[145] This was despite the fact that the glass balustrades were confined to only a small part of the house. The courts' analysis is therefore very much focused on the seriousness of the health and safety risk posed by the defect in question, and not just the scale or extent of the defective works.

> Although the *Vainker* case is not related to fire safety or building safety defects per se, the principles which it establishes and the lessons learned above are all transferrable and equally applicable to, for example, cladding claims which are brought on the basis of the DPA

Third, the measure of damages for a breach of the DPA is not confined to the minimum costs required to render the dwelling fit for habitation. In *Vainker*, the architect contended that the addition of a handrail would be an adequate remedy and the wholesale replacement of the glass balustrades with toughened laminated glass was unnecessary. Jefford J observed, however, that "it would be wholly contrary to the design intent in the House", and "there is nothing in the statute to limit the damages recoverable in respect of the failure to see that the work is done in a professional manner to the minimum necessary to put the dwelling into a habitable condition".[146] The recoverable damages was therefore held to be the cost of making the dwelling fit for habitation in the way it would have been had the architect's services been provided in a professional manner (ie had the architect identified the non-laminated glass and asked the contractor to rectify the non-compliance).

Fourth, section 6(3) of the DPA provides, inter alia, that any term which purports to exclude or restrict any liability arising by virtue of the DPA shall be void. Jefford J confirmed that a net contribution clause in the architect's appointment which was relied on to reduce its liability under the DPA based on the extent of its responsibility falls foul of section 6(3) of the DPA and is void for that reason.[147] In other words, the architect was exposed to a greater liability under the DPA compared to its potential liability in contract or in tort. This will no doubt be of significant interest to claimants who wish to maximise their recovery, whereas many professional defendants will find themselves significantly more exposed under the DPA without the protection of a net contribution clause.

Although the *Vainker* case is not related to fire safety or building safety defects per se, the principles which it establishes and the lessons learned above are all transferrable and equally applicable to, for example, cladding claims which are brought on the basis of the DPA. Given the recent proliferation of DPA claims, it is likely that parties will increasingly look to *Vainker* in the future as another leading judgment for guidance on the core ingredients of a successful DPA claim.

[144] *Vainker*, at paras 282 to 285 and 302.
[145] Ibid, at para 286.
[146] Ibid, at para 338.
[147] Ibid, at para 348 and 349.

Remedies under the BSA

The new legislative regime introduced by the BSA has been covered in the previous annual reviews, and an important aspect of the changes under the BSA is the creation of new remedies for building safety defects such as remediation orders (section 123), remediation contribution orders (section 124) and building liability orders (section 130).

Before considering the recent case law, it is noteworthy that the BSA has now been amended by the Leasehold and Freehold Reform Act 2024, sections 114 to 116 of which are particularly important. In summary, sections 123 and 124 of the BSA have now been amended, such that a remediation order and/or a remediation contribution order can be made in relation to "relevant steps" which include interim measures to mitigate the safety risks posed by the building (such as waking watch fire patrols and simultaneous evacuation alarms). Further, a remediation contribution order can also cover the costs of obtaining an expert report and the costs of alternative accommodation if residents have to be moved from the building for safety.

Last year saw the first decision from the Property Chamber of the First-tier Tribunal (FTT) on the test for making a remediation contribution order under section 124 of the BSA (which is an order against a landlord/developer and/or its associated companies to bear the costs of investigating, mitigating and/or remedying a relevant defect). In *Triathlon Homes LLP v Stratford Village Development Partnership and Others*,[148] the FTT provided some helpful guidance on the factors which are and are not relevant when considering whether it is "just and equitable" to make a remediation contribution order against a developer and its ultimate parent company (in this case, Stratford Village Development Partnership and Get Living respectively).

To begin with, the FTT observed that it is not relevant to consider the leaseholder's motivation in bringing the applications, their identity, or the basis of their eligibility to make the application, as Parliament had made the remedies available to leaseholders and the leaseholder was entitled to take advantage of them.[149] It also bears emphasis that the availability to the applicant of other claims or potential claims should not disqualify it from applying for a remediation contribution order.[150] The FTT therefore had in mind the intention of Parliament in providing a means for leaseholders to readily pass on the costs of remedial works to a developer and/or its associated companies, given that the policy of the BSA is that "primary responsibility" for the cost of remediation should fall on the original developer.[151]

As to factors relating to the position of the developer and its associated companies, the FTT did not attach any weight to the changing ultimate beneficial ownership of those parties in the period since the development was undertaken, and the source and extent of those parties' assets/liabilities are also unlikely to carry much weight either.[152] The FTT was also not concerned with the ability or inability of the developer or its associated companies to pass on liability to some other party who may be responsible under the general law.[153] Again, this is plainly informed by what the FTT perceived as the policy and parliamentary intention behind the BSA.

Based on the above reasoning, the FTT held that it was just and equitable in the circumstances to make a remediation contribution order not just against the developer, SVDP, but also against its parent company, Get Living. An important reason for this was that SVDP was unlikely to be able to comply with the remediation contribution order with Get Living's financial support.[154] The FTT was therefore keen to ensure that the remediation contribution order would be complied with and effective in practice.

While the *Triathlon* decision concerned the specific remedy of a remediation contribution order, the FTT's analysis of the various factors which go to the "just and equitable" test is also likely to be instructive when it comes to future applications for building liability orders under section 130 of the BSA, which adopts substantially the same test. It will be interesting to see in due course whether there are any differences in the TCC's approach to a section 130 application, and this may well be in the not-too-distant future as there have been recent cases in the TCC where an application for a building liability order has been or will be made.[155]

148 [2024] UKFTT 26 (PC); [2024] BLR 139.
149 Ibid, at para 246.
150 Ibid, at para 261.
151 Ibid, at paras 264 and 265.
152 Ibid, at paras 251 to 255.
153 Ibid, at para 256.
154 Ibid, at para 266.
155 See eg *381 Southwark Park Road RTM Company Ltd and Others v Click St Andrews Ltd and Another* [2024] EWHC 3179 (TCC).

> While the *Triathlon* decision concerned the specific remedy of a remediation contribution order, the FTT's analysis of the various factors which go to the "just and equitable" test is also likely to be instructive when it comes to future applications for building liability orders under section 130 of the BSA, which adopts substantially the same test

While there is yet to be a TCC decision granting a building liability order, the TCC has provided some useful guidance in *Willmott Dixon Construction Ltd v Prater and Others*[156] regarding the timing for making and hearing an application for a building liability order.

In this case, Willmott Dixon brought a claim for circa £47 million of damages for the costs of remedying cladding defects against, inter alios, Prater (the specialist cladding sub-contractor), Lidner (Prater's guarantor), and AECOM (the building services engineer). AECOM became concerned about Prater and Lidner's financial status, and so it issued an application for a building liability order against Lidner's associated companies, who sought to stay the application and have it heard separately after the trial of the main claim.

Jefford J rejected the stay application and held that the building liability order application should be considered together with the main claim. She observed that it will generally be sensible and efficient for an associated company against whom an order is sought to be made a party to the litigation and for that application to be heard together with the main claim, although a judge has a discretion to direct separate hearings.[157] This is an important indication for parties wishing to apply for a building liability order in the future.

As to the logistics of dealing with a building liability order application, Jefford J pointed out that if the associated companies are added as parties to the main proceedings, then that would avoid arguments later on that the circumstances in which that primary liability was established mean that it is not just and equitable to make a building liability order.[158] Conversely, if the application for the building liability order is "hived off", then it is likely that the court will need to determine whether the liability is a "relevant liability" and whether a building liability order is "just and equitable" at a separate hearing based on evidence already covered or by hearing further evidence – this is likely to cause delays and increase costs, neither of which would be desirable.[159]

Insofar as there was any concern that the associated companies would be involved in aspects of the proceedings which had no bearing on the building liability order, Jefford J noted that any evidence that these parties adduce and any cross-examination they undertake can be limited to the issues that they say arise in respect of the building liability order.[160] Given the courts' strong predisposition towards hearing a building liability order application together with the main claim, it is likely that separate hearings will only be ordered in exceptional circumstances, and there will need to be good reasons (such as significant savings of time and costs) to justify such an approach.

[156] [2024] EWHC 1190 (TCC).

[157] Ibid, at para 17.
[158] Ibid, at para 18.
[159] Ibid, at paras 22 to 25.
[160] Ibid, at para 26.

Grenfell Tower Inquiry – Phase 2 Report

Seven years after the Grenfell Tower inquiry was first commissioned in the wake of the Grenfell Tower tragedy on 14 June 2017, the much-anticipated Grenfell Tower Inquiry Phase 2 Report was finally published on 4 September 2024.[161] Running to over 1,700 pages, the Phase 2 Report built on the findings of the Phase 1 Report on the events of 14 June 2017, which was published in October 2019.[162]

Any attempt to summarise the gargantuan Phase 2 Report is unlikely to do it justice, and practitioners and stakeholders in the construction industry should all read the Phase 2 Report in full, especially those regularly involved in projects or disputes involving fire safety issues. Nevertheless, some key conclusions are worth noting for present purposes.

First, in relation to the development and marketing of the combustible Kingspan K15 insulation for use on buildings of over 18 metres in height, the Phase 2 Report described this as a story of "deeply entrenched and persistent dishonesty on the part of Kingspan in pursuit of commercial gain coupled with a complete disregard for fire safety", and which was inadvertently facilitated by the "serious incompetence" on the part of two bodies, the British Board of Agrément (BBA) and the Local Authority Building Control (LABC), which "compromised their independence by entering into negotiations with Kingspan over the wording of their certificates and agreeing to include language that was inappropriate and in some cases misleading".[163]

Any attempt to summarise the gargantuan Phase 2 Report is unlikely to do it justice, and practitioners and stakeholders in the construction industry should all read the Phase 2 Report in full, especially those regularly involved in projects or disputes involving fire safety issues

The findings in relation to the testing and marketing of the Kingspan K15 insulation (and indeed other cladding materials) may well be of relevance to other disputes involving Kingspan K15 insulation, where there are issues as to the potential negligence of contractors/designers in relying on the certification of Kingspan K15 insulation, and/or potential breaches of clauses prohibiting the use of deleterious materials in a project.

In relation to cavity barriers, although the Siderise full-fill and open-state cavity barriers functioned effectively when tested in accordance with BS 476-20, the Phase 2 Report observed that "[d]esign professionals must take responsibility for ensuring that the choice of rainscreen panel will not render the cavity barriers ineffective", and that "[n]o competent design professional could reasonably have understood the datasheet to mean that the cavity barrier would remain effective even if the rainscreen became seriously distorted or detached".[164] This should have been obvious to any competent designer or cladding contractor, but the marketing material/datasheet should also have made this qualification explicit.[165] Again, this is likely to be relevant to other disputes regarding the potential negligence of contractors/designers when designing rainscreen claddings and cavity barriers.

The Phase 2 Report concluded that the government "failed to amend or clarify the guidance in Approved Document B on the construction of external walls, which, by 2013 at the latest, it knew was unclear and not properly understood by a significant proportion of those engaged in the UK construction industry", despite knowing by 2016 that there were concerns in the industry about the routine use of combustible insulation and ACM PE panels in high-rise buildings in breach of functional requirement B4. This was described as a "serious failure on the part of the government".[166] Overall, the government "failed to recognise the importance of the Building Regulations and the accompanying statutory guidance" to building safety, and "failed to put in place arrangements to ensure that the working of the system was properly monitored".[167]

[161] Moore-Bick, M, Akbor, A and Istephan, T, "Grenfell Tower Inquiry: Phase 2 Report" (hereafter "Grenfell Tower Phase 2 Report"), Volumes 1 to 6 (HC19-I to HC19-VI, September 2024), www.grenfelltowerinquiry.org.uk/phase-2-report.
[162] Moore-Bick, M, "Grenfell Tower Inquiry: Phase 1 Report", Volumes 1 to 4 (HC49-I to HC49-VI, October 2019), www.grenfelltowerinquiry.org.uk/phase-1-report.
[163] Grenfell Tower Phase 2 Report, Volume 2 (Part 3 – The testing and marketing regime), Chapter 22 (Kingspan K15 insulation), at para 22.134.
[164] Ibid, Chapter 27 (Siderise cavity barriers), at para 27.31.
[165] Ibid, at para 27.32.
[166] Ibid, Chapter 29 (Failures in the system), at para 29.9.
[167] Ibid, at para 29.21.

Similarly, in relation to the bodies involved in the testing and certification of building materials, the Phase 2 Report identified widespread and systemic failings, and these will have an impact on parties which are seeking to rely on the certification/accreditation of materials at the time as a defence to claims brought in respect of fire safety defects:

- The Building Research Establishment was said to be "marred by unprofessional conduct, inadequate practices, a lack of effective oversight, poor reporting and a lack of scientific rigour",[168] especially in the way it carried out and recorded tests in accordance with BS 8414.[169]
- The BBA "failed to manage effectively the conflict between the commercial and ... regulatory aspects of its operations in the two cases we investigated", and this applied not only to the specific cladding materials used on Grenfell Tower but probably other cases too.[170]
- The LABC similarly "failed to scrutinise properly the claims made for the products by manufacturers" and was "willing to accommodate the customer at the expense of those who relied on the certificates".[171]
- The United Kingdom Accreditation Service "did not always follow its own policies and its assessment processes were lacking in rigour and comprehensiveness".[172]
- The National House Building Council repeatedly "failed to demonstrate sufficient independence and showed itself willing to accommodate the wishes of Kingspan for commercial reasons", and this failure "struck at the heart of the system of building control" especially with the introduction of approved inspectors who "were able to operate as commercial providers of building control services".[173]

The conclusions drawn in the Phase 2 Report regarding the failures of the parties involved in the refurbishment of Grenfell Tower between 2012 and 2016 are also noteworthy, as those issues are "likely to be repeated widely across the construction industry":[174]

- In relation to the contractors/façade sub-contractors, "many of those engaged on the project did not properly understand the nature and scope of the obligations they had undertaken, or, if they did, failed to pay much attention to them", even though the contract expressly required the main contractor to carry out the whole of the design and construction in accordance with statutory requirements and take responsibility for the design work previously done by the client's design consultant.[175]
- The façade sub-contractor was engaged under a letter of intent which was never replaced by a formal contract, and so the sub-contractor "did not concern itself with its legal obligations but set about its work following what it regarded as the standard practice in the industry".[176] The engagement of some the design consultants were similarly informal.[177] This "casual approach to contractual relations" was described as a "recipe disaster if events take an unexpected turn", and this "widespread culture of getting on with the job without waiting for terms to be formally agreed is unprofessional and likely to result in a failure by those carrying out the work on site to understand the scope of their responsibilities".[178]

The conclusions drawn in the Phase 2 Report regarding the failures of the parties involved in the refurbishment of Grenfell Tower between 2012 and 2016 are also noteworthy, as those issues are "likely to be repeated widely across the construction industry"

- The role of the main contractor is an important one, and although it is entitled to appoint specialist sub-contractors to carry out individual elements of the works, "it must ensure that within its organisation it has access to sufficient knowledge and expertise to be able to monitor the work of its sub-contractors and consultants effectively and to satisfy itself that their work complies with their obligations and with its own obligations to the client".[179] In the case of Grenfell Tower, the main contractor "relied blindly on its sub-

[168] Ibid, at para 29.27.
[169] Ibid, at paras 29.28 to 29.30.
[170] Ibid, at para 29.41.
[171] Ibid, at para 29.48.
[172] Ibid, at para 29.55.
[173] Ibid, at para 29.57.
[174] Grenfell Tower Phase 2 Report, Volume 4 (Part 6 – The refurbishment of Grenfell Tower), Chapter 67 (Conclusions), at para 67.1.
[175] Ibid, at para 67.2.
[176] Ibid, at para 67.4.
[177] Ibid, at para 67.5.
[178] Ibid, at para 67.8.
[179] Ibid, at para 67.11.

contractors and consultants to exercise all relevant skill and care without being in a position to assess the quality of their work",[180] and it failed to identify clearly who was to take responsibility for critical decisions such as the choice of insulation, rainscreen panels and other materials.[181]

- For the construction industry generally, it is "essential that those engaged in it at all levels and in whatever capacity be competent to carry out their functions and exercise all reasonable skill and care in doing so".[182] However, the contractors and consultants involved in the Grenfell Tower refurbishment had surprisingly "limited knowledge of the Building Regulations, the statutory guidance and indeed industry guidance displayed by their employees, for whom a working knowledge of the regulatory regime should have been a fundamental requirement", and they failed to inquire into the fire performance of the materials proposed and did not seem to be concern about fire safety generally.[183]
- The contractors and consultants in the Grenfell Tower refurbishment failed to respond to critical questions raised by the tenant management organisation (TMO) as to fire safety, the provision of information to building control was "piecemeal", and there was inadequate record-keeping of important design changes and as-built documentation.[184] Moreover, those parties failed to take proper responsibility for ensuring compliance with the Building Regulations, and wrongly "regarded building controls as, in effect, an additional consultant, whose function was to give advice on the design and choice of materials and act as a safeguard to ensure compliance with the Building Regulations".[185]
- Finally, the client/developer also has an important role to play because "it appoints the architect, who carries out the preliminary design work and in many cases continues to develop the design under a contract with the principal contractor".[186] In the case of Grenfell Tower, the client TMO was "unduly concerned with reducing costs", and this drove the choice of architect and main contractor, as well as the value engineering exercise which resulted in the choice of materials (although that was ultimately the responsibility of the construction professionals).[187] The TMO's decision not to appoint a professionally qualified project manager and to perform the function itself was also a "mistake".[188]

On the whole, the Phase 2 Report pointed out that there has to be "a change in approach on the part of all concerned which prioritises safety over speed and cost and lays much greater emphasis on an understanding of the regulatory regime and its purpose".[189] The Phase 2 Report concluded with almost 60 recommendations, and this included the following key points which are directly relevant to the construction industry:

- The appointment of a single regulator in respect of all functions relating to the construction industry (including, inter alia, the regulation, research, testing and certification of construction products, licensing of contractors, regulation and oversight of building control and Building Regulations, and accrediting of risk assessors);[190]
- A review of the definition of "higher-risk buildings" so that it is not only by reference to height (which is arbitrary) but takes into account the nature and use of the building;[191]
- The consolidation of the government's responsibility for all functions relating to fire safety under one department and a single Secretary of State;[192]
- The appointment by the Secretary of State of a chief construction adviser to provide advice on all matters affecting the construction industry;[193]
- The review and revision of the Building Regulations and Approved Document B;[194]
- The introduction of a statutory requirement for a fire strategy produced by a registered fire engineer to be submitted with the "Gateway 2" and "Gateway 3" building control applications,[195] and for the applications to be endorsed by a senior manager of the principal designer and the principal contractor;[196]
- The development of new fire testing methods that will enable the assessment of whether an external wall system can support a particular evacuation strategy;[197]

[180] Ibid.
[181] Ibid, at para 67.12.
[182] Ibid, at para 67.13.
[183] Ibid, at para 67.14.
[184] Ibid, at para 67.15.
[185] Ibid, at para 67.17.
[186] Ibid, at para 67.19.
[187] Ibid, at para 67.21.
[188] Ibid, at para 67.23.
[189] Ibid, at para 67.24.
[190] Grenfell Tower Phase 2 Report, Volume 4 (Part 14 – Recommendations), Chapter 113 (Recommendations), at paras 113.5, 113.6, 113.22 and 113.23.
[191] Ibid, at para 113.7.
[192] Ibid, at para 113.8.
[193] Ibid, at para 113.9.
[194] Ibid, at paras 113.11 to 113.14.
[195] Ibid, at para 113.15.
[196] Ibid, at paras 113.31 and 113.33.
[197] Ibid, at para 113.17.

- The introduction of government guidance cautioning that the BS 9414 test method should not be used as a substitute for an assessment by a qualified fire engineer;[198]
- The establishment of an independent body to accredit and regulate the profession of fire engineers, and to provide courses for their training and continuing professional development;[199]
- The introduction of a licensing scheme operated by the construction regulator for principal contractors undertaking works on higher risk buildings;[200]
- The appointment of an independent panel to consider whether building control functions should be performed by those who have a commercial interest in the process, and whether all building control functions should be performed by a national authority;[201] and
- The establishment of a system of mandatory accreditation to certify the competence of fire risk assessors.[202]

It remains to be seen whether, and if so how quickly, the government implements the recommendations put forward by the Phase 2 Report. Given that it has already taken seven years for the inquiry to be concluded, one would hope that the government would take these recommendations seriously and take urgent steps to begin introducing some of these measures. This is to ensure that both the government and the construction industry as a whole put the lessons learned into action as soon as practicable, and that sufficient measures will be in place to avoid similar issues and mistakes arising in ongoing and future construction projects.

[198] Ibid, at para 113.18.
[199] Ibid, at paras 113.25 to 113.28.
[200] Ibid, at para 113.33.
[201] Ibid, at paras 113.37 and 113.38.
[202] Ibid, at paras 113.37 and 113.41.

Global perspectives

As in previous years, the interesting legal developments in 2024 which are relevant to the construction, infrastructure and energy industries were by no means confined to the UK. If one looks towards the East, there have been significant developments in other jurisdictions where English practitioners and construction professionals are often involved in important projects and disputes. This section hones in on some of those developments in Hong Kong, Singapore and the UAE in particular.

Hong Kong

The year 2024 was a special one for the construction industry in Hong Kong, as it saw the enactment of the long overdue Construction Industry Security of Payment Ordinance (Cap 652) (SOP Ordinance) which has been in the pipeline for years. The aim of the SOP Ordinance is similar (and has obvious parallels) to the HGCRA in the UK, as it introduces a statutory interim payment regime and adjudication mechanism for payment disputes for construction contracts.

The SOP Ordinance applies to main contracts for construction work with a value of at least US$5 million, as well as main contracts for the supply of goods or services related to construction work with a value of at least US$500,000. It also applies to all subcontracts within the same supply chain of a main contract subject to the SOP Ordinance.

In terms of the interim payment regime, section 18 of the SOP Ordinance provides that between each billing date, a claiming party may serve a payment claim which identifies the work to which the payment relates and state the claimed amount and how it is calculated. Sections 19 to 21 then deal with payment responses, and in essence:

- A paying party's payment response must be served by the earlier of the payment deadline or 30 days after the payment claim is served (unless agreed otherwise);

- The payment response must identify the payment claim to which it relates, and state the admitted amount, the difference between the claimed and admitted amounts, and how the admitted amount is calculated;

- The paying party must pay the admitted amount by the date specified in the contract or 60 calendar days after the payment claim is served, whichever is earlier; and

- In the event of a payment dispute which satisfies the conditions of section 23 of the SOP Ordinance (for example, because the claimed amount is not admitted in full, a payment response has not been served on time, or the admitted amount is outstanding), then the parties can refer the dispute to an adjudication, similar to the statutory adjudication regime under the HGCRA in the UK. This is intended to be a speedy and cost-effective means of dispute resolution, and section 53 of the SOP Ordinance provides that legal costs are not recoverable from the other party (although the adjudicator can order a party to pay their fees and expenses and the nominating body's fees).

It is noteworthy that unlike in the UK, the absence of a payment response does not prevent an adjudication over the true valuation of the claimed amount as that amount is regarded as disputed by virtue of section 21 of the SOP Ordinance, but no set-off (for example, cross-claims based on delay damages or defect rectification costs) is permitted in an adjudication. As a result, there is unlikely to be room for the type of "smash and grab" adjudications which have been seen in the UK.

Pursuant to section 24 of the SOP Ordinance, an adjudication must be commenced within 28 days beginning on the date which a payment dispute arises. The default timetable is then set out in sections 25 to 46 of the SOP Ordinance (subject to any longer period specified by the adjudicator for the response and reply). The default deadline for the adjudicator's decision 55 working days after the adjudicator's appointment, but that period can be extended by the parties' agreement.

It is noteworthy that section 46 of the SOP Ordinance provides that an adjudication determination on the value of any construction work or related goods and services will be binding on later adjudications, unless the claimant or respondent can show that the value has changed since. This appears at first sight to be less stringent than the position in the UK, where the same or substantially the same dispute cannot usually be adjudicated twice.

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Section 49 of the SOP Ordinance provides that an adjudication decision can be enforced by way of an expedited procedure in the Hong Kong Court of First Instance (HKCFI), with leave to be granted within seven days unless there is a set-aside application or the adjudicator's determination is no longer binding or has been paid in full.

The grounds for setting aside an adjudication decision are set out in section 48 of the SOP Ordinance, namely: (i) a decision procured by fraud/bribery; (ii) a material denial of natural justice; (iii) an adjudicator's failure to act independently and impartially; and (iv) an adjudicator acting in excess of their jurisdiction. A set-aside application must be made within 14 days after the adjudication decision has been served.

The SOP Ordinance will come into force on 28 August 2025. Given the substantial parallels between the SOP Ordinance in Hong Kong and the HGCRA in the UK, it is likely that the expertise of English construction practitioners can be called upon to advise on such matters in the early days of the implementation of the SOP Ordinance, and the Hong Kong courts are also likely to look at the TCC's judgments on adjudication enforcement for guidance on the appropriate approach to take. It will be interesting to see the extent of this cross-fertilisation in the coming years.

Aside from the SOP Ordinance, it is worth noting that the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) (Reciprocal Enforcement Ordinance) also came into

force on 29 January 2024. This applies to judgments made on or after the date of entry into force and provides for the enforcement of a Mainland Chinese judgment in Hong Kong by way of application to the Hong Kong court for registration of the judgment, and the enforcement of a Hong Kong judgment in the Mainland by way of an application to the Hong Kong court for a certified copy of the judgment and certificate.

This applies to judgments in civil and commercial proceedings and criminal judgments containing an order for payment (except those falling within the list of "excluded judgments"). The Reciprocal Enforcement Ordinance will make it easier for a wide range of civil judgments in Hong Kong and the Mainland China to be mutually enforced and recognised, without requiring parties to specifically submit to the jurisdiction of a Hong Kong or Mainland court. It will also minimise the multiplicity of proceedings and judgments over the same dispute. This will be of relevance to litigation involving construction, infrastructure and energy disputes where there are parties based in both Hong Kong and the Mainland.

In terms of case law, the HKCFI's decision in *Hip Hing Construction Co Ltd v Hong Kong Airlines Ltd*[203] provided an instructive illustration of the principles governing whether a trust has been created over retention monies. Mimmie Chan J drew on case law in Hong Kong, the UK and other common law jurisdictions regarding the necessary conditions for creating a valid trust, particularly the need for intention to create a trust and certainty of subject matter.[204] She observed that "the cases in which certainty of the subject matter was upheld by the Court is that there had been clear identification of the property, which was not mixed with property of the alleged trustee".[205]

On the facts, Mimmie Chan J found that the contractual provision that retention monies "shall be held upon trust" was a "clear manifestation of the parties' intention to create a trust", and it is more than just a contractual right to require the establishment of a trust.[206] However, she noted that "[m]oney is interchangeable, and physically indistinguishable, from each other, and hence fungible",[207] and "[i]f there is no identified bulk, or the property is completely unspecified, problems as to uncertainty may arise".[208]

Because the employer had not at any time paid any retention monies into any specific and identifiable account, and there was no evidence as to what bank accounts were held by the employer and use for the purposes of payment, Mimmie Chan J ultimately held that the purported trust fails for "lack of a sufficiently identifiable bulk of which the trust money is said to form part".[209] She pointed out that contractors are "advised to be vigilant in safeguarding their rights and to apply to the court at an early stage of the project, to ensure that the trust property is preserved and protected", rather than wait until the employer becomes insolvent.[210] This message rings equally true for contractors in the UK who have the benefit of an express trust provision in respect of retention monies.

Finally, turning to the arbitration scene, Hong Kong continues to adopt a pro-arbitration approach generally when it comes to supporting arbitral proceedings and enforcing arbitral awards. Attempts to re-run an arbitration by raising new or reframed arguments after the event would be robustly rejected by the courts. In *X and Another v Z Co*,[211] for instance, the arbitral proceedings related to an alleged failure by X and Y Co to complete a purchase of shares following Z Co's exercise of an exit right under the sale and purchase agreement. The award found in favour of Z Co's claim for specific performance or damages in lieu.

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X and Y Co sought to set aside the award on the basis that they were unable to present their case and/or the arbitral procedure was not conducted in accordance with the parties' agreement. In so doing, they alleged that the tribunal failed to deal with arguments relating to

[203] [2024] HKCFI 370.
[204] Ibid, at paras 11 to 45.
[205] Ibid, at para 44.
[206] Ibid, at para 47.
[207] Ibid, at para 58.
[208] Ibid, at para 61.
[209] Ibid, at para 65.
[210] Ibid, at para 66.
[211] [2024] HKCFI 695.

the non-satisfaction of the conditions precedent for the obligation to repurchase shares, and also the deduction of tax liabilities from the exit price in the event that specific performance was granted.

Mimmie Chan J described this as an example of "a losing party in an arbitration coming to court to launch a challenge to an award by 'repackaging'... arguments which had not been made the focus of submissions to the tribunal, and presenting them to the court as key issues which had not been dealt with by the tribunal".[212]

In particular, the court concluded that the conditions precedent defence was "not even dealt with or contained in the written submissions",[213] and "the tribunal cannot be criticised either for having acted outside the scope of the submission and having dealt with an issue not raised or argued at length, or having failed to give the parties an opportunity to argue such issue".[214] Similarly, the tax defence was never raised in written submissions or at the hearing, and X and Y Co did not take into account the issue of tax liabilities when providing its calculation of the exit price to the tribunal.[215] The setting aside application was therefore rejected, and X and Y Co were ordered to pay indemnity costs.[216]

In appropriate cases, however, the Hong Kong courts will refuse to enforce an arbitral award, and there are some notable examples of this in 2024. In *A v B and Others*,[217] the parties engaged in an arbitration regarding liability for royalty fees and other charges under a licence agreement for the operation of learning centres using a certain computer system. The arbitration was governed by the International Arbitration Rules and Supplementary Procedures for International Commercial Arbitration of the American Arbitration Association, Article 33 of which required an award to state its reasons. On the facts, however, the award simply stated the applicable contractual provisions and then simply stated orders to be made.

Mimmie Chan J held that the award was unenforceable because "there was no analysis made nor any explanation given, however brief, as to why she accepted the effect as held by her, and why the Respondents' contentions ... were rejected by her, or were considered by her to be irrelevant to her conclusions".[218] This was contrary to the applicable arbitral rules, "sufficiently serious to affect the structural integrity of the arbitral process, and to have undermined due process".[219] Although this was no doubt an exceptional set of facts, it is nonetheless a salutary reminder that an arbitral tribunal is expected to provide reasons which are reasonably sufficient and understandable by the parties (unlike in construction adjudications, where the reasons are often stated very briefly).

Another illustration can be found in *SYL and Another v GIF*,[220] which concerned a dispute arising out of a loan agreement between a lender and two borrowers, a first security deed between the lender and borrowers, and a second security deed between the lender, one of the borrowers and other security providers. A single arbitration was commenced under the HKIAC Rules,

[212] Ibid, at para 1.
[213] Ibid, at para 32.
[214] Ibid, at para 33.
[215] Ibid, at paras 45 to 48.
[216] Ibid, at para 51.
[217] [2024] HKCFI 751.
[218] Ibid, at para 32.
[219] Ibid, at para 33.
[220] [2024] HKCFI 1324.

but Article 29 provided that this can only be done under multiple contracts if, inter alia, the arbitration agreements under which the claims are made are compatible.

The loan agreement contained an HKIAC arbitration clause based on the appointment of one arbitrator by the lender and another one by the borrowers, and this was stated to apply mutatis mutandis to the two security deeds. In the event, the HKIAC appointed an arbitrator unilaterally because there was no joint designation of an arbitrator by the borrowers and security providers. The HKCFI set aside the jurisdictional award, on the basis that the arbitration agreements under the loan agreement and first security deed were incompatible with the arbitration agreement under the second security deed.

Deputy High Court Judge Norman Nip SC emphasised that "the primacy of consent" is "the cornerstone of modern international arbitration", and the borrowers contracted for the right to designate an arbitrator should a dispute arise, which "cannot be curtailed by a unilateral decision on the part of a counterparty ... to commence a single arbitration based on multiple contracts".[221] Given that one of the borrowers would be deprived of the right to designate an arbitrator because it was not a party to the second security deed, there were valid concerns that the lender may "gain an unfair advantage" which "impeaches the integrity of the arbitration".[222]

The *SYL* decision is a timely reminder that parties need to exercise particular caution when commencing an arbitration in respect of multiple agreements forming part of the same transaction, especially where the agreements were not all entered into between the same parties. It is important to consider whether the arbitration agreements and/or relevant arbitral rules allow a single arbitration in these circumstances, and if so whether there are any material differences in the procedure for the constitution of the tribunal. This will be relevant where, for instance, a single arbitration is contemplated for disputes under a main contract and the relevant supply chain.

[221] Ibid, at paras 38 and 39.
[222] Ibid, at para 40.

Singapore

Singapore continues to be an important arbitration centre for cross-border disputes in the Asia Pacific region. Its position has long been reinforced by the robust approach taken by the Singapore courts when exercising their supervisory jurisdiction and adherence to the principle of minimum curial intervention in international arbitrations.

The pro-arbitration approach of the Singapore courts was once again illustrated in 2024 by the Singapore High Court's decision in *DGE v DGF*,[223] where an unsuccessful party sought to set aside an arbitral award which found that DGE was liable for the supply of solar panels with defective AAA backsheets.

The supply contract appended a so-called "limited warranty", and DGF initially argued that DGE was liable to DF for breaches of the warranty, in addition to the claim for breaches of the Convention on Contracts for the International Sale of Goods (CISG). DGE relied on the warranty as well to exclude DGF's claims (including the CISG claim).

At the start of the arbitral hearing, the tribunal asked the parties to address an unpleaded issues, that is, whether the warranty was for the benefit of the third-party end-user and not applicable between DGF and DGE. In the event, the tribunal decided in the award that the warranty was not applicable between DGF and DGE, but DGF nonetheless succeeded in its CISG claim under the supply contract (which the tribunal considered was not excluded by the warranty). DGE therefore argued, inter alia, that the tribunal acted in breach of natural justice by ruling on the unpleaded third-party warranty issue. The Singapore High Court rejected the setting aside application.

Kristy Tan JC held on the third-party warranty issues, albeit unpleaded, that there was no breach of the fair hearing rule because it became a live issue when the tribunal put it in play on the first day of the hearing, and both parties had a reasonable opportunity to present their cases, including after DGF abandoned its claim based on the warranty.[224] The fact that DGE did not have the opportunity to adduce evidence of extrinsic facts regarding the parties' negotiations and understandings was neither here nor there as such evidence was inadmissible in any event.[225]

[223] [2024] SGHC 107.
[224] Ibid, at paras 87 to 102.
[225] Ibid, at paras 105 and 106.

The judge further concluded that the third-party warranty issues was within the scope of the submission to arbitration and did not fall foul of Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration, given that:

> "The totality of the picture is ... that the Third-Party Warranty Issue arose from or was connected to the pleaded disputes; it was raised at the start of the evidentiary hearing and the parties were directed to address it; it was a live issue in the Arbitration; and the parties had a reasonable opportunity to address it and availed themselves of the opportunity."[226]

Similarly, there was no failure to adhere to the agreed arbitral procedure in breach of Article 34(2)(a)(iv) of the UNCITRAL Model Law. The procedural order prescribed "the specialised procedure that is to apply to the specific situation where new matters are raised at the hearing", and the new matter raised by the tribunal at the hearing fell within the scope of this procedure, without necessarily having to be raised with an attendant amendment in pleadings.[227] In any event, even if the tribunal should have required a pleading amendment, there would have made "no meaningful difference to the status quo".[228]

The moral of the story is that where a tribunal raises an issue relevant to the pleaded dispute with the parties and the parties have had the opportunity to address the issue, the Singapore courts will not intervene in the arbitral procedure or set aside the arbitral award based on technical and contrived arguments that there have been breaches of the rules of natural justice and/or the parties' agreed arbitral procedure. This is essential to the courts' long-standing pro-arbitration approach.

The Singapore courts' continuing pro-arbitration approach can also be seen in *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd and Another*,[229] where the Singapore Court of Appeal upheld a stay for arbitration granted by the High Court in respect of an action brought by the contractor to restrain the employer from obtaining payment under an unconditional on-demand bond, in circumstances where the employer had commenced an arbitration on its ultimate entitlement to the sums claimed under the building contract.

In Singapore, the court will grant an injunction against payment under a bond not only if the demand is made fraudulently, but also if it would be "unconscionable" for the party to make a demand under the bond. The latter ground goes well beyond those recognised in the UK, Hong Kong and other common law jurisdictions for injuncting a demand under a bond

Sundaresh Menon CJ observed that the employer had in effect converted the unconditional bond into a conditional bond, payable upon proof in the arbitration that the sum demanded was due.[230] While the logic of the employer's approach was somewhat confusing, there was simply "no ground at all for the matter not to proceed to arbitration", and there was no risk of inconsistent findings because the substantive dispute was strictly between the employer and the contractor and the arbitration would ultimately resolve the employer's entitlement to any sums under the bond.[231]

The *Star Engineering* judgment is also notable for its consideration of the principles on restraining payment under an unconditional bond. In Singapore, the court will grant an injunction against payment under a bond not only if the demand is made fraudulently, but also if it would be "unconscionable" for the party to make a demand under the bond.[232] The latter ground goes well beyond those recognised in the UK, Hong Kong and other common law jurisdictions for injuncting a demand under a bond.

Sundaresh Menon CJ reiterated the well-established principles that where a restraining order is sought, "the court is not concerned at all with that underlying dispute", and "[t]he presumptive position is that there will be no such interference unless sufficient evidence is adduced of the possibility of the demand itself being fraudulent or, where applicable, unconscionable in the sense described above".[233] On the facts, it was found that the parties contractually agreed to exclude unconscionability as a

[226] Ibid, at para 120.
[227] Ibid, at para 124.
[228] Ibid, at para 126.
[229] [2024] SGCA 30.
[230] Ibid, at para 41.
[231] Ibid, at para 42.
[232] See eg *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another* [1999] 3 SLR(R) 44, at paras 16 and 20.
[233] *Star Engineering*, at para 37.

ground for restraining a demand under the bond.[234] This is a helpful confirmation of the courts' respect for the parties' express intentions in limiting the grounds for judicial intervention.[235]

What if the parties have not excluded unconscionability as a ground for restraining a demand under a bond? Is it easy to establish such a ground in Singapore? The Singapore High Court's recent judgment in *Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa*[236] would suggest not. That case concerned an attempt by a contractor to restrain an employer of certain church restoration works from making a demand under an on-demand bond to recover delay-related damages and the costs of outstanding warranties and rectification works.

> The Singapore courts are reluctant to interfere in the enforcement of performance bonds in most cases, as in the UK, Hong Kong and other common law jurisdictions

The contractor contended that the employer's demand was unconscionable because it was based on an inflated claim for delay liquidated damages which ignored the contractor's entitlement to Covid-19 relief and purported to recover the cost of works that were omitted from the contractual scope. On the facts, the Singapore High Court refused to grant the restraining order sought.

Alex Wong JC emphasised that the threshold of unconscionability was a high one and required a strong prima facie case,[237] and that "a mistaken but bona fide call on a performance bond would not fall foul of the doctrine of unconscionability".[238] There is good reason for such a strict standard because "[a] performance bond in the context of a construction contract is a contractual bargain between the parties to that contract allowing the beneficiary to call on that bond as a safeguard for the contractor's performance", and the court needs to be "very careful not to set a precedent which expanded the scope of the court's interference in these bargains such that the greater commercial uncertainty in their application is created".[239]

On the facts, the judge concluded that the contractor failed to make out its case and satisfy its burden of proof.[240] In particular, although the contractor contended that the architect's calculation of the liquidated damages was erroneous, the architect's error (even if proven) did not equal unconscionability on the part of the employer. The architect was independent of the employer and did not act as the latter's agent, and insofar as the employer relied on the architect, there was "no unconscionable conduct in that reliance as there was no explicit impropriety in the behaviour of the Architect or the defendant and I could not infer any such unconscionability based on the circumstantial evidence".[241]

The *Shanghai* decision makes it abundantly clear that even though unconscionability is an additional ground for restraining a demand under a bond in Singapore, in practice, that is unlikely to succeed save in the plainest cases of bad faith and there is a high burden for any applicant to overcome. In other words, the Singapore courts are reluctant to interfere in the enforcement of performance bonds in most cases, as in the UK, Hong Kong and other common law jurisdictions. This is interesting not only for disputes governed by Singaporean law, but also cross-border disputes where parties seek to drawn on Singapore's case law to challenge a demand under a bond based on unconscionability.

UAE

The UAE has long been a centre for arbitration in the Middle East, especially with the success of the Dubai International Financial Centre (DIFC) and the growing influence of the Abu Dhabi Global Market (ADGM). In the Dubai International Arbitration Centre (DIAC) Annual Report for 2023, for example, it was reported that 40 per cent of DIAC arbitrations concerned construction contracts, which serves to confirm the continuing importance of the UAE as a forum for the resolution of construction disputes.

[234] Ibid, at paras 10(d) and 33.
[235] See also *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and Another* [2015] SGCA 24.
[236] [2024] SGHC 5.
[237] Ibid, at para 36.
[238] Ibid, at para 37.
[239] Ibid, at para 40.
[240] Ibid, at para 38.
[241] Ibid, at paras 42 to 44.

> Parties to construction and engineering contracts governed by UAE law must ensure that their arbitration clauses do not take the form of a unilateral option or right to arbitrate which only one party can exercise, as it will most likely be unenforceable and will not be sufficient to preclude the other party from litigating in the Dubai Courts

A number of noteworthy cases coming out of the UAE in 2024 will be of interest to construction-related arbitrations. In Dubai Court of Cassation Case No 735 of 2024, the parties were in dispute under a contract for the supply and installation of waterproofing and suspended ceilings on the Remraam, Warsan and Palmarosa projects. The sub-contractor brought a claim in the Dubai courts against the main contractor for outstanding payment, but the main contractor objected on the basis that the contract provided it with the unilateral option to refer a dispute to an arbitration.

The Dubai Court of Cassation rejected the main contractor's contentions. It emphasised that in order to be enforceable, an arbitration clause must be clear and explicit, and in terms that are not ambiguous, vague, subject to doubt, subject to possible alternate meanings, or susceptible to controversy. It was also necessary for there to be a "meeting of the minds" for an arbitration agreement to be enforceable as a contract within a contract.

On the facts, the Court of Cassation concluded that the unilateral arbitration clause was an arbitrary condition which violated the principle of equality between the parties before a judicial body because it afforded one party an unfair advantage over the other. Further, there was no "meeting of the minds" because the parties did not conclusively agree to arbitration as their mutually chosen forum. In other words, there was no clear and unambiguous agreement to arbitrate.

Therefore, parties to construction and engineering contracts governed by UAE law must ensure that their arbitration clauses do not take the form of a unilateral option or right to arbitrate which only one party can exercise, as it will most likely be unenforceable and will not be sufficient to preclude the other party from litigating in the Dubai Courts.

The validity of arbitration clauses also arose for determination in Abu Dhabi Court of Appeal Case No 449 of 2024, which concerned the validity of arbitration clauses providing for arbitration in the DIFC-LCIA after the DIFC-LCIA was abolished by Decree No 34 of 2021.

The Court of Appeal helpfully confirmed that the arbitration clause remained valid and the arbitration could be managed by the successor institution, namely the DIAC. The question turned on the intention of the parties, and on the facts, there was a clear intention to arbitrate.

Indeed, given the severability clause in the contract, the arbitration agreement can operate as a whole even if the part referring to the DIFC-LCIA became inoperable. In reaching this conclusion, the Court of Appeal also relied on and followed the approach of a decision of the Paris Court of Appeal (Case No 10/2578).

On the principles relevant to arbitrations in the UAE generally, Dubai Court of Cassation Case No 606 of 2024 provided instructive clarification on a number of amendments introduced by Federal Decree Law No 15/2023 to the UAE Federal Arbitration Law. In particular, the Court of Cassation confirmed that parties which fail to object to breaches of the arbitration agreement or applicable legal procedures promptly within the prescribed time frame or within seven days of discovering the breach may well be deemed to have waived their objections, and where parties have not agreed on any specific arbitral procedure in a DIAC arbitration, the tribunal is free to determine its own procedure as long as it complies with UAE law (including, for example, the adoption of the International Bar Association's Guidelines on Conflicts of Interest).

Finally, it is worth noting that Decree No 29 of 2024 was issued to establish a new "Judicial Authority for Resolving Jurisdictional Conflicts between the DIFC Courts and Judicial Bodies in the Emirate of Dubai", replacing the Joint Judicial Committee established under the previous Decree No 19 of 2016. The oversight of the new body will extend beyond jurisdictional conflicts between the DIFC Courts and the Dubai Courts to encompass the Rental Disputes Centre, the Judicial Committees formed by a decree or decision, and other bodies deemed as judicial authorities in Dubai.

The new rules and procedures require decisions to be issued within 30 days of the parties' final submissions, and requests for a stay will be determined within 14 days of the date of service of the claims. Article 9(c) of the Decree also introduces a system of precedent which is similar to the common law, such that legal rules prescribed in the decisions will be treated as judicial principles which are final and binding on all judicial bodies. Parties should therefore have regard to the new procedure in place, and it will be interesting to see whether this provides speedier resolution of jurisdictional conflicts between the DIFC Courts and Dubai's other judicial bodies.

Concluding observations

The year 2024 was a remarkable one in terms of the volume of important and thought-provoking cases on a range of topics which are close to the heart of legal practitioners and construction professionals within the industry, ranging from the scope of statutory adjudication to the principles governing claims under the DPA and BSA. It also saw the release of the new JCT 2024 suite of contracts, which will take the place of JCT 2016 as the new standard form to be used in many future projects across the UK.[242]

Some of the cases discussed above are subject to ongoing appeals. In particular, *Providence* is being appealed to the Supreme Court, and *BDW* is being appealed to the Court of Appeal. Get Living is also appealing against the FTT's *Triathlon* decision. The jury is still out on the final word in these two important decisions, as the appeals will most likely be heard at some point in 2025. It is important for practitioners and industry stakeholders alike to follow those appeals closely and keep an eye out for the further judgments in these cases.

On the topic of appeals, the Supreme Court appeal in *URS Corporation Ltd v BDW Trading Ltd*[243] (which was discussed in some detail in the annual review for 2023) was heard in December 2024, and it is hoped that the Supreme Court's judgment will be handed down before the end of 2025. The decision will address the scope of duty of an engineering consultant, the accrual of a tortious cause of action in cases of latent defects, the developer's right to bring a DPA claim, the retrospectivity of the BSA's extension of the limitation period for DPA claims, and the accrual of a cause of action for a contribution claim. The importance of this wide-ranging appeal cannot be overstated, and the industry should stay tuned for this significant decision.

The industry now has the benefit of the findings in the Grenfell Tower Inquiry Phase 2 Report, which will no doubt remain as one of the most important public inquiries in the history of the construction industry. 2025 may well see the implementation of some of the inquiry's

[242] See the author's recent webinar, "JCT 2024 – 10 Key Changes in the New Suite of Contracts" (delivered on 26 September 2024), www.atkinchambers.com/webinar-jct-2024-10-key-changes-in-the-new-suite-of-contracts-thursday-29th-september/.
[243] [2023] EWCA Civ 772; [2023] BLR 437.

recommendations (or at least steps being taken towards such implementation), and this will have a significant impact on the Building Regulations and Building Control regimes. Everyone in the industry will need to be fully aware of any legislative changes being introduced, and in the meantime, the points noted by the inquiry as to lack of competence and poor practices in the industry should be taken on board immediately by developers, contractors and professional consultants and applied in ongoing and future projects.

With the constant proliferation of construction disputes, perhaps it is more important than ever for parties to consider alternative dispute resolution in order to resolve their disputes in the most cost-efficient and commercially sensible manner

It is also expected that more cases touching on DPA claims and the effect of the BSA will reach the courts in 2025, and it is possible that the TCC will finally have the opportunity to consider the principles applicable to an application for a building liability order. Any such decisions will be of wider importance to parties which are making or facing claims relating to building safety defects, and it is crucial that practitioners and industry stakeholders stay apprised of the latest updates on these matters.

With the constant proliferation of construction disputes, perhaps it is more important than ever for parties to consider alternative dispute resolution (ADR) in order to resolve their disputes in the most cost-efficient and commercially sensible manner. It is noteworthy that in *Churchill v Merthyr Tydfil County Borough Council*,[244] the Court of Appeal held that the courts do have the power to stay proceedings and order the parties to engage in ADR, and CPR r.1.1(2) was amended in 2024 to include the promotion and use of ADR as part of the courts' overriding objective. It remains to be seen whether parties in TCC disputes will increasingly be ordered to attempt mediation, although experience shows that most parties to construction disputes tend to be open to mediation in any event.

Finally, the TCC Guide (which was last revised in October 2022) is the subject of an ongoing review by the TCC Guide Working Group. It is anticipated that the next version of the TCC Guide will be published before the end of 2025, and although the revisions are likely to be modest in most parts, it will nonetheless be important for construction practitioners to take note of any updates to the procedural guidance given on day-to-day matters such as preparation for case management conferences and best practice for the preparation of expert evidence.

Given all the ongoing and pending developments which are already in play and expected to come to fruition in 2025, there will certainly be no shortage of materials to cover in the next annual review. Until then, let us take stock of all the changes witnessed and progress made in 2024, as we march forwards into another year of feverish activity for the construction, infrastructure and energy industries, both in the UK and abroad.

[244] [2023] EWCA Civ 1416; [2024] BLR 12.

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Appendix: judgments analysed and considered in this review

2024 judgments analysed

A v B and Others [2024] HKCFI 751

Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) [2024] UKSC 23; [2024] BLR 413

Abu Dhabi Court of Appeal Case No 449 of 2024

BDW Trading Ltd v Ardmore Construction Ltd [2024] EWHC 3235 (TCC); [2025] BLR 14

Beck Interiors Ltd v Eros Ltd [2024] EWHC 2084 (TCC); [2024] CILL 5053

Dawnvale Cafe Components Ltd v Hylgar Properties Ltd [2024] EWHC 1199 (TCC); [2024] BLR 557

DGE v DGF [2024] SGHC 107

Dubai Court of Cassation Case No 606 of 2024

Dubai Court of Cassation Case No 735 of 2024

Essential Living (Greenwich) Ltd v Conneely Facades Ltd [2024] EWHC 2629 (TCC); [2024] CILL 5077

FES Ltd v HFD Construction Group Ltd [2024] CSIH 37; (2024) 42 BLM 01 5

Hip Hing Construction Company Ltd v Hong Kong Airlines Ltd [2024] HKCFI 370

ISG Retail Ltd v FK Construction Ltd [2024] EWHC 878 (TCC); [2024] BLR 377

McLaughlin & Harvey Ltd v LJJ Ltd [2024] EWHC 1032 (TCC); [2024] BLR 427

Morganstone Ltd v Birkemp Ltd [2024] EWHC 933 (TCC); [2024] BLR 361

My Contracts Ltd v 74 Hamilton Terrace Freehold Ltd [2024] EWHC 2896 (TCC)

Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] EWCA Civ 962; [2024] BLR 547

RTI Ltd v MUR Shipping BV [2024] UKSC 18; [2024] 1 Lloyd's Rep 621; (2024) 41 BLM 07 1

Shanghai Chong Kee Furniture & Construction Pte Ltd v Church of St Teresa [2024] SGHC 5

Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd and Another [2024] SGCA 30

SYL and Another v GIF [2024] HKCFI 1324

Tata Consultancy Services Ltd v Disclosure and Barring Service [2024] EWHC 1185 (TCC)

Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2024] EWCA Civ 1330; [2025] BLR 1

Triathlon Homes LLP v Stratford Village Development Partnership and Others [2024] UKFTT 26 (PC); [2024] BLR 139

Vainker and Another v Marbank Construction Ltd and Others [2024] EWHC 667 (TCC)

Willmott Dixon Construction Ltd v Prater and Others [2024] EWHC 1190 (TCC)

Workman Properties Ltd v ADI Building And Refurbishment Ltd [2024] EWHC 2627 (TCC); [2024] CILL 5081

X and Another v Z Co [2024] HKCFI 370

Judgments considered

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

Aspect Contracts (Asbestos) Ltd v Higgins Construction plc [2015] UKSC 38; [2015] BLR 503

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

Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA Civ 990; [2017] BLR 1

Bresco Electrical Service Ltd v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25; [2020] BLR 497

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

Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416; [2024] BLR 12

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

Fiona Trust & Holding Corporation and Others v Privalov and Others [2007] UKHL 40; [2008] 1 Lloyd's Rep 254

Hillcrest Homes Ltd v Beresford & Curbishley Ltd [2014] EWHC 280 (TCC)

Home Group Ltd v MPS Housing Ltd [2023] EWHC 1946 (TCC); [2023] BLR 474

J Murphy & Sons v W Maher and Sons Ltd [2016] EWHC 1148 (TCC); [2016] BLR 435

JTI POLSKA Sp Z o o and Others v Jakubowski and Others [2023] UKSC 19; [2023] 2 Lloyd's Rep 64

Marbank Construction Ltd v G&D Brickwork Contractors Ltd [2021] EWHC 1985 (TCC)

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

N.V. Bureau Wijsmuller v The "Tojo Maru" (Owners) [1969] 2 Lloyd's Rep 193

O'Donnell Developments Ltd v Build Ability Ltd [2009] EWHC 3388 (TCC)

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

Providence Building Services Ltd v Hexagon Housing Association Ltd [2023] EWHC 2965 (TCC)

Rendlesham Estates plc and Others v Barr Ltd [2014] EWHC 3968 (TCC); [2015] BLR 37

Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2023] EWHC 1765 (TCC)

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

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

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