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Keeping pace with change – construction law in 2025/2026

By Mathias Cheung

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Introduction

This article summarises some of the key legal and industry developments in construction law over the course of 2025 and the first quarter of 2026, both in the UK and abroad.[1] *During this time, there have been a significant number of interesting judgments handed down at all levels of the English Court system, from the Technology and Construction Court (TCC) all the way up to the UK Supreme Court and Privy Council, some of which relate to particular questions of construction law whereas others affect wider principles of contracting and tort. This article provides an overview of the most recent developments, as the legal landscape continues to evolve as we race through 2026.*

One cannot help but reflect on the extent to which domestic and international construction law has evolved over the years. Few people could have anticipated, for instance, the enactment of the Building Safety Act 2022 (BSA) and the sudden proliferation of case law thereafter revolving around claims under the Defective Premises Act 1972 going back some 30 years. In a similar vein, as we enter the 30th year since the enactment of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), the body of case law regarding the enforcement of adjudication decisions continues to grow in such a way that perhaps judges and construction lawyers in the early days of the Act did not envisage.

This theme of evolution is one of the defining characteristics of the common law, which Lord Sales described in a recent lecture at Cambridge University as "the product of centuries of indirect lawmaking by judges as a byproduct of deciding real cases and of articulating the legal rules which emerge from those decisions and which fall to be applied in present cases and can be applied to future cases".[2] In that same speech, Lord Sales noted the "open-textured" form of common law rules given how they are "revisable through processes of being applied, or qualified, or distinguished". This is important because "if the law is flexible in its application to new situations and is developed flexibly in accordance with developing social standards, it can actually make the application of the law more certain and predictable to those who are subject to it".

The mutually complementary and almost symbiotic relationship between flexibility and certainty is what makes the common law interesting, and it is also what keeps it relevant and important. It is interesting, because the law does not stagnate and the study of the law never ceases to provide new materials for enrichment, whether one is a student, an academic or a practising lawyer. It is also relevant and important, because those who operate within the principles of common law need to understand the scope and effect of those principles and how they may or may not apply to their factual circumstances, especially when there is an incremental (or sometimes not so incremental) change in the law. This is very much the case for the construction industry, where significant financial investments are often at stake, new standards

[1] Previous annual reviews for the years 2017 to 2024 are available to view at www.i-law.com/ilaw/specialFeature.htm?querySector=Construction.

[2] Lord Sales, "Certainty and flexibility in the law: insights from English law" (delivered to LLM students at Cambridge University on 16 June 2025), supremecourt.uk/uploads/speech_lord_sales_16062025_d3e182b62d.pdf.

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and technologies develop constantly, and legal disputes abound due to the competing interests of different stakeholders in building projects.

> The mutually complementary and almost symbiotic relationship between flexibility and certainty is what makes the common law interesting, and it is also what keeps it relevant and important

As readers will see in the discussion to follow, much of the recent case law in 2025 and early 2026 carries wider public importance for the construction industry which extends well beyond the specific facts of the cases decided, including two highly anticipated decisions handed down by the UK Supreme Court. Some of those cases have also generated lively debates as to the state of the law, while others have left certain important legal questions ripe for an authoritative answer on another day. This review provides guidance to parties and their legal representatives on some of the common legal issues which arise in construction, infrastructure and energy projects, based on the latest judicial word from the UK and other key jurisdictions.

Adjudication enforcement

As noted above, the HGCRA has now been enacted for nearly 30 years, and construction adjudications (whether contractual or statutory) continue to form part of the regular stream of most construction lawyers' practices in the UK. Adjudication has also become a fact of life for developers, contractors and construction professionals who are involved in projects on a daily basis, as adjudications are commonly seen as a quick first port of a call for dispute resolution before the matters are escalated to litigation or arbitration.

Even practitioners who primarily focus on international construction disputes increasingly find themselves involved in adjudications, especially given the introduction of adjudication legislation in other jurisdictions (such as Australia, Singapore and Hong Kong) and the incorporation of adjudication procedures into many standard form and bespoke contracts around the world. In this context, adjudication-related case law in the UK is not only of interest to English practitioners with a domestic practice, but also those based in other jurisdictions where adjudication is also becoming increasingly common, as there will inevitably be a degree of cross-fertilisation between different jurisdictions.

With the above in mind, it is worth noting a number of interesting TCC judgments in 2025 and early 2026 concerning payment disputes, questions of natural justice, and jurisdictional issues which go to the very heart of the scope of the right to adjudicate.

Smash and grab adjudications and Part 8 claims

A contractor seeking to take advantage of the statutory requirement under section 111 of the HGCRA to pay the "notified sum" and to obtain payment swiftly in a smash and grab adjudication will often do so by impugning the validity of an employer's purported payment notice and/or pay less notice. Similarly, an employer defending a smash and grab adjudication will commonly have to demonstrate that it has served a valid payment notice and/or pay less notice. The validity of a given payment notice or pay less notice can therefore have a material impact on the parties' respective payment rights and obligations.

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In 2025, there were a number of interesting decisions by the TCC which provided instructive guidance into how the court will approach the statutory requirements under the HGCRA, in terms of both the timing and the contents of payment and pay less notices. All of these disputes arose from Part 8 claims seeking final declarations as to the validity of notices under the HGCRA in order to avoid payment of the sums awarded by an adjudicator in a smash and grab adjudication.

The first was *Placefirst Construction Ltd v CAR Construction (North East) Ltd*,[3] which was handed down at the beginning of 2025. Placefirst was the contractor and CAR was the sub-contractor on a construction project in Durham. Under the subcontract, Placefirst was required to issue a payment notice not later than five days after the due date, and a pay less notice no later than two days before the final date for payment. CAR issued a payment application on 24 July 2024, and Placefirst issued an email on 31 July 2024 which attached two documents entitled "Valuation 30 – Payless Notice.pdf" and "Valuation 30.xlsm", respectively.

In October 2024, CAR obtained a favourable decision in a smash and grab adjudication which required Placefirst to pay a notified sum of £867,031.36 plus VAT, and it then proceeded to enforce the adjudication decision by way of a summary judgment application. Placefirst then commenced Part 8 proceedings to see final declarations as to the validity of its payment and pay less notices.

The first question which had to be decided by the TCC was whether the pay less notice issued on 31 July 2024 was valid because it was served (on CAR's case) before the date when it could properly have been served under the HGCRA and the subcontract. HHJ Stephen Davies began by noting that it was "finely balanced",[4] but he ultimately concluded that the pay less notice served by Placefirst was valid.

CAR's argument relied on section 111(5)(b) of the HGCRA, which provides that a pay less notice may not be given "before the notice by reference to which the notified sum is determined" in a case referred to in sections 111(2)(b) or (c). Section 111(2)(b) of the HGCRA refers to a section 110A(3) payment notice given in accordance with section 110B(2), and section 110B(2) in turn refers to a payee's right to give a section 110A(3) payment notice at any time after the date on which a payer was required by the contract to give a payment notice. Section 110B(4) further provides that if a payee is permitted or required to notify the payer of the sum which will become due before the deadline for the payer to give a payment notice, then that payee's notice "is to be regarded as a notice complying with section 110A(3) given pursuant to sub-section (2)".

CAR's argument was that because section 110B(2) of the HGCRA only permits a payee notice to be given at any time after the date on which the payer's payment notice must be given (ie five days after the payment due date), the "deemed" notice under sub-section 110B(4) must be regarded as having been given no earlier than after five days after the payment due date. On that hypothesis, CAR contended that Placefirst's pay less notice was invalid under section 111(5)(b) because it was given before the expiry of the deadline for the payer's payment notice.[5] HHJ Davies rejected CAR's argument for two reasons.

First, a payee's notice is only to be "regarded" as being a section 110A(3) payment notice, and the pay less notice must not be given before the date of the payee's notice, but nothing in the HGCRA provides that a payee's notice is "deemed" to be or "transmuted into" a notice given five days after the payment due date.[6]

Secondly, HHJ Davies observed that "there is no compelling reason why it should have been intended that the payer should be unable to give a pay less notice before that date". There may be circumstances where the payer does not object to the valuation in an interim payment application but wishes to make a specific deduction from the valuation in a pay less notice, and there is no logical reason why a pay less notice should not be given before the time for giving a payment notice has elapsed, or why a payer cannot choose to serve either a payment notice or a pay less notice only but not both.[7] The judge therefore took a pragmatic, commercial view of the consequences of the parties' competing interpretations and what the HGCRA actually envisaged.

The next question concerned the validity of Placefirst's payment notice, which ultimately depended on whether the HGCRA allows a payment notice and a pay less notice to be served at the same time, and whether a payment notice served in that manner was intended in form, substance and intent a payment notice.

[3] [2025] EWHC 100 (TCC); [2025] BLR 175.
[4] Ibid, at para 15.
[5] Ibid, at para 58.
[6] Ibid, at para 60.
[7] Ibid at paras 61 to 63.

HHJ Davies noted that while a payment notice and a pay less notice have to be served as separate documents, there is "no reason in principle why a payment notice and a pay less notice cannot be served at the same time under cover of the same letter or email or other communication".[8] Further, the judge made it clear that there was no requirement under the HGCRA for a payment notice to state expressly that the sum stated was that which the payer considered due at the due date, nor would the wrongful inclusion of deductions in the valuation go to the validity of a payment notice.[9]

Construing "Valuation 30.xlsm" on the facts, HHJ Davies considered that it was sufficiently clear that the document was intended to be a payment notice, as it was: (i) described as a valuation and a subcontract payment certificate; (ii) plainly intended to have a formal effect under the subcontract separate from the pay less notice; (iii) in substance a payment notice; and (iv) not obviously purely subsidiary to the pay less notice. There was therefore no room for reasonable doubt on an objective basis in that case.[10]

> Parties wishing to obtain quick payment through a smash and grab adjudication should therefore consider the risks of doing so if their case hinges on strained arguments predicated on a legalistic interpretation of the HGCRA

It is hardly surprising that the TCC reached the above conclusions on the facts, given that the paying party in this case acted reasonably diligently and promptly served two documents which, either separately or together, made clear the intention that it did not intend to pay the sums claimed in the payee's payment application. HHJ Davies was no doubt mindful of the "severe, if not draconian, consequences for a party who fails to serve a pay less notice",[11] and he concluded his judgment by observing as follows:

> "In short, it seems to me that it would be an unfortunate outcome in a case such as this if a contractor who sent two communications, both of which were in substance effective as payment notices or pay less notices, had to be treated as ineffective, because one was not properly described and the other was sent too late, due to the complexity of the Act and (in my view) an unduly legalistic interpretation of its requirements. I am happy to be able to reach a conclusion which does not have that effect."[12]

Parties wishing to obtain quick payment through a smash and grab adjudication should therefore consider the risks of doing so if their case hinges on strained arguments predicated on a legalistic interpretation of the HGCRA, especially where the paying party has taken reasonable steps to serve what appear on their face to be valid payment and/or pay less notices. The TCC will likely take a dim view of such arguments, and even if there is a short-term victory in an adjudication, that may well be overturned at the enforcement stage by a well-timed Part 8 claim.

That the TCC is unlikely to be attracted by overly technical arguments regarding the compliance of payment and pay less notices with the HGCRA requirements can also be seen in *RBH Building Contractors Ltd v James and Another*,[13] which related to the construction of a luxury house at Ferndown, Saunton, North Devon. In January 2025, the claimant RBH succeeded in a smash and grab adjudication and was awarded payment of £663,016.16. The employers, Mr and Mrs James, commenced Part 8 proceedings to seek a final declaration that they had in fact issued a valid pay less notice.

The pay less notice in question consisted of a letter from the employers setting out the disputed items in 11 bullet points and the reasons relied on by the employers. At the Part 8 hearing, the court was provided with a table explaining how each of the 11 bullet points were referable to the sums claimed in the payment application by reference to the Excel spreadsheet attached to the application.[14] Importantly, the total amount claimed in the payment application in respect of the 11 disputed items was £1,245,145.55, which exceeded the net sum of £663,016.16 said to be due under the application and would have reduced the sum due to nil.[15]

8 Ibid, at paras 67 to 69.
9 Ibid, at paras 80 and 81.
10 Ibid, at paras 85 and 86.
11 Ibid, at para 38.
12 Ibid, at para 89.
13 [2025] EWHC 2005 (TCC); [2025] BLR 517.
14 Ibid, at paras 52 and 53.
15 Ibid, at para 54.

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> A delicate balance has to be struck between protecting contractors' cashflow on the one hand and not making it excessively difficult for employers to give a valid payment or pay less notice on the other

Deputy High Court Judge Neil Moody KC held that the letter would have been "understood by any reasonably objective reader who had knowledge of the contract works, and ... those bullet points set an adequate agenda for an adjudication by identifying specifically which elements of the payment application were not accepted and, briefly, why they were not accepted".[16] The judge emphasised that the letter did not have to set out an arithmetical calculation, as that "would be to read into the statute an additional requirement that does not appear in section 111 and would be to take an overly prescriptive approach to the contents of a notice".[17]

The pragmatic and commercial approach taken by the TCC in the interpretation of the HGCRA requirements and the treatment of payment and pay less notices is a positive one. In particular, it is clear that the TCC is reluctant to impose an unduly strict burden on parties in domestic projects who are not legally trained and may not have any legal advice during a project or any prior experience of the HGCRA regime. After all, a delicate balance has to be struck between protecting contractors' cashflow on the one hand and not making it excessively difficult for employers to give a valid payment or pay less notice on the other.

Interestingly, the same kind of pragmatism can be seen in *Jaevee Homes Ltd v Fincham*,[18] although this time in the context of determining the validity of a contractor's invoices for payment. This was a case concerning works carried out by Mr Fincham at the former Mercy nightclub, and in a smash and grab adjudication, the adjudicator required Jaevee to pay Mr Fincham the sum of £145,896.31 under four invoices in the absence of any pay less notice. Jaevee commenced a Part 8 claim seeking final declarations as to the terms of the parties' contract, and the invalidity of Mr Fincham's invoices as default payee's notices under the HGCRA.

Deputy High Court Judge Roger ter Haar KC first considered the parties' competing arguments on the formation of the contract, and he decided that a contract was indeed concluded when the parties agreed by way of a series of WhatsApp messages. The judge noted that even if there was no agreement on the duration, start date and/or payment terms for the works, those were not essential terms which prevented the existence of a contract. On the facts, there was a sufficiently concluded agreement because it was clear who the contracting parties were, the price and the scope of work was agreed, the contractor was asked to start on site as soon as possible, and there was express confirmation that the job was given to Mr Fincham.[19]

Further, the judge found that the contract was concluded at the time when Jaevee confirmed in a WhatsApp message that the job was given to Mr Fincham, subject to some further exchanges a few minutes later regarding monthly payment applications. After the payment terms were clarified, the judge was of the clear view that a contract had been concluded by that point in time, and so Jaevee's own standard terms which came later were not incorporated into the contract.[20]

The question then was whether the four invoices relied on by Mr Fincham were valid as payment applications and default payee's notices under the HGCRA provisions. Although each of the four invoices set out the works done to date without any breakdown of the sums attributed to those works, the judge considered that, when read together with the quotations for those works, the first two invoices were sufficiently clear as to the items in the quotations which were said to be completed, the third invoice was for the remaining contract sum, and the fourth invoice was for extra works. The invoices therefore sufficiently set out the basis for the sums claimed.[21]

[16] Ibid, at para 55.
[17] Ibid, at para 55.
[18] [2025] EWHC 942 (TCC).
[19] Ibid, at paras 83 to 91.
[20] Ibid, at paras 93 to 99.
[21] Ibid, at paras 131 to 139.

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The judge also accepted Mr Fincham's argument that Jaevee understood the invoices to be applications for payment and never complained that they were unclear or required more information, and if a stricter approach were taken then few contractors would ever be able to comply with the HGCRA or the Scheme.[22]

This is a cautionary tale for paying parties seeking to impugn the validity of a payment application, in an attempt to avoid the consequences of their own failure to issue a valid and timeous payment notice or pay less notice (especially in the face of multiple unpaid payment applications)

The *Jaevee* decision should bring some comfort to contractors in domestic projects where the contractual scheme and payment arrangement are informal, as the TCC seems prepared to take a pragmatic approach when considering whether a party's payment claim substantially complies with the formality requirements in the HGCRA for payment applications and default payee's notices. It is also a cautionary tale for paying parties seeking to impugn the validity of a payment application, in an attempt to avoid the consequences of their own failure to issue a valid and timeous payment notice or pay less notice (especially in the face of multiple unpaid payment applications).

Another recent example of the TCC construing payment applications generously can be seen in *1st Formations Ltd v Lapp Industries Ltd*,[23] where the claimant, 1st Formations, sought to overturn an adjudicator's decision awarding a notified sum of £100,000 plus VAT to Lapp in a smash and grab adjudication by challenging the validity of the payment application.

Deputy High Court Judge Adrian Williamson KC started by observing that "[t]he mischief which has concerned the judges of this court in the cases summarised in *Kersfield* and *Advance JV* is that payees may take unfair advantage of the post-2011 regime", and "[t]hat could occur where payers are simply not put on notice that an interim payment is being sought, such that they cannot be expected to be ready with their own notices".[24] In the judge's view, that was simply not the situation on the facts of the case.

The judge observed that Lapp had accurately complied with paragraph 2 of the Scheme, and the fact that it also went on to seek a lesser sum "on account" given the state of the parties' commercial negotiations over the final account did not render it ambiguous or not in substance, form, and intent a payment application. Quite the contrary, the valuation was reasonably detailed and provided an adequate agenda for an adjudication.[25] The same conclusion applied to the complaint that the valuation was said to be "provisional" and "subject to any agreed adjustment following assessment".[26] Further, even if the due date or final date for payment stated on the payment application was incorrect, the judge stated that there was no authority which required the due date or final date to be accurately stated in order to render a payee's notice valid and compliant with the HGCRA and the Scheme.[27]

In conclusion, the judge held that "[s]tanding back, and looking at the Application in a common sense, commercial way, it seems to me obvious that LAPP was making an application for an interim payment in the sum of £100,000.00 plus VAT".[28] The emphasis on construing payment applications based on a commercial and common-sense approach is therefore the key takeaway from the *1st Formations* decision, and it is also consistent with the approach taken in *Jaevee*.

As the judge warned at the end of the judgment in *1st Formations*, "any other approach to the Application would be to fall into the trap of 'nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis'", and "[p]rovided that the notice makes tolerably clear what is being claimed and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective".[29] Parties should therefore be aware of the

[22] Ibid, at paras 140 to 143.

[23] [2025] EWHC 1526 (TCC); (2025) CILL 5169. See also *Building Law Monthly*, August/September 2025, (2025) 42 BLM 08 10.

[24] Ibid, at para 29, citing *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC). See *Building Law Monthly*, March 2017, (2017) 34 BLM 03 3 and *Advance JV (a joint venture between Balfour Beatty Group Ltd and MWH Treatment Ltd) v Enisca Ltd* [2022] EWHC 1152 (TCC); [2022] BLR 605.

[25] Ibid, at paras 34 to 36.

[26] Ibid, at para 39.

[27] Ibid, at para 38.

[28] Ibid, at para 40.

[29] Ibid, at para 41.

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risks of attracting the court's censure if they seek to avoid payment of a notified sum based on overly technical or legalistic arguments regarding the validity of a payment application, as such arguments are likely to be given a cold reception in the TCC.

There is, however, a limit to the commercial and practical approach of the court towards the interpretation of payment applications and payment or pay less notices, and such an approach does not extend to re-characterising a document as something which was never intended or said to be. A good illustration of this can be found in *Vision Construct Ltd v Gypcraft Drylining Contractors Ltd*,[30] where the main contractor, Vision Construct Ltd (VCL), contended on a Part 8 claim that (among other things) its purported payment notice which was issued out of time should nonetheless be construed as a pay less notice.

Deputy High Court Judge Adrian Williamson KC described this as an "ambitious submission", given that the subject box and the main body of the covering email referred to the document as a payment notice, and the document itself was headed "Payment Notice" and also referred to the breakdown of the sum stated in the "Payment Notice".[31]

The judge concluded that "this document was what it said it was: a Payment Notice", because "[a]ny other reading of the document would be entirely artificial", and "it would ... entirely undermine the Act and the subcontract if what the parties clearly intended at the time to be a Payment Notice could somehow retrospectively be converted into a Pay Less Notice".[32] This is a sobering reminder that the TCC's generous interpretation of payment or pay less notices cannot be stretched so far as to retrospectively re-characterise a document as a payment notice or pay less notice where the document was plainly never intended to be such a notice at the time.

[30] [2025] EWHC 2707 (TCC); [2026] BLR 1.
[31] Ibid, at para 42.
[32] Ibid, at paras 43 and 44.

Breach of natural justice

It is well established that parties are discouraged from rerunning an adjudication at an enforcement hearing under the guise of a natural justice argument, and the courts have repeatedly emphasised that challenges based on a breach of natural justice should only be made in the plainest cases.[33] Statistically, arguments based on alleged breaches of natural justice have been rejected by the courts in the overwhelming majority of disputes involving the enforcement of an adjudication decision.

The robust approach historically taken by the courts has once again been reaffirmed by the TCC in *Project One London Ltd v VMA Services Ltd*,[34] which was published at the very end of 2025. The dispute arose from the design and installation of mechanical works at 1–4 Munro Terrace and 112–114 Cheyne Walk in London. The parties engaged in a true valuation adjudication regarding one of VMA's applications for payment, and the adjudicator decided that VMA was required to repay the sum of £102,656.67 to Project One on his assessment of the works.

> Statistically, arguments based on alleged breaches of natural justice have been rejected by the courts in the overwhelming majority of cases involving the enforcement of an adjudication decision

VMA sought to resist enforcement by alleging that the adjudicator committed various breaches of natural justice, either by making adjustments for which neither party had provided evidence or arguments, or by failing to consider what was said to be undisputed evidence. Deputy High Court Judge Adrian Williamson KC had little difficulty rejecting VMA's arguments and holding that the adjudicator's decision should be enforced in the usual way.

[33] See *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15, at para 87 (Chadwick LJ).
[34] [2025] EWHC 3304 (TCC). See *Building Law Monthly*, February 2026, (2026) 43 BLM 02 8.

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First, as to VMA's complaint that the adjudicator made his own adjustment for possible defects in the pipework when valuing the air-conditioning works (which were found to be compliant contrary to Project One's arguments), the judge found that the pipework issue had in fact been ventilated extensively before the adjudicator, and because the parties' evidence and submissions were unhelpful and imprecise, "he had to do the best he could to achieve the rough justice which adjudication requires" and could not be criticised for doing so.[35]

Secondly, the judge held that the fact that the adjudicator may have misunderstood or overlooked relevant evidence was not a ground to resist enforcement, and this was "really an attempt to dress up an alleged error of law or fact as a breach of natural justice".[36] The judge emphasised that for a failure to consider evidence to amount to a breach of natural justice, there must be a deliberate failure to consider the evidence, and "[i]t would only be in an extraordinary case that an inadvertent failure to consider some issue would bring the natural justice principle into play". [37]

Finally, in relation to VMA's complaint that the adjudicator made a number of deductions which were described in the decision as "arbitrary", the judge concluded that "the adjudicator meant no more than that he was providing the best approximate valuation he was able to produce in the time available", which was precisely what the adjudicator was expected to do.[38]

[35] Ibid, at paras 20 and 21.
[36] Ibid, at para 25.
[37] Ibid, at para 26.
[38] Ibid, at para 33.

On the whole, the judge pointed out that even if the individual alleged breaches were made out, none of them would have been material as they "do not go to the heart of the dispute".[39] The judge noted that, "standing back from the detail, this is a classic case of a losing party seeking "to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'".[40]

A similar approach can be seen in *Clegg Food Projects Ltd v Prestige Car Direct Properties Ltd*,[41] where the defendant similarly tried to resist enforcement of an adjudication decision in the Leeds TCC on the basis that the adjudicator's valuation of the disputed payment application adopted his own "fair and reasonable rates" and a single remeasurement which the defendant did not have the opportunity to comment on, such that there was an alleged breach of natural justice.

HHJ Kelly had little difficulty dismissing the defendant's purported challenge to the adjudicator's decision. The judge noted that the adjudicator was asked by the parties to determine the overall valuation of the payment application (not the individual rates), and in those circumstances, "it is acceptable for an adjudicator to come to a different view from the parties in respect of the value of a particular item which he considers "fair and reasonable" using the documentation provided and submissions made by the parties".[42] In reality, the issues determined were "fairly canvassed during the course of the adjudication", and the

[39] Ibid, at para 37.
[40] Ibid, at para 40.
[41] [2025] EWHC 2173 (TCC); [2025] BLR 563.
[42] Ibid, at paras 37 and 38.

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values adopted by the adjudicator were "an intermediate position between those contended for by the parties, or [were] more favourable to the defendant".[43]

HHJ Kelly noted in particular that the parties chose to instruct a chartered quantity surveyor to assess their submissions and decide the gross valuation for the payment application, and he provided a valuation within the range contended for by the parties. There was no breach of natural justice in failing to seek further submissions, nor was it necessary for the adjudicator to set out his detailed methodology in his decision.[44] In any event, the defendant could not establish that any alleged breach was material, given that the adjudicator mostly adopted rates which were more favourable to the defendant, and the judge criticised "the excessive granularity with which the defendant seeks to undermine the adjudicator's decision".[45]

Finally, as to the defendant's complaint that the adjudicator failed to provide sufficient reasons for his decision, HHJ Kelly concluded that "against the background of a broadbrush process where the overall values arrived at for the different elements of Application 37 are set out, there is sufficient detail in the 88-page decision to enable the parties to understand how the adjudicator came to his decision in the round", and although fuller reasons could have been set out, that did not mean the reasons given were inadequate.[46]

> There was no breach of natural justice in failing to seek further submissions, nor was it necessary for the adjudicator to set out his detailed methodology in his decision

These recent decisions provide yet more cautionary tales for any unsuccessful party considering a challenge to enforcement based on natural justice arguments. Save in the plainest of cases involving something more than a mere inadvertent failure to consider evidence or an exceptional case of a core issue being determined without ever being addressed at all by either party, an unsuccessful party should probably comply with an adjudication decision rather than try to resist enforcement. Otherwise, there could be a real risk not only of unsuccessfully resisting enforcement, but also of facing indemnity costs if the arguments are found to be wholly unmeritorious.

Scope of right to adjudicate

It is axiomatic that under the HGCRA (and also the express terms of many standard form building and engineering contracts), a party to a construction contract has the right to refer a dispute to adjudication at any time. Whilst there is usually little difficulty with determining who is a party to a construction contract, interesting questions can arise if one moves away from the typical case of a bipartite relationship between an employer and a contractor under a construction contract. In the space of 12 months between early 2025 and early 2026, the TCC has handed down four judgments which touch on the question of who has a right to adjudicate, each addressing a distinct factual scenario which has not previously been considered by the court before.

The case of *RBH Building Contractors Ltd v James and Another*[47] has already been considered above in the context of the Part 8 determination on the validity of the employers' pay less notice. In that same decision, Deputy High Court Judge Neil Moody KC also considered whether the smash and grab adjudication decision was itself enforceable, and in particular, whether the employers were residential occupiers and were therefore excluded from the statutory adjudication regime by virtue of section 106 of the HGCRA.

Pursuant to section 106(2) of the HGCRA, the statutory adjudication provisions do not apply to "a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence". There has been limited case law on the interpretation of section 106, and there had been no prior reported cases where the exclusion under section 106 was held to apply.

[43] Ibid, at paras 40 and 41.
[44] Ibid, at para 43.
[45] Ibid, at para 44.
[46] Ibid, at paras 53 and 54.

[47] [2025] EWHC 2005 (TCC); [2025] BLR 517.

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In one of the few leading authorities on this issue, Coulson J (as he then was) noted that section 106 contemplated an employer "who occupied and would continue to occupy as their home the property that was the subject of the works ... or who had bought the property and intended to live there when the construction works were completed", and he emphasised that "section 106 needs to be approached with common sense".[48]

In *RBH*, Deputy High Court Judge Neil Moody KC had to consider whether the contract fell within the scope of section 106, in circumstances where Mr and Mrs James had never occupied a house that was being put up for sale, but at the time of the contract until around November 2022, their intention was in fact to occupy it. The judge started by observing that "[t]he question as to when the intention to occupy should be determined must be at the time when the contract is entered into", and "[t]here must be some certainty during a building project as to whether the works are subject to adjudication provisions or not".[49]

On the facts, the judge concluded that Mr and Mrs James had real prospects of successfully demonstrating that they were residential occupiers and that section 106 of the HGCRA was engaged, such that the adjudication decision could not be enforced. In reaching this conclusion, the judge considered that:

(1) It was not unusual for a family home to be owned by one of the spouses and occupied by the other.[50]

(2) There could be an intent to occupy even though it was conditional on repaying the development loan.[51]

(3) Many owner-occupiers let out their properties on an Airbnb basis for a few weeks a year, but they would otherwise be occupier the properties as their residence.[52]

(4) The reference to "market sale" in the planning documents arguably related to housing that could be sold freely on the open market as opposed to other categories which were subject to various restrictions.[53]

(5) The fact that there was a potential breach of the development loan agreement or potentially untruthful dealings in relation to the loan agreement was not determinative.[54]

(6) The loan documents and other documents raised the possibility that the house was being constructed as a development for onward sale but this had to be considered as part of the wider picture of the employers' evidence, as well as the facts that they registered with a local GP, went on the electoral roll and lived on site during the works.[55]

The decision in *RBH* is the first reported case in which the TCC has refused to enforce an adjudication decision on the basis that there was a real prospect of establishing the "residential occupier" exception under section 106 of the HGCRA. It is particularly interesting to see the way in which the court approached the parties' evidence – although there were certainly materials pulling in different directions, the court was emphatic that a common-sense approach should be adopted.

In particular, where there is sufficient evidence that the employers may have had some intention at the time of contract to reside at the property, the court may well refuse to enforce an adjudication decision even if the disputed facts cannot be summarily resolved without further oral evidence. It will be interesting to see whether *RBH* and the scope of section 106 of the HGCRA will receive further judicial attention in the coming months, but in any event, parties involved in residential projects should carefully consider the potential application of section 106 of the HGCRA before embarking on any adjudication.

> The decision in *RBH* is the first reported case in which the TCC has refused to enforce an adjudication decision on the basis that there was a real prospect of establishing the "residential occupier" exception under section 106 of the HGCRA

A rather different question arose in two other TCC judgments, in relation to the relationship between assignment and the right of adjudication under

[48] See *Westfields Construction Ltd v Lewis* [2013] EWHC 376 (TCC); [2013] BLR 223, at paras 10 and 11.
[49] *RBH*, at para 25.
[50] Ibid, at para 31 and 32.
[51] Ibid, at para 33.
[52] Ibid, at para 34.
[53] Ibid, at para 35.
[54] Ibid, at paras 36 to 42.
[55] Ibid, at paras 43 and 44.

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construction contracts. The first of these cases was *Grove Construction (London) Ltd v Bagshot Manor Ltd*,[56] which concerned an attempt by the contractor, Grove, to enforce an adjudication decision obtained against Bagshot, which was the assignee of the employer's benefit of the contract with Grove after the original employer, Bagshot Manor Development Ltd (BMDL), entered into administration.

Bagshot resisted enforcement on the basis that Grove had no right to adjudicate against Bagshot because, as the assignee, Bagshot had inherited none of the burdens, obligations or liabilities under the contract, and an assignment is only apt to pass the benefit but not the burden of a contract. Bagshot also brought a Part 8 claim for declarations to the same effect. On Bagshot's case, Grove could only adjudicate against Bagshot if it could be shown that Bagshot had become a party to the construction contract (for example, by way of novation), which was simply not the case on the facts.

District Judge Baldwin of the Liverpool TCC accepted Bagshot's argument and refused to enforce the adjudication decision, on the basis that "the parties to the deed intended to assign to the defendant no more and no less than BMDL's benefits accrued and to accrue in future under the contract", and to construe the assignment deed as importing a burden "would be a backdoor importation of something impermissible".[57] The judge observed that "the original contract continues to subsist between BMDL and the claimant", and so "the claimant only has a right to refer a dispute arising under the contract and, it therefore follows, only a dispute where BMDL is the other party to the adjudication".[58]

Notably, the judge also considered the effect of clause 7.1 of the construction contract, which permitted the employer, BMDL, to assign its entire rights under the contract to a third party. He pointed out that under clause 7.1, "BMDL would have the contractual right to assign the whole of its rights under the contract, including the right to refer to adjudication", but that was irrelevant on the facts as the court was concerned with Grove's (and not Bagshot's) right to refer a dispute to adjudication.[59]

The judge did not consider that his conclusion was "unconscionable or far-reaching", as "the impact of insolvency upon a party in the position of the claimant is simply one of the hazards of contracting, not least within the construction industry", and parties can always amend their contracts and make bespoke provisions to deal with such risks.[60] The effect of the decision in *Grove* is that parties would have to enter into a novation, and perhaps provide for such a novation in the event of insolvency under the construction contract, if a third party taking the benefit of a contract is to be subject to the burden of being adjudicated against.

It is noteworthy that *Grove* dealt with the very specific question of whether an assignee taking the benefit of a construction contract can be adjudicated against, but it does not in fact deal with the wider question of whether an assignee can refer a dispute to adjudication to enforce the assigned rights and claims. As it happens, that very question came before the court within the same year in the case of *Paragon Group Ltd v FK Facades Ltd*,[61] which was heard in December 2025 with the judgment handed down shortly thereafter in January 2026.

In October 2018, Office Depot International (UK) Ltd (ODI) and FK Facades Ltd (FK) entered into an amended JCT Minor Works Contract 2016 for the carrying out of certain remedial works to the roof installation at a commercial property in Ashton Moss, Greater Manchester. In 2021, ODI assigned the benefit of the contract to OT Group Ltd (OTG), and OTG in turn assigned the benefit of the contract to Paragon Group Ltd (Paragon) in 2024.

Article 6 of the contract provided that "if any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 7.2". Clause 7.2 then provided that the Scheme for Construction Contracts (Scheme) shall apply to any such adjudication. After the contract was terminated in April 2025, Paragon commenced an adjudication against FK to recover liquidated damages for delay, and the adjudicator awarded £80,500 of liquidated damages to Paragon.

Paragon applied for summary judgment to enforce the adjudication decision. FK, however, sought to challenge enforcement on the basis that: (i) the assignee did not have any right to refer a dispute to adjudication; and/or (ii) the dispute referred did not arise under the contract. These (and other) grounds were in fact raised during the adjudication to challenge the adjudicator's jurisdiction, but the adjudicator rejected those jurisdictional objections in a non-binding ruling.

[56] [2025] EWHC 591 (TCC). See *Building Law Monthly*, May 2025, (2025) 42 BLM 05 4.
[57] Ibid, at para 33.
[58] Ibid, at para 35.
[59] Ibid, at para 35.
[60] Ibid, at para 36.
[61] [2026] EWHC 78 (TCC); [2026] BLR Plus 15.

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The *Paragon* judgment provides welcome and authoritative clarification from the TCC that an assignee of the benefit of a building contract can have the right to refer a dispute to adjudication under the express adjudication provisions of the contract and/or the provisions of Part I of the Scheme, although that would always be subject to the particular terms of the contract in question. If parties wish to avoid being on the receiving end of an adjudication from an assignee of a contracting party, then they will need to expressly legislate for that in their contracts

Prior to *Paragon*, there was no direct authority on the issue of whether an assignee of the benefit of a construction contract has the right to refer a dispute to adjudication. This was rather surprising (as HHJ Stephen Davies also noted in his judgment),[62] as anecdotal evidence suggests that many within the construction industry have operated for years on the basis that assignees of the benefit of a building contract can refer a dispute to adjudicate, and many construction practitioners and adjudicators have previously dealt with adjudications brought by assignees.

There was, however, some conflicting dicta in a number of previous decisions, where the court had either proceeded on the basis that there could be a legitimate assignment of a right to adjudicate,[63] or had made obiter comments to the effect that the issue was not necessarily straightforward.[64] However, none of those previous cases resulted in a binding determination of this important point which would have significant practical implications for parties who have taken an assignment of rights and claims under a construction contract.

[62] Ibid, at para 2.
[63] See eg *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2009] EWHC 3222 (TCC); [2010] BLR 89, at paras 49 and 50 (Coulson J).
[64] See eg *Westdawn Refurbishments Ltd v Roselodge Ltd* (HHJ McCahill QC, unreported, 2006).

In his judgment, HHJ Stephen Davies started by nothing that the issue was not entirely straightforward.[65] He then summarised the general principles of assignment and pointed out that for a statutory assignment, "what was assigned was not only the legal right to the things in action but also all legal and other remedies for the same".[66]

Although the judge was taken to a number of authorities at the hearing, he considered that those authorities were "at best, of marginal assistance",[67] and emphasised that "[w]hat is under consideration here is whether an assignee 'stands in the shoes of' the assignor (that being an expression often used in the context of a legal assignee)".[68] Ultimately, it all came down to the proper interpretation of the wording of the contract and the Scheme.

FK's case relied heavily on the reference in paragraph 1(1), Part I of the Scheme to "any party to a construction contract", but the judge considered that "the drafters did not have a conscious intention to differentiate between the position of an original contracting party and that of an assignee when referring to a 'party to a construction contract'", and that "the various references to 'party' in the Scheme can perfectly easily be read as if they included in brackets 'or any legal assignee of such party, where applicable' without doing violence to the wording of the Scheme".[69]

Further, the judge took the view that Article 6 of the contract was the primary operative contractual provision on adjudication, and that the reference therein to "employer" and "contractor" included a reference to their assignees given the employer's express right to assign the benefit of the contract.[70] In particular, he emphasised that "a statutory assignment of the benefit of a thing in action under a contract passes the legal right to the thing and all legal rights and other remedies for the same, which are transferred to the assignee as if they had been theirs from the beginning, and which would thus ... include the right to adjudicate".[71]

Although the judge acknowledged that there were some practical complications which could arise if an assignee can adjudicate against the original party, he concluded that those potential concerns were more apparent

[65] *Paragon*, at para 2.
[66] Ibid, at para 23.
[67] Ibid, at para 44.
[68] Ibid, at para 54.
[69] Ibid, at para 59.
[70] Ibid, at paras 60 to 63.
[71] Ibid, at para 63.

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than real or otherwise not compelling reasons for not allowing an assignee to adjudicate.[72] The judge was also particularly mindful of "the difficulties which would arise if the only way an assignee could adjudicate a claim was by forcing or persuading the assignor to lend their name to an adjudication against the other original party", as that would be "potentially fraught with difficulty and delay".[73]

As for FK's alternative argument that a claim by an assignee did not arise under the contract, the judge observed that this argument did not have any freestanding merit, given that any claim which was brought in Paragon's capacity as assignee was obviously a claim arising under the contract, and not a claim arising under the assignment.[74] In those circumstances, the judge rejected FK's jurisdictional challenge and granted summary judgment in favour of Paragon.

The *Paragon* judgment provides welcome and authoritative clarification from the TCC that an assignee of the benefit of a building contract can have the right to refer a dispute to adjudication under the express adjudication provisions of the contract and/or the provisions of Part I of the Scheme, although that would always be subject to the particular terms of the contract in question. If parties wish to avoid being on the receiving end of an adjudication from an assignee of a contracting party, then they will need to expressly legislate for that in their contracts.

Although FK was granted permission to appeal by the TCC, the company has since entered into administration, and at the time of writing, no steps have been taken by FK's administrators to lift the statutory moratorium on legal proceedings or otherwise pursue the appeal. It appears, therefore, that the *Paragon* decision is likely to remain the final word for the time being. Although it may seem odd at first blush that an assignee can have the right to adjudicate but cannot be on the receiving end of an adjudication, that can be explained by the inherent limitations of an assignment in passing only the benefit but not the burden of a contract.

It is worth noting that in *Grove*,[75] the judge was not taken to the well-known authorities dealing with the relationship between assignees and arbitration clauses, which have consistently held that the assignee takes the benefit of the assigned rights with both the benefit and the burden of the arbitration clause, given that section 136(1) of the Law of Property Act 1925 provides that a legal assignment has the effect of passing not only the relevant legal right to a chose in action, but also "all legal or other remedies for the same".[76] Should the same issue arise again in the future, it will be interesting to see whether another judge (or indeed an appellate court) would take a different view on a party's ability to adjudicate against an assignee after considering the case law on arbitrations.

The most recent case addressing the scope of the right to adjudicate is *Darchem Engineering Ltd v Bouygues Travaux Publics and Another*,[77] which considered the interesting question of whether a constituent member of an unincorporated joint venture has the right to refer

[72] Ibid, at paras 65 to 74.
[73] Ibid, at para 75.
[74] Ibid, at para 79.

[75] *Grove Construction (London) Ltd v Bagshot Manor Ltd* [2025] EWHC 591 (TCC). See *Building Law Monthly*, May 2025, (2025) 42 BLM 05 4.
[76] See eg *Montedipe SpA and Another v JTP-RO Jugotanker (The "Jordan Nicolov")* [1990] 2 Lloyd's Rep 11, *Schiffahrtsgesellschaft Detlef Von Appen GmbH v Wiener Allianz Versichrungs AG* [1997] 2 Lloyd's Rep 279.
[77] [2026] EWHC 220 (TCC); (2026) CILL 5261.

a dispute to adjudication without acting jointly with the other member of the joint venture. The dispute arose under an amended NEC3 subcontract for works relating to the construction of the Hinkley Point C nuclear power station. Under the subcontract, Darchem Engineering Ltd (Darchem) and Framatome Ltd (Framatome, formerly known as Efinor Ltd) were, "acting jointly and severally", the "sub-contractor".

Darchem (acting jointly and severally as the sub-contractor) referred a number of disputes to a series of adjudications and sought to enforce the third and last of those decisions, which ordered the main contractor (BYLOR, which is an unincorporated joint venture between Bouygues Travaux Publics and Laing O'Rourke Construction Ltd) to comply with the previous two adjudication decisions and pay Darchem the sum of £23,944,012 under a recent application for payment. The disputes were referred to adjudication by Darchem in this manner due to the particular commercial complications on the project – Framatome is ultimately owned by EDF Energy (which also owns and finances the project), and it did not give its consent to be joined as a referring party in the adjudications against BYLOR.

BYLOR resisted enforcement by arguing that the party to the subcontract was the "sub-contractor", and that only Darchem and Framatome acting jointly had the right to refer a dispute to adjudication, such that the adjudicator lacked the requisite jurisdiction to determine the disputes referred by Darchem without the involvement of Framatome.

Constable J approached the question as one of contractual interpretation, and refused to enforce the adjudication decision on the basis that Darchem did not have the right to refer a dispute to adjudication without joining Framatome as a referring party. As a starting point, the judge considered that the bulk of the subcontract terms were "drafted in a manner objectively consistent with the subcontract being bilateral, with two parties, rather than four or six".[78] He referred to, for instance, provisions which mentioned "either" or "neither" party, and the termination provisions under clauses 91.1 and 91.2 which provide that if a party is a joint venture, then the insolvency of a constituent of the joint venture would suffice to trigger a right of termination.[79]

Although Constable J noted that the four entities were collectively referred to as "Parties" in the agreement and before the executory signatures, the agreement referred to the joint and several liability of the persons who operate under a joint venture, consortium or other unincorporated grouping. Therefore, he considered that "a natural reading of the words is that each of the constituent entities is not itself a 'Party', but forms part of a Party; and that joint and several liability is imposed in respect of the obligations undertaken by that 'Party'".[80] The fact that each constituent member of the joint venture signed the agreement was said to be neutral, as it was natural and necessary for each constituent entity of the unincorporated joint ventures to execute the deed.[81]

> The commercial implications of the TCC's approach on the parties' right to adjudicate cannot be underestimated, however, and this does not appear to be considered (at least not in any detail) in the *Darchem* decision

An interesting feature of the subcontract is that it contained a bespoke clause 12.6, which allowed a joint venture to notify a "leader" who had authority to bind the "sub-contractor" and each of its constituents, and absent such notification, BYLOR was entitled to rely on each constituent as having the authority to bind the "sub-contractor" and each of its constituents. Constable J considered that "there [was] no unilateral entitlement on the part of the sub-contractor to be treated as such" absent the notification of a "leader", and that clause 12.6 would be "otiose" if there was an automatic right for either constituent member of the joint venture to act severally.[82]

Finally, Constable J took the view that Darchem's interpretation of the subcontract could give rise to potential complications in practice. If each constituent member of

[78] Ibid, at para 17.
[79] Ibid, at para 18.
[80] Ibid, at para 23.
[81] Ibid, at para 24.
[82] Ibid, at para 31.

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the joint venture were a separate party, then each of them could separately commence an adjudication against each of the other joint venture members, nominating a different adjudicator for each in relation to an identical issue. The judge was concerned that there would be no mechanism for preventing this situation, and that one would expect clearer and more comprehensive procedural safeguards.[83]

This decision will no doubt be of interest to parties embarking (or about to embark) on a construction project as part of a consortium, contractual alliance or unincorporated joint venture. The TCC's decision in *Darchem* means that all the constituent members of such unincorporated groupings must always act jointly when referring a dispute to adjudication, unless the contract expressly allows individual constituents to act severally in an adjudication, or otherwise provides for a mechanism for one of the constituents to be nominated to act on behalf of all entities under that unincorporated grouping.

The commercial implications of the TCC's approach on the parties' right to adjudicate cannot be underestimated, however, and this does not appear to be considered (at least not in any detail) in the *Darchem* decision. Where a constituent member of a joint venture refuses to cooperate with the other member and withholds consent to any involvement in an adjudication or the nomination of a "leader", whether due to commercial differences within the joint venture or otherwise, then the TCC's decision would have the effect of depriving the joint venture and both of its constituents of the right to adjudicate. In those circumstances, the only option would be to pursue legal proceedings (and join the uncooperative joint venture member as a co-defendant).

The TCC's decision also limits the effect of the words "acting jointly and severally" to an imposition of joint and several obligations only, without any ability to exercise rights jointly and severally. The rights and obligations of two or more parties who act jointly and severally as an unincorporated joint venture are of some public importance, given that such joint ventures are increasingly common in the construction industry (both in the UK and abroad). It is therefore worth noting that Darchem has applied to the Court of Appeal for permission to appeal, and readers should therefore watch this space in the coming months.

[83] Ibid, at paras 38 to 41.

Validity of adjudicator's nomination

Before leaving the topic of adjudications, it is worth mentioning *RNJM Ltd v Purpose Social Homes Ltd*,[84] where the TCC considered the effect of false representations made by a party when applying to an adjudicator nominating body. It has been established in previous cases that fraudulent misrepresentations in the nomination process asserting conflicts of interest against potential adjudicators could render the nomination invalid and any adjudication decision a nullity.[85]

In *RNJM*, the claimant stated on the application form to the Royal Institution of Chartered Surveyors (RICS) that there was a conflict of interest between the claimant and an adjudicator (Mr Bunker) in a prior adjudication, with the stated reason being "Dispute over payment with Referring Party". HHJ Kelly observed that "[i]n the referral form, no details are beyond the bare assertion that there is a dispute over payment between the claimant and Mr Bunker", and the repeated requests from the defendant for an explanation of the alleged dispute were ignored by the claimant.[86] This remained the case at the time of the enforcement hearing, and "it remains the situation that the claimant has never set out any adequate explanation as to why it asserts that there was a dispute".[87]

> It has been established in previous cases that fraudulent misrepresentations in the nomination process asserting conflicts of interest against potential adjudicators could render the nomination invalid and any adjudication decision a nullity

Moreover, the claimant and the defendant were jointly and severally liable for the adjudicator's fees, and in the end, the defendant paid the adjudicator's fees and there

[84] [2025] EWHC 2224 (TCC); [2025] BLR 577.
[85] See eg *Eurocom Ltd v Siemens plc* [2014] EWHC 3710 (TCC); [2015] BLR 1.
[86] Ibid, at para 49.
[87] Ibid, at para 50.

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was no suggestion of any further fee dispute between the adjudicator and the parties.[88] Although the claimant contended that the steps taken by the adjudicator to chase for his fees constituted a "risk" of apparent bias against the claimant, this was described by the judge as a "bald assertion".[89] This was especially significant given that the RICS form made clear the severe consequences if the alleged potential conflict turned out to be unjustified.[90]

> Referring parties should be very cautious about making allegations of potential conflict of interest or any other representations aimed at influencing the adjudicator nomination process

HHJ Kelly concluded that "[t]he evidence provided by the claimant is wholly inadequate to establish the nature of and reason for asserting that there was an alleged dispute", and there were serious questions as to why the claimant asserted that any dispute amounted to a conflict of interest with the adjudicator and on what basis the claimant asserted an "honest" belief that there was a conflict of interest. The judge therefore had no hesitation in refusing the claimant's application for summary judgment.[91]

Referring parties should therefore be very cautious about making allegations of potential conflict of interest or any other representations aimed at influencing the adjudicator nomination process. If such representations are to be made, then the referring party and its legal representatives should provide a proper explanation of the basis of the representations made, and should satisfy themselves that there is a genuine, honest and justified belief in those representations. Otherwise, the TCC will have little hesitation in finding that a nomination process was void, and that an adjudication decision is unenforceable as a result.

[88] Ibid, at para 51.
[89] Ibid, at para 52.
[90] Ibid, at para 57.
[91] Ibid, at paras 59 and 60.

Contractual interpretation

Questions of contractual interpretation pervade almost every construction, infrastructure or energy dispute which is referred to adjudication, arbitration or litigation for determination. That should come as no surprise, given that most high-value construction, infrastructure or energy projects are governed by complex contractual instruments entered into between sophisticated commercial parties (often, though not invariably, with the support of specialist legal advice).

In the period from 2025 up to early 2026, the TCC and the appellate courts have had the occasion to consider a number of contentious issues of contractual interpretation which will have wider implications for the construction industry as a whole. The topics covered by these judgments span termination provisions, design obligations and notice requirements for contractual claims.

These recent decisions provide interesting case studies for parties who are drafting or negotiating similar provisions for a future contract, and also those who are engaged in ongoing disputes concerning similar contractual issues. This section will therefore consider the key points raised and how they might provide helpful guidance to those within the construction, infrastructure and energy industries.

Contractual termination

Readers will recall from the previous annual review for 2024 that the contractual provisions for termination for a repeated default under an amended JCT Design and Build Contract 2016 was the subject of the Court of Appeal's decision in *Providence Building Services Ltd v Hexagon Housing Association Ltd*.[92] That case 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 employer, Hexagon, to pay the "notified sum" which had contractually fallen due in respect of interim payments. The first payment default was notified under clause 8.9.1 of the contract in December 2022, but this sum was paid within the 28-day cure period. The second payment default occurred in May

[92] [2024] EWCA Civ 962; [2024] BLR 547.

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2023 in relation to a different interim payment application, and that was when Providence purported to terminate the contract immediately on the basis of a repeated default.

The parties were in dispute as to 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". Both the adjudicator and Deputy High Court Judge Adrian Williamson KC in the TCC rejected Providence's argument, but in the Court of Appeal, Stuart-Smith LJ allowed Providence's appeal and concluded 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".[93]

The Supreme Court granted permission to appeal to Hexagon in November 2024, and the appeal was eventually heard in November 2025. In an interesting turn of events, the Supreme Court's judgment in *Providence Building Services Ltd v Hexagon Housing Association Ltd*[94] came out in January 2026, unanimously reversing the Court of Appeal's decision and finding in favour of Hexagon. In other words, the Supreme Court held that a right to terminate immediately for a repeated default would only arise under clause 8.9.4 if the previous default was not remedied within the prescribed cure period and actually triggered a right to terminate on that prior occasion.

Lord Burrows began by making a number of general observations regarding the interpretation of industry-wide standard form contracts. He noted that it is "clear law that explanatory notes to a contract may be admissible evidence as an aid to interpretation".[95] Further, when interpreting standard form contracts, "the admissible background context may include past decisions of the courts on, and practice in relation to, clauses in an earlier version of the standard form", for instance where the standard form has been amended to depart from a decision of a court.[96]

However, the general position is that, subject to limited exceptions like those identified above, an examination of what has been termed the "archaeology of the forms" is to be discouraged.[97] Lord Burrows further emphasised that a standard-form contract should usually be interpreted consistently for all contracting parties using that form and, subject to any bespoke amendments, that interpretation is unlikely to be contradicted by the objective intentions of the particular contracting parties.[98]

Turning to the wording of clause 8.9.4, Lord Burrows pointed out that opening words of clause 8.9.4 (ie "If the Contractor for any reason does not give the further notice referred to in clause 8.9.3") showed that clause 8.9.4 was parasitic on clause 8.9.3, and that the contractor must have had an accrued right to terminate under clause 8.9.3 before clause 8.9.4 applies. On Providence's interpretation, the opening words of clause 8.9.4 and the reference to clause 8.9.3 would be "superfluous", "unclear and ambiguous", or otherwise "both otiose and obscure".[99]

The conclusion reached above was also influenced by Lord Burrows' view that his interpretation of clause 8.9.3 would produce "a rational and less extreme outcome", namely that it is only where the earlier specified breach went uncured for 28 days, and was in that sense particularly serious, that the contractor can terminate immediately for a further late payment.[100] In contrast, Lord Burrows noted that Providence's interpretation would produce an extreme outcome, for if the Employer made two late payments, each being made one day late, on Providence's interpretation, the contractor would be entitled to serve a notice terminating the contract provided that a specified default notice had been served in respect of the first late payment – this was described as using "a sledgehammer to crack a nut".[101]

Finally, Lord Burrows noted that the Court of Appeal's reasoning was driven by its conviction that clause 8.9.4 should be given the same meaning as clause 8.4.3 (employer's right to terminate contractor for a repeated default), because they shared the same structure and very similar wording. In his view, the heavy reliance on clause 8.4.3 was misplaced, because clauses 8.4 and 8.9 were plainly asymmetrical and different language was

[93] Ibid, at para 29.
[94] [2026] UKSC 1; [2026] BLR Plus 14. See *Building Law Monthly*, February 2026, (2026) 43 BLM 02 1.
[95] Ibid, at para 24.
[96] Ibid, at para 26.
[97] Ibid, at para 28.
[98] Ibid, at para 30.
[99] Ibid, at paras 32 and 33.
[100] Ibid, at para 34.
[101] Ibid, at para 35.

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used by the drafters, and the different wording of clause 8.4.3 was explicable precisely because it was intended to clarify that, in contrast to clause 8.9.4, there need be no previously accrued right to terminate for the purpose of clause 8.4.3.[102]

Parties to existing and future JCT contracts should therefore take heed of the Supreme Court's final word on the interpretation of JCT clause 8.9.4: this clause can only be relied on if a previous specified default is not cured in time and actually triggers a right of termination which is somehow not exercised by the contractor. If a contractor wishes to have the benefit of a more generous right to terminate for a repeated default, including where a previous specified default is remedied within the cure period, then bespoke amendments will have to be made to JCT clause 8.9.4.

Indeed, it will be interesting to see whether future revisions to the JCT suite of contracts will seek to redraft clause 8.9.4 in order to circumvent the *Providence* decision and provide greater protection to contractors from repeated payment defaults. As Lord Burrows noted at the end of in his judgment:

> "Even if Stuart-Smith LJ were correct, contrary to Adrian Williamson KC's view, to regard other remedies for the Contractor as inadequate to counter cash-flow difficulties, the interpretation of the disputed termination clause should not be distorted so as to favour the Contractor. If there is a problem for contractors, which could be justifiably ameliorated by a differently worded termination clause, that is a matter for the JCT to consider, in the light of this judgment, in a future draft of the standard form contract."[103]

Another noteworthy appellate decision of 2025 relevant to cases of contractual termination was *Kulkarni v Gwent Holdings Ltd and Another*,[104] where the Court of Appeal considered (among other things) the interpretation of clause 7.1(d) of a shareholders' agreement which provided for certain eventualities in the event of a shareholder "committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 business days of notice to remedy the breach being served by the Board".

> *Kulkarni* is another illustration of the court's emphasis on the language adopted by the parties when considering the proper scope and effect of contractual termination provisions. Parties can expect the court to be reluctant to accept interpretations of such provisions which lead to extreme outcomes, where such outcomes are not supported or necessitated by the wording of the termination clause in question

The question was whether the material breach in question (which was admitted by the defendants) were remediable and actually remedied within the meaning of clause 7.1(d), especially in circumstances where the breach was repudiatory in nature. The court's approach is instructive, given that many construction, infrastructure and energy contracts contain a right to terminate for a "material breach".

Nugee LJ considered the authorities on remediability of material breaches,[105] and then focused intensely on the wording of clause 7.1(d), which simply referred to a "material or persistent breach" which "has not been so remedied". He pointed out that the parties could have stated that a repudiatory breach was to be considered irremediable, but they did not do so, despite the fact that a "material or persistent" breach might well be repudiatory – the clause simply proceeded on the basis that such a breach might be "capable of remedy" and drew no distinction between repudiatory and other breaches.[106]

In concluding that a repudiatory breach could be capable of remedy for the purposes of clause 7.1(d), Nugee LJ drew a distinction between repudiation at common law (which is not normally subject to the right to remedy the

[102] Ibid, at paras 36 and 37.
[103] Ibid at para 38.
[104] [2025] EWCA Civ 1206. See *Building Law Monthly*, February 2026, (2026) 43 BLM 02 11.
[105] Ibid, at paras 59 to 75.
[106] Ibid, at para 77.

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breach) and contractual termination. In *Kulkarni*, the court was only considering "the distinct question of whether a breach is 'capable of remedy' within the meaning of a contractual provision".[107] Further, Nugee LJ emphasised that when determining whether a breach of contract is "capable of remedy" within the meaning of a contractual provision, a "practical rather than technical" approach is normally to be adopted, and the common law rules of repudiation are normally irrelevant for such purposes.[108]

Kulkarni is another illustration of the court's emphasis on the language adopted by the parties when considering the proper scope and effect of contractual termination provisions. Parties can expect the court to be reluctant to accept interpretations of such provisions which lead to extreme outcomes, where such outcomes are not supported or necessitated by the wording of the termination clause in question. It is important, therefore, that more careful thought is given to the scope of termination provisions at the drafting stage, and that clear and express wording is used if a particular outcome is desired.

Design obligations

In the previous annual review for 2024, the TCC's decision in *Workman Properties Ltd v ADI Building and Refurbishment Ltd*[109] concerning a contractor's entire design responsibility under an amended JCT Design and Build Contract 2016 was discussed. In that case, HHJ Stephen 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.[110]

The contractual allocation of design responsibility and design risks continues to be a hot topic in construction disputes, and in 2025, the Manchester TCC's decision in *John Sisk and Son Ltd v Capital & Centric (Rose) Ltd*[111] provided an interesting contrast to the *Workman* decision in 2024, as the court reached a very different conclusion in *Sisk* and found that the contractor did not bear the risks relating to certain existing site structures.

[107] Ibid, at para 78.
[108] Ibid, at para 79.
[109] [2024] EWHC 2627 (TCC); (2024) CILL 5081.
[110] Ibid, at paras 77 to 84 and 95.
[111] [2025] EWHC 594 (TCC); [2025] BLR 268.

In *Sisk*, the dispute concerned the scope of Sisk's responsibility for risks relating to the existing structures on site. Amended clauses 2.42.2 to 2.42.3 of the JCT Design and Build Contract 2016 in question provided that Sisk was contractually responsible for all risks in relation to the existing site, including the risk in relation to the condition of the existing structures and the risk of any of the information provided by the employer, Capital & Centric (Rose) Ltd (C&C) being wrong. However, clause 2.42 was expressly "subject to item 2 of the clarifications".

The bespoke contract definition of the "clarifications" was "The clarifications headed 'Contract Clarifications' contained within Volume 2, Appendix 2.9 of the Employer's Requirements". In the electronic version of the contract, there were two clarifications documents, one being a worksheet headed "contract clarifications" and the other a worksheet headed "tender submission clarifications". In the paper version of the contract, however, there was only one clarification document, which was a printed and initialled copy of the "contract clarifications" worksheet.

In the Part 8 claim which came before the TCC, the parties were in dispute as to whether or not the tender submission clarifications fell within the contract definition of the "clarifications", and also the interpretation of the worksheet headed "contract clarifications" (especially item 2 therein). The determination of these questions was necessary in order to establish whether Sisk had taken the risks relating to the existing structures on site.

HHJ Stephen Davies observed at the outset that there was "no proper basis" for having regard to pre-contractual negotiations for the purpose of buttressing the parties' respective contractual arguments as to what the meaning of the "contract clarifications" document was. He described this as "an illegitimate exercise" which plainly offended against the restriction of admission of pre-contractual negotiations.[112] Therefore, the judge approached the question as a matter of contractual interpretation of the contract documents alone.

Considering the contractual definition of "clarifications", the judge was of the clear view that this was a reference to the worksheet headed "contract clarifications" and not the "tender submission clarifications", and this was reinforced by the fact that it was obvious from the content of the "contract clarifications" and the "tender submission clarifications" that clause 2.42.4 could only be referring to item two of the former.[113] Therefore, the starting point

[112] Ibid, at paras 65 to 74.
[113] Ibid, at paras 75 to 82.

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for ascertaining the proper construction of clause 2.42.4 was what appeared in the "contract clarifications" document itself.

Construing item 2 of the "contract clarifications" document, the judge noted that item 2 referred to the "Existing Structures Risk" as "Employer Risk" and stated that "Employer is to insure" those works and "obtain warranty from [the consultant civil and structural engineer] Arup with regard to suitability". Although there was definition of the capitalised terms referring to "Risk", the judge considered that those words could "reasonably obviously be understood in their normal or natural meaning, especially in the context of construction contracts generally and this design and build contract in particular, as referring respectively to: (a) the contractual risks associated with the condition of the existing structures (as a defined term); and (b) the contractual risks accepted by the employer".[114]

Moreover, the judge took the view that the most likely meaning of the words "Employer Risk" was that C&C was the "risk owner" (ie C&C held the contractual risk as to the suitability of the existing structures including their suitability to support and facilitate the contract works), such that clause 2.42.4 simply provided a limited carve out to the otherwise wide ambit of clauses 2.42.1 to 2.42.3.[115] Although the contract clarifications stated that the risk only remained with C&C until "receipt of letters of reliance and/or warranties for these surveys", it was reasonably clear that it was for C&C to provide a letter of reliance or a warranty in favour of Sisk from each consultant which has provided each of the specified surveys, and C&C was the risk owner until those documents were provided to Sisk.[116]

Finally, as regards the other "tender submissions clarification" relied on by C&C, the judge considered that the document was ambiguous and there was in any event no admissible evidence that it reflected an agreed position

[114] Ibid, at para 84.

[115] Ibid, at paras 100 and 101.

[116] Ibid, at para 105.

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in March 2022.[117] Even if there was, the fact that the position changed two months later in the "contract clarifications" document did not necessitate a different conclusion. In the judge's view, "positions can and do change, often very considerably, in the course of a lengthy contract negotiation process such as the present, and it would be wrong in my view to place too much weight on a submission that it is wholly implausible that this is what happened in this case".[118]

Ultimately, given that C&C was advised by professional consultants and lawyers at the time, the judge considered it "extremely unlikely" that C&C could have agreed to the inclusion of the words "Employer Risk" in the mistaken belief that it was not agreeing to take the employer's risk for the existing structures' suitability.[119] Indeed, the judge noted that the pre-contractual correspondence (which was inadmissible) in any event demonstrated that C&C's assertion of an "agreed" position in March 2022 was wrong, as it was clear that things had moved on and clause 2.42.4 was later agreed and included in the contract.[120]

Whilst the TCC's conclusion in *Sisk* was a function of the particular contractual documents and terms in that case, it is nonetheless an instructive example of how the court approaches questions of interpretation where there are ambiguities and/or inconsistencies relating to the scope of a parties' design obligations and the allocation of risks. The court will always seek to construe the contract documents as a whole and give effect to the natural and ordinary meaning of the contractual language used by the parties, and resort to pre-contractual negotiations is most unlikely to yield any tangible benefit. Parties should therefore think twice before adducing evidence of pre-contractual discussions in a case involving only questions of interpretation.

Moreover, from a contract drafting perspective, it is clear that a sufficiently clear carve-out from an otherwise very wide design obligation can make a huge difference to the parties' contractual allocation of risk and the outcome in the event of a dispute. The express carve-out in bespoke clause 2.42.4 and the "contract clarifications" document of the JCT Design and Build Contract in *Sisk* can be contrasted with the complete absence of similar carve-outs in the JCT Design and Build Contract in *Workman*, and this explains the strikingly different conclusions reached in the two cases. Careful thought should therefore be given in every case to the operative provisions and contract documents dealing with design risks and design responsibility.

[117] Ibid, at paras 107 to 114.
[118] Ibid, at para 117.
[119] Ibid, at para 118.
[120] Ibid, at para 121 to 135.

Notice requirements and conditions precedent

Many contracts for construction, infrastructure and energy projects (both in the UK and abroad) contain strict requirements for notifying claims for extensions of time, additional costs and/or other remedies, non-compliance with which would result in the claims becoming time-barred. Indeed, there is hardly a construction dispute involving claims for additional time and/or costs which does not involve some form of time-bar argument one way or another. In all of those cases, the logical first question is always whether the relevant notice requirement constitutes a condition precedent to a party's claimed entitlements.

In the period from 2025 to early 2026, three appellate judgments from the English courts have provided helpful guidance on the interpretation of notice requirements and when they would be treated as amounting to conditions precedent. These decisions provide helpful guidance to any party who is grappling with the effect of a contractual notice requirement in a construction, infrastructure or energy dispute, whether in the UK or overseas.

The first noteworthy decision is *Disclosure and Barring Service v Tata Consultancy Services Ltd*,[121] which arose from a contract for the implementation of a new digital system to modernise the paper-based Disclosure and Barring processes. Clause 6.1 of the contract provided that if a deliverable did not satisfy the acceptance test criteria or a milestone was not achieved due to the contractor's default, the authority would promptly issue a non-conformance report (NCR), which may then require (among other things) the payment of delay damages.

Coulson LJ upheld Constable J's decision in the TCC and held that clause 6.1 of the contract amounted to a condition precedent. After a detailed consideration of the previous authorities on this subject, Coulson LJ provided the following helpful summary of the principles governing the determination of whether a clause amounts to a condition precedent:[122]

> (1) The issue will turn on the precise words used, set within their contractual context.

[121] [2025] EWCA Civ 380; (2025) CILL 5162. See also *Building Law Monthly*, May 2025, (2025) 42 BLM 05 1.
[122] Ibid, at para 26.

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(2) A clause needs something that makes the relief conditional upon the requirement.

(3) Clear words will usually be necessary for a clause to be a condition precedent. That said, it is not necessary for the clause to say in terms "this is a condition precedent".

(4) It will usually be necessary for the link between the two steps to be expressed in the language of obligation (ie shall) but that will not on its own be sufficient to amount to a condition precedent.

(5) It is not necessary for the step one condition to be expressed in a finite number of days or weeks. More flexible periods – "timely", "within a reasonable time" etc – have been included in clauses which courts have found to be a condition precedent.

Coulson LJ then proceeded to apply those principles to the contractual provision in question. In that regard, he held that "the words of clause 6.1, when seen in context, are clear", and pointed out that the NCR was not just a procedural box-ticking exercise, for the NCR would categorise the test issues described in the testing procedures or set out the non-conformities of the deliverable where no testing had taken place, any other reasons the milestone was not achieved, and the consequential impact.[123]

In Coulson LJ's view, the NCR therefore served to make plain to both parties what the particular problems were so that both parties could see how they might be resolved, and the use of the word "then" in clause 6.1 clearly indicated that the entitlement to claim delay damages would only arise if the steps in clause 6.1 (including the provision of a NCR) had been taken – this was reinforced by the fact that the various other remedies in clause 6.2 could only work if clause 6.1 had been complied with and a NCR had been issued.[124]

Although the authority contended that clause 6.1 did not clearly express that the absence of a NCR would prevent a claim for delay damages, Coulson LJ noted that arguments that parties could have said so more clearly are "almost always self-defeating",[125] and in reality:

> "... what is of primary importance is whether the words clearly convey the necessary conditionality. This can generally be done in two ways. The clause can be put in a positive mode, namely that, 'if you do X, you will get Y'. Alternatively, it can be put in a negative formulation: 'unless you do X, you cannot have Y'."[126]

Coulson LJ further noted that the absence of a fixed time limit did not prevent clause 6.1 from being a condition precedent, especially where the use of the mandatory "shall" was linked to the "if" part of the clause – some of the other clauses held to be conditions precedent in previous cases similarly did not have fixed time limits for compliance.[127]

> The court will have little sympathy with technical arguments which strain to assert that a clause is not sufficiently clearly expressed as a condition precedent, and the fact that there is no strict time limit imposed or that the words "condition precedent" are not used is unlikely, without more, to prevent a condition precedent from arising

Finally, Coulson LJ rejected the authority's purported reliance on the difference in language between clause 6.1 and another clause (clause 5) which was held to be clearly a condition precedent. Whilst Coulson LJ accepted that the fact that different words had been used in clause 5 meant that the wording in clause 6.1 should be the subject of "careful scrutiny", he emphasised that it was not a form of presumption against clause 6.1, and "the court's principal task remains to give meaning to the words actually used"[128] – this is comparable to the approach taken by the Supreme Court in Providence, which very much focused on the specific clause in question and did not place too much weight on differently worded neighbouring clauses. In relation to clauses 5 and 6.1 specifically, it was also important that there was no rational explanation for treating one clause as a condition precedent and another as not.[129]

[123] Ibid, at paras 27 to 29.
[124] Ibid, at paras 30 to 32.
[125] Ibid, at para 38.
[126] Ibid, at para 39.
[127] Ibid, at paras 48 to 56.
[128] Ibid, at paras 59 and 60.
[129] Ibid, at para 60.

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The Court of Appeal's decision in *Tata* makes it abundantly clear that the English courts will not shy away from giving effect to notice requirements or other forms of conditions precedent, if the wording is sufficiently clear to convey the intention that a contractual right or entitlement is conditional upon compliance with the condition precedent. The court will have little sympathy with technical arguments which strain to assert that a clause is not sufficiently clearly expressed as a condition precedent, and the fact that there is no strict time limit imposed or that the words "condition precedent" are not used is unlikely, without more, to prevent a condition precedent from arising.

That the approach taken in *Tata* represents good law is further confirmed by the most recent Privy Council decision in *Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago,*[130] concerning a number of variation claims arising from a FIDIC Yellow Book Contract (1999 Edition) for the design, supply and installation of 28.43 km of pipeline from Rio Claro to Mayaro. The contractor's variation claims were held by the trial judge to be time-barred, but the Court of Appeal in Trinidad overturned that decision and found in favour of the contractor. The Privy Council's decision was delivered at the very start of 2026 by Coulson LJ, who was (rather unsurprisingly) invited to sit on the Judicial Committee for the purposes of this particular appeal.

Coulson LJ noted that whilst an oral instruction not made in accordance with the contract could still become binding on the parties if the non-compliance is waived by both parties,[131] the contractor was in any event required to notify the additional costs under FIDIC clause 3.6 and to seek an engineer's determination under FIDIC clause 3.5, such determination being of paramount importance.[132] The first procedural failure, therefore, was the failure by the contractor to give any proper notice of the likely increase in costs or seek a determination under FIDIC clause 3.6.

In any event, Coulson LJ considered that the second and "fatal" procedural failure by the contractor was the failure to make a claim under clause 20.1. In this regard, Coulson LJ considered that the language of FIDIC clause 20.1 was in "classic condition precedent form", applying the principles which he had summarised in *Tata* and emphasising that the "defining feature of a condition precedent is dependency between the requirement and the relief; one must be conditional upon the other".[133] It is also noteworthy that FIDIC clause 20.1 (and other similarly worded clauses) had been treated as a condition precedent in previous cases.[134]

Accordingly, Coulson LJ concluded that if the contractor had wanted to make a claim for any of the disputed variations, and they could not make progress due to the engineer's alleged failure to play his part in the variation process, it was up to them to make a claim under clause 20.1, but they failed to do so.[135] The effect of clause 20.1 was not affected by the subsequent termination of the contract, as the effect of the termination "operates prospectively rather than retrospectively", and since the time for making a claim under clause 20.1 had expired long before the termination, "the eventual termination could not in law resurrect claims that had not been made in time".[136]

> While every case will depend on its own facts, parties should not be under any illusion that an estoppel argument is the panacea every time there is an issue of time-bar, as the evidential threshold for establishing any estoppel is likely to be very high indeed

Although the contractor belatedly raised an (unpleaded) argument of waiver or estoppel, Coulson LJ drew on the Supreme Court's decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[137] (on no oral modification clauses), especially Lord Sumption's dicta that an estoppel defence would require some words or conduct unequivocally representing that the variation was valid notwithstanding its informality, and that something

[130] [2026] UKPC 2. See *Building Law Monthly*, March 2026, (2026) 43 BLM 03 1.
[131] Ibid, at para 54.
[132] Ibid, at paras 55 and 56.
[133] Ibid, at paras 60 and 61.
[134] Ibid, at paras 62 and 63, citing *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC); [2014] BLR 484 and *NH International (Caribbean) Ltd v National Insurance Property Development Co Ltd* [2015] UKPC 37; [2015] BLR 667.
[135] Ibid, at para 66.
[136] Ibid, at paras 67 and 68.
[137] [2018] UKSC 24; [2018] BLR 479.

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more would be required for this purpose than the informal promise itself.[138] The same minimum requirements, according to Coulson LJ, applied equally if the contractor were to avoid the consequences of their failure to comply with clause 20.1.[139]

The *Uniform Building* decision therefore provides yet another clear example of the courts' strict approach towards construing and enforcing formality requirements and contractual procedures for claims which amount to conditions precedent. Moreover, Coulson LJ's dicta regarding the minimum requirements for an estoppel defence (in turn based on the dicta in *MWB*) against a contractual time-bar is important, as it gives parties an indication as to the courts' likely approach. While every case will depend on its own facts, parties should not be under any illusion that an estoppel argument is the panacea every time there is an issue of time-bar, as the evidential threshold for establishing any estoppel is likely to be very high indeed.

Parties might sometimes seek to argue that a condition precedent to a party's obligation should not be given effect because the other party has by its own breaches prevented the fulfilment of that condition. Historically, this has sometimes been known as the *Mackay v Dick* principle,[140] and it has also been referred to as a form of "deemed waiver" or "quasi-estoppel". The Supreme Court's decision in 2025 in *King Crude Carriers SA and Others v Ridgebury November LLC and Others*[141] has now rung the death knell for the so-called *Mackay v Dick* principle under English law, at least as far as debt claims are concerned.

The dispute in *King Crude* arose from contracts for the sale of three vessels on the Norwegian Saleform 2012, with amendments and additions. Under the contracts, the buyers were obliged to lodge a deposit of 10 per cent of the purchase price with a deposit holder. The deposit was required to be paid within three banking days of the deposit holder confirming in writing that the deposit account had been opened. The parties were obliged to provide all necessary documentation for the opening of the account. In breach of contract, the buyers never did so. The sellers terminated the three contracts and claimed the deposits in debt, relying on the *Mackay v Dick* principle.

> It does not necessarily mean that a contractor has no remedy if, for instance, an employer's breach prevents the fulfilment of a condition precedent. Rather, the employer's breach will sound in damages, and the measure of the contractor's loss is arguably the lost entitlement as a result of the employer's breach

After surveying the relevant authorities and academic commentary, Lord Hamblen and Lord Burrows concluded that the *Mackay v Dick* principle was not a principle of law in English law for six reasons:[142]

(1) Lord Watson in *Mackay v Dick* did not cite or rely upon any English law authorities in support of the principle stated by him, Lord Blackburn did not adopt the same reasoning in his speech, and Lord Selbourne LC agreed with both speeches and was ambiguous.[143]

(2) The English law authorities do not speak with one voice, and in the cases which appeared to support the *Mackay v Dick* principle, the same result could have been reached through the application of the law on damages for breach of contract.[144]

(3) Such a principle of law would fundamentally undermine the law on contracts for the sale of goods and also the sale of land if it were to be applied in respect of a failure to fulfil a condition precedent to the passing of property, and it is unclear how the principle can be cut back in a principled manner.[145]

(4) The various formulations or explanations of the *Mackay v Dick* principle of law are all fictional, and there is no convincing explanation for *Mackay v Dick* as a principle of law.

(5) The English law of contract proceeds on the basis of the terms of the contract, express and implied, and

138 Ibid, at para 16.
139 *Uniform Building*, at paras 74 and 75.
140 Based on Lord Watson's speech in the House of Lords' decision in *Mackay v Dick* (1881) 6 App Cas 251.
141 [2025] UKSC 39; [2026] BLR Plus 12; [2025] 2 Lloyd's Rep 560.

142 Ibid, at para 61.
143 Ibid, at para 62.
144 Ibid, at para 63.
145 Ibid, at para 64.

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their proper interpretation. This is consistent with the importance which English law attaches to freedom of contract and to the application and enforcement of the terms of the bargain which the parties have made, all of which promotes certainty and predictability.[146]

(6) The consequence of rejecting *Mackay v Dick* as a principle of law does not lead to injustice. Subject to terms to the contrary, where a condition precedent has not been fulfilled because of the debtor's breach of contract, that breach is appropriately and adequately dealt with in English law through the claimant's remedy in damages.

While the *King Crude* decision specifically rules out the application of the *Mackay v Dick* principle to pre-conditions for debt obligations, it is likely that any future arguments regarding the disapplication of conditions precedent to claims for other contractual remedies or general damages based on the *Mackay v Dick* principle will similarly be rejected, given the Supreme Court's criticisms and its emphasis on giving effect to the parties' contractual bargain.

However, this does not necessarily mean that a contractor has no remedy if, for instance, an employer's breach prevents the fulfilment of a condition precedent. Rather, the employer's breach will sound in damages, and the measure of the contractor's loss is arguably the lost entitlement as a result of the employer's breach. Parties will have to pay particular attention to how they should be framing their legal arguments and claims in the future, in cases where the other party's defaults have prevented the fulfilment of a condition precedent.

[146] Ibid, at para 67.

Defective works and building safety

Three-and-a-half years after the entry into force of the BSA, claims under the Defective Premises Act 1972 (DPA) regarding defective works continue to grow in numbers, especially where the contractual and tortious claims are potentially statute-barred. Further, parties continue to grapple with the meaning and effect of the various BSA provisions, most notably in relation to the retrospectivity of the BSA and the new remedies for building safety defects or risks. In the past year, a number of highly anticipated judgments have come out of the courts, which will have a wider significance to the whole construction industry and claims for defective works generally.

Claims for building safety defects – *URS v BDW*

One of the most highly anticipated and widely discussed construction cases of 2025 was undoubtedly the Supreme Court's decision in *URS Corporation Ltd v BDW Trading Ltd*,[147] as envisaged in the annual review for 2024. Readers will recall the discussion of the Court of Appeal's decision[148] in the annual review for 2023. In short, the Supreme Court affirmed the Court of Appeal's decision in its entirety.

By way of a brief recap, BDW was the developer for two high-rise residential developments (Capital East in London and Freemens Meadow in Leicester) and appointed URS as its structural engineering consultant for those developments. Practical completion for those two developments occurred in or around March 2007 to December 2008, and thereafter, BDW sold all of the apartments to third-party purchasers, and its interest under a head lease was also transferred in December 2008. From that point onwards, BDW had no remaining proprietary interest in the developments.

Following the Grenfell Tower tragedy in June 2017, investigations were carried out at the two developments, and structural design defects were discovered in late

[147] [2025] UKSC 21; [2025] BLR 379.
[148] [2023] EWCA Civ 189; [2023] BLR 437.

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2019. BDW considered that the defects presented a danger to occupants and risked damaging BDW's market reputation, and so in 2020 and 2021, BDW carried out the necessary repair works, even though no claims had been intimated by any third-party owner or occupier against BDW at the time.

BDW issued a negligence claim against URS in the TCC in 2020. After a preliminary issue trial in October 2021, Fraser J (as he then was) held, inter alia, that the losses claimed were within the scope of URS's duty and were not too remote, on the assumed fact that there were various defects resulting from URS's negligence.

After the BSA came into force in June 2022 and retrospectively extended the limitation period for claims under section 1 of the DPA, BDW applied to amend its case in order to add a DPA claim and a claim for contribution under the Civil Liability (Contribution) Act 1978 (the "Contribution Act"). Deputy High Court Judge Adrian Williamson KC granted this application.

URS appealed against the decisions of Fraser J and Deputy High Court Judge Adrian Williamson KC, but the appeals were dismissed by the Court of Appeal in July 2023. In summary, Coulson LJ held that:

(1) There was a standard duty not to cause economic loss due to defects, and the need for a proprietary interest at the time when the cause of action accrued did not arise.[149]

(2) This was a conventional claim for remedial costs to protect occupants against danger, and this claim can be brough even if the property had been sold.[150]

(3) BDW's tortious claim for economic loss accrued upon practical completion when the defective design became irrevocably incorporated into the building, not at the time of knowledge.[151]

(4) Section 135(3) of the BSA was express and clear and there was no carve-out from retrospectivity for ongoing litigation.[152]

(5) There was nothing in section 1(1) of the DPA which confined it to individual purchasers and excluded developers.[153]

(6) The right to bring a contribution claim arises even if no primary claim has yet been brought upstream,[154] and liability under the primary claim was to be assessed as at the trial date, such that the extended limitation under BSA applied even though liability had ceased at the time of incurring costs in 2020. In any case, section 135(3) of the BSA applied and the extended limitation was to be treated as always having been in force.[155]

The appeal was heard by a panel of seven Justices of the Supreme Court, and in the end the Supreme Court dismissed all four of BDW's grounds of appeal. Lord Hamblen and Lord Burrows gave the leading judgment on Grounds 1 to 3, and Lord Leggatt gave the leading judgment on Ground 4.

Ground 1 concerned whether the damage claimed fell outside the scope of URS's duty of care and/or was too remote because it was voluntarily incurred (disregarding the possible impact of section 135 of the BSA). Lord Hamblen and Lord Burrows considered the four cases relied on by URS to establish a principle of "voluntariness" and concluded that those cases did not establish any such principle which would render a loss too remote or outside the scope of the duty of care.[156] Rather, those were particular cases where the court held that the voluntary payments or expenditures were examples of no duty of care being owed for pure economic loss, or losses being too remote on the specific facts.

Insofar as voluntariness may be relevant to causation or mitigation, Fraser J held that those matters had to be determined at trial and that ruling was not appealed.[157] In any event, Lord Hamblen and Lord Burrows observed that BDW was not acting voluntarily "in a true sense", because: (i) the defects gave rise to a health and safety risk; (ii) BDW had a legal liability to the homeowners under the DPA, even though it was unenforceable at the time due to limitation; and (iii) there would be potential reputational damage to BDW.[158]

Taking a step back from the Supreme Court's legal reasoning, it is plain that the court considered that it was fair and reasonable to hold URS liable for its own negligent design, given that the remedial costs were referrable to the rectification of URS' negligent design, and the court

149 Ibid, at para 34.
150 Ibid, at para 45.
151 Ibid, at paras 117 to 124.
152 Ibid, at paras 160 to 171.
153 Ibid, at para 181.
154 Ibid, at paras 198 to 206.
155 Ibid, at paras 217 and 218.
156 *URS* (SC), at paras 37 to 54.
157 Ibid, at para 61.
158 Ibid, at paras 62 to 66.

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was reluctant to allow URS to avoid liability for its own negligence simply because the developer happened to have sold on the property to third-party purchasers.

> The Supreme Court's decision now exposes contractors and construction professionals to potentially concurrent liabilities towards all of those parties – tortious liability towards the original developer, and liability under the DPA towards both the original developer and subsequent purchasers

However, one might wonder whether this was precisely the mischief which the DPA was meant to fix, and whether it is a step too far to impose a continuing liability in tort to the original developer in these circumstances. The DPA is intended to give third-party purchasers a direct right of action against the persons who carried out the works, where the developer has suffered no loss after selling off the property at full value, and the subsequent third-party purchasers who suffered the loss and has to rectify the defects does not have any contractual or tortious claim against the persons who carried out the works.

The Supreme Court's decision now exposes contractors and construction professionals to potentially concurrent liabilities towards all of those parties – tortious liability towards the original developer, and liability under the DPA towards both the original developer and subsequent purchasers. The practical implications of this will no doubt need to be worked out in future cases to ensure that contractors and construction professionals will not be made to compensate for the same loss twice.

Ground 2 concerned the effect of section 135 of the BSA and whether it applied in the circumstances of the case. URS argued that section 135(3) of the BSA did not apply to collateral or incidental issues (or deem prior matters of historic fact to be other than they were), such that for the purposes of deciding the voluntariness of BDW's payment which is relevant to the questions of scope of duty, remoteness, causation and mitigation, BDW could not be treated as being subject to an in-time liability to the homeowners when the repair works were done.

Lord Hamblen and Lord Burrows considered that section 135(3) of the BSA was not restricted to actions under section 1 of the DPA, but "can equally apply to actions dependent on section 1, such as where the claim made is for damages for the tort of negligence or for contribution under the Contribution Act", and that this was supported by the wider title, wording and context of section 135 of the BSA.[159]

In reaching this conclusion, Lord Hamblen and Lord Burrows were obviously keen to uphold the purpose and policy behind the BSA, and reference was also made to the explanatory notes in respect of the BSA.[160] Even if there was a presumption that statutory retrospectivity extends no further than necessary, a broad interpretation was necessary to achieve the purpose of the BSA.[161] Moreover, while section 135(3) of the BSA deemed a different legal state of affairs (ie the enforceability of DPA claims against BDW) to exist at the time of the repair works, it did not alter any facts which may be relevant to the questions of causation or mitigation,[162] and so those questions remain to be determined at trial.

Ground 3 was to do with the question of whether URS owed a duty to BDW under section 1(1)(a) of the DPA. Lord Hamblen and Lord Burrows considered the wording of section 1(1)(a) of the DPA and concluded that the duty was owed to "a person who has ordered the dwelling to be built, most obviously the first owner", taking into account the Law Commission's report which led to the enactment of the DPA (and its recommendations that the statutory duty should not just be owed to any person who acquires an interest in the dwelling but also should apply in all circumstances).[163]

Importantly, Lord Hamblen and Lord Burrows observed that "there is no inconsistency, or logical fallacy, in saying that a developer can both owe a DPA duty (eg to a subsequent purchaser) and be owed that duty (by the builder/architect/engineer)", and there are other situations where a party may both owe and be owed a

[159] Ibid, at paras 99 to 101.
[160] Ibid, at paras 102 to 108.
[161] Ibid, at para 124.
[162] Ibid, at paras 119 to 121.
[163] Ibid, at paras 139 to 150.

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duty under section 1 of the DPA.[164] For the same reasons, the argument that the DPA did not contemplate the losses incurred by BDW could not be right and was also rejected by the Supreme Court.[165]

Finally, Ground 4 dealt with BDW's entitlement to bring a contribution claim against URS pursuant to section 1 of the Contribution Act, notwithstanding that there had been no judgment or settlement between BDW and any third party and no third party had ever asserted any claim against BDW.

Lord Leggatt held that on the correct interpretation of the Contribution Act, the right of a first defendant to recover contribution from a second defendant arises when the claimant has suffered damage for which both defendants are each liable, and the first defendant has paid or been ordered or agreed to pay compensation in respect of the damage to claimant.[166] There was no requirement that the first defendant's liability to pay had been established by a judgment, an admission or a settlement.

Lord Leggatt emphasised that the starting point should be the words enacted by Parliament in the Contribution Act, and not any previous legislation or case law interpreting such legislation.[167] Specifically, he relied on the reference in section 1(2) of the Contribution Act to the first defendant being liable for the damage in question immediately before "he made or was ordered or agreed to make the payment", and pointed out that this extended to "a payment in kind".[168]

Lord Leggatt further considered that the cases under the previous legislation (which URS relied upon) did not show any "clearly established" position, as there were no reported cases where a payment was made to the claimant without entering into a settlement agreement.[169] It was also wrong for URS to suggest that the Law Commission did not recommend any change to the law about the accrual of a contribution claim under the Contribution Act, as the Law Commission did make such a recommendation, but this was not adopted by Parliament in the end.[170]

> *Pirelli* remains good law for the time being. Will it take another 40 years for the issue to come before the courts again? It all remains to be seen

Ultimately, Lord Leggatt observed that a "policy choice to allow contribution to be recovered without requiring D1's total liability to be ascertained is not irrational or unreasonable", and so BDW was not precluded from bringing a contribution claim simply because there had been no judgment against BDW or settlement between BDW and any third party and no third party had ever asserted any claim against BDW.[171]

In many ways, the Supreme Court's decision in *URS* was remarkable not so much for what was said in the judgment, but what was not. Although many within the construction

[164] Ibid, at paras 154 and 155.
[165] Ibid, at para 161.
[166] Ibid, at para 212.
[167] Ibid, at para 243.
[168] Ibid, at paras 225 and 226.
[169] Ibid, at paras 254 and 255.
[170] Ibid, at paras 257 to 261.
[171] Ibid, at paras 264 and 265.

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industry had been looking forward to a reconsideration of *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[172] (which held that a tortious claim for defects accrued at the time when the physical damage manifested itself) and the principles on the accrual of a tortious claim in relation to defective works, the Supreme Court declined to do so in this case because it was not strictly necessary to decide this issue given its conclusions on the question of scope of duty and remoteness.[173]

In particular, Lord Hamblen and Lord Burrows observed that "there are strong arguments of principle for accepting that there can only be an actual loss once the pure economic loss has been discovered or could reasonably have been discovered", but that might undermine the legislative solution introduced by the Latent Damage Act 1986, and so this question "raises difficult issues" which would benefit from fuller submissions in a future case.[174] It seems, therefore, that *Pirelli* remains good law for the time being. Will it take another 40 years for the issue to come before the courts again? It all remains to be seen.

An interesting comparison with the Supreme Court's approach in *URS* is that taken by the Court of Appeal in *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point*.[175] The bulk of that decision dealt with the interpretation of paragraph 9 of Schedule 8 to the BSA and the extent to which it has retrospective effect on leaseholders' obligation to pay service charges, which goes beyond the scope of construction law and this annual review.

Nevertheless, it is worth noting that in *Adriatic*, Newey LJ considered in detail the case law regarding the presumption against retrospectivity and interference with property rights,[176] and also noted Lord Leggatt's observation in *URS* that there is a "principle that a statute, even though clearly intended to have retrospective effect, should not be construed as having any greater retrospective operation than is clearly necessary".[177] Nugee LJ (with whom Holgate LJ agreed on the issue of retrospectivity) also agreed with this summary of the principles.[178]

In the end, the majority of the Court of Appeal (Newey LJ dissenting) preferred an intermediate interpretation of paragraph 9 of Schedule 8 to the BSA, which meant that its effect was that no further service charges relating to the remediation of relevant building safety defects would be payable after 28 June 2022, but service charges paid before that date would not be disturbed.[179] As Nugee LJ explained, this was considered to be the best way of giving effect to the legislative purpose of the BSA:

> "Parliament cannot have intended that leaseholders should still continue to face the uncertainties and difficulties of the large and unaffordable bills that the legislation was designed to address. The only way to give effect to the Parliamentary intention of breaking the logjam and protecting leaseholders is to my mind to interpret the provisions that "no service charge is payable" as meaning what they appear to say, namely that from the date of such provisions coming into force no such service charge is indeed payable."[180]

The intermediate position taken by the majority of the Court of Appeal in *Adriatic* is interesting, as it does cloak paragraph 9 of Schedule 8 to the BSA with some retrospectivity even absent the type of express wording found in section 135 of the BSA, but with an arbitrary line drawn on the effective date of the BSA provisions. The Supreme Court has granted permission to appeal against the Court of Appeal's decision, so it will be interesting to see the approach which the Supreme Court takes when construing paragraph 9 of Schedule 8.

A final postscript relates to the Court of Appeal's observations in *Adriatic* regarding the explanatory notes to the BSA. Newey LJ noted that in *URS*, Lords Hamblen and Burrows were "under a misapprehension" when they said that "the Explanatory Notes to the Bill and to the BSA ... were in materially the same terms", as the Supreme Court was in fact only referring to the explanatory notes in respect of the BSA which the government published after the BSA had already been enacted, and the terms of those notes were not contained in the notes to the Bill.[181] Although this did not necessarily affect the correctness of the Supreme Court's conclusions in *URS*, parties should bear this in mind when relying on the relevant passages of the *URS* decision and also be careful to cite the correct explanatory notes in any future dispute involving the interpretation of the BSA.

172 [1983] 2 AC 1.
173 *URS* (SC), at para 72.
174 Ibid, at paras 76 and 77.
175 [2025] EWCA Civ 856; (2025) 42 BLM 08 1.
176 Ibid, at paras 53 to 64.
177 *URS* (SC), at para 301.
178 *Adriatic*, at paras 134 to 140.
179 Ibid, at paras 194 to 205.
180 Ibid, at 203.
181 Ibid, at para 34, referring to *URS* (SC), at para 105.

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Remedies under the BSA

One of the most defining features of the BSA is the creation of a number of new remedies for building safety defects, such as remediation orders (section 123), remediation contribution orders (section 124) and building liability orders (section 130). A common thread running through these provisions is that the courts and tribunals have to consider whether it is "just and equitable" to make the order in question, albeit there is no official guidance within the BSA or its explanatory notes on the relevant factors for applying this test.

As noted in the annual review for 2024, the First-tier Tribunal (FTT) provided some helpful guidance in *Triathlon Homes LLP v Stratford Village Development Partnership and Others*[182] on the factors which are and are not relevant when considering whether it is "just and equitable" to make a remediation contribution order (RCO) against a developer and its ultimate parent company. In that case, Stratford Village Development Partnership (SVDP) was the developer and Get Living was the parent company.

> A common thread running through these provisions is that the courts and tribunals have to consider whether it is "just and equitable" to make the order in question, albeit there is no official guidance within the BSA or its explanatory notes on the relevant factors for applying this test

By way of a quick recap, the FTT held that it was 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.[183] The FTT also emphasised that the availability to the applicant of other claims or potential claims should not disqualify it from applying for a RCO.[184] The FTT very much 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.[185]

As for 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 or liabilities are also unlikely to carry much weight either.[186] 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.[187] On this basis, the FTT held that it was just and equitable in the circumstances to make a RCO not just against the developer, but also against its parent company, especially since the developer was unlikely to be able to comply with the RCO without its parent company's financial support.[188]

SVDP and Get Living appealed against the FTT's decision, but the Court of Appeal had little difficulty dismissing the appeal and upholding the FTT's ruling in *Triathlon Homes LLP v Stratford Village Development Partnership and Others*,[189] in a detailed judgment which was given by Nugee LJ.

The court began by confirming that the FTT was right to observe that "the policy of the Act was to place primary responsibility on the developer" which can be "clearly seen from the Act",[190] as confirmed by the Supreme Court in *URS*.[191] Further, Nugee J pointed out that the Building Safety Fund was not intended to displace the BSA provisions which regulate which parties should, if able to, contribute to the cost, and so the FTT was "entirely justified" in concluding that the developer and its associates should fund the works.[192] He therefore rejected the argument that the FTT wrongly created an unexpressed presumption in favour of granting a RCO against any developer.

182 [2024] UKFTT 26 (PC); [2024] BLR 139.
183 Ibid, at para 246.
184 Ibid, at para 261.
185 Ibid, at paras 264 and 265.
186 Ibid, at paras 251 to 255.
187 Ibid, at para 256.
188 Ibid, at para 266.
189 [2025] EWCA Civ 846; [2025] BLR Plus 40.
190 Ibid, at para 61.
191 *URS* (SC), at paras 104 and 106 (Lord Hamblen and Lord Burrows) and 274 (Lord Leggatt).
192 *Triathlon* (CA), at para 64.

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As to the FTT's view that the policy of the BSA was to pass on remedial costs to original developers as the parties with the primary responsibility, Nugee LJ agreed with the FTT that it was relevant that the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022 allowed alternative recovery against the developer's trustees who are the superior landlords, as it illustrates the policy of the BSA that costs should fall on developers.[193]

Although SVDP and Get Living sought to criticise Triathlon's motivations for seeking the RCO, Nugee LJ agreed with the FTT that parties with legal rights or remedies are generally entitled to pursue them without explaining their subjective reasons, and so Triathlon clearly had an interest in the defects being remedied as the owner of long leaseholds.[194]

Turning to the other potential sources of funding and recovery available to Triathlon, Nugee LJ emphasised that the purpose of the BSA was not just to ensure that the required works were done, but it was also about who paid for those works, and so the FTT was right to say that the Building Safety Fund should be seen as a "last resort".[195] Similarly, the FTT was entitled to conclude that the primary responsibility fell on developers under the BSA, and that was not contingent on leaseholders waiting for the outcome of complex, lengthy, and expensive litigation against other third parties.[196]

The Court of Appeal also considered the wider context of the Building Safety Fund applications, and Nugee LJ observed that the fact that the parties cooperated on the applications was not determinative of whether a RCO should be granted, and Triathlon had not promised not to apply for RCO or otherwise preclude itself from doing so.[197] Importantly, the Building Safety Fund grant was not an out-and-out grant, as clause 5.4.1 of the standard Grant Funding Agreement typically required applicants to use reasonable endeavours to pursue claims. In other words, the grant was only ever intended to be a "temporary funding pending recovery from those who can be made legally liable".[198]

Although SVDP and Get Living also sought to rely on the fact that the identity of their beneficial owners over the years, the Court of Appeal did not consider that this was relevant in the circumstances. Nugee LJ pointed out that Get Living's predecessor acquired SVDP's assets and liabilities and willingly assumed the risk, and this was not changed by the fact that the project was initially publicly owned.[199]

Finally, Nugee LJ rejected the argument that terms of the Grant Funding Agreement expressly prohibited a claim against Get Living. On a proper construction of the agreement, Nugee LJ considered that Get Living could not be pursued in its capacity as a leaseholder, but it did not prevent Get Living from being pursued in other capacities such as here as the associate of the freeholder, even if they happened to satisfy the definition of "Leaseholder" under the agreement.[200]

> The courts seem somewhat predisposed towards granting a remedy under the BSA to pass on the remedial costs to the original developers, as that is considered to be the overall legislative purpose of Part 5 of the BSA

The further guidance given by the Court of Appeal in *Triathlon* on the "just and equitable" test will be of relevance not only to applications for RCO, but also applications for building liability orders on the back of claims against developers, contractors and construction professionals under the DPA and/or for other liability relating to a building safety risk, given that the same "just and equitable" test needs to be met for a building liability order to be granted. The courts seem somewhat predisposed towards granting a remedy under the BSA to pass on the remedial costs to the original developers, as that is considered to be the overall legislative purpose of Part 5 of the BSA.

In this regard, it is worth noting that the first building liability order was made by the TCC in *381 Southwark Park Road RTM Company Ltd and Others v Click St Andrews Ltd*

193 Ibid, at paras 67 to 74.
194 Ibid, at paras 75 and 82.
195 Ibid, at paras 87 and 88.
196 Ibid, at paras 94 to 98.
197 Ibid, at paras 99 to 106.
198 Ibid, at paras 110 and 111.
199 Ibid, at paras 115 to 121.
200 Ibid, at paras 122 to 134.

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(in liquidation) and Another.[201] In doing so, Jefford J had regard to and followed the approach taken by the FTT in *Triathlon*, and the focus was very much on the financial position of the primary defendant and not on the assets of the associated company, and so the dubious financial position of the parent company did not militate against the granting of a building liability order.[202] As more building safety claims filter through the courts, there will likely be more decisions from the TCC dealing with the test for building safety liability orders, and it will be interesting to see whether any new factors or considerations arise in future cases which may lead to different outcomes.

Closely related to building liability orders under section 130 of the BSA are information orders under section 132 of the Act, which are intended to allow parties to obtain certain information or documents relating to persons who are, or have at any time in a given period been, associated with the company which is the subject of the order, in order to decide whether and if so against whom a building liability order should be sought.

In *BDW Trading Ltd v Ardmore Construction Ltd and Others*,[203] the TCC had the opportunity to consider one of the first contested applications for an information order under section 132 of the BSA, and HHJ Keyser KC provided some noteworthy guidance in the course of rejecting BDW's application.

HHJ Keyser KC observed at the outset that an information order can only be made against a corporate body who is subject to a relevant liability (as expressly provided in section 132(3)(a) of the BSA), and such an order cannot be made if there is no basis for supposing that the party has any "relevant liability" as defined in section 130 of the BSA.[204] Importantly, the judge emphasised that the order cannot require an associate of the corporate body with the relevant liability to provide the information, and any indication to the contrary in the explanatory notes cannot override the statutory provisions.[205]

In relation to the need to show a "relevant liability" within the meaning of section 132 of the BSA, the judge noted that whilst it is not necessary for the relevant liability to have been established already, applications under section 132 of the BSA ought to be short and uncomplicated, and the court has to arrive at a view and be satisfied of the existence of a "relevant liability" for the purposes of the application – it is not sufficient to show only reasonable, plausible or credible grounds for believing there is a "relevant liability", and the court was therefore not sufficiently satisfied on the evidence provided by BDW.[206] In this regard, the judge emphasised also that an applicant must satisfy the condition in section 132(3)(a) by demonstrating a relevant liability "relating to a specified building" in respect of which it is making a BLO application.[207]

Even if BDW met the threshold of satisfying the court as to the existence of a "relevant liability", the judge would have in any event refused the requests for information, because he considered the information sought to be too wide-ranging (including, for instance, information on corporate structure, group security structure details, purpose of incorporation of companies, financial allowances or provisions for remedial works on this and other projects, management accounts/reports, banking and lending facilities, value of ongoing contracts, profit and loss forecasts).

The approach taken by the TCC in *BDW* is likely to significantly narrow the scope of future applications for information orders. Parties should ensure that before making any application for an information order, it will have clear and cogent evidence to satisfy the court that there is a "relevant liability", and although the judge in *BDW* did not require the liability to be established, it is difficult to see what else would suffice to satisfy the court. It may be that the most secure way of meeting the test is to obtain an adjudication decision which, albeit not final, independently declares that there is a "relevant liability".

In any case, it would also be important to confine the scope of the information sought to what is reasonably necessary to identify the potential associated companies for a building liability order and the prospects or value of obtaining such an order. Those within the industry who are grappling with building safety claims and applications for remedies under the BSA should keep a close eye on any new decisions on the application of the BSA provisions, as further guidance can be expected from the TCC in the months and years ahead.

[201] [2024] EWHC 3569 (TCC); [2025] BLR 261.
[202] Ibid, at paras 9 to 15.
[203] [2025] EWHC 434 (TCC); [2025] BLR 216.
[204] Ibid, at para 17.
[205] Ibid, at paras 18 to 19.
[206] Ibid, at paras 25 to 30.
[207] Ibid, at para 35.

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Global perspectives

In 2025, there were significant legal developments relevant to the construction, infrastructure and energy industries not only within the UK, but also in various other jurisdictions where English practitioners and construction professionals are often actively and regularly involved. In particular, there are a number of noteworthy cases and legislative changes in Hong Kong, Singapore and the UAE, which will be briefly considered below.

Hong Kong

In the annual review for 2024, the long-awaited enactment of the Construction Industry Security of Payment Ordinance (Cap 652) (SOP Ordinance) was discussed and the key provisions were summarised. Over the course of 2025, there has been a growing dialogue between legal practitioners in Hong Kong and the UK regarding the UK's experience with adjudications and security for payment legislation, lessons learned under the HGCRA, and how practitioners in the two jurisdictions may be able to collaborate in the future under the new statutory regime in Hong Kong.

On 28 August 2025, the SOP Ordinance officially came into force in Hong Kong. Stakeholders in the Hong Kong construction industry should all familiarise themselves with the payment mechanism, adjudication procedure and enforcement mechanism under the SOP Ordinance, as those provisions will apply automatically to construction contracts entered into after 28 August 2025 and which fall within the scope of the SOP Ordinance, whether the contract is oral, written, or partly oral and partly written. When entering into any construction contract, parties should consider whether the contract meets the monetary threshold in Schedule 4 to the SOP Ordinance and/or falls within one of the scenarios specified in section 9 of the SOP Ordinance.

It will be interesting to see in due course what types of contentious issues arising under the SOP Ordinance will require the intervention of the Hong Kong courts, and what guidance they will provide to shape the principles governing the payment, adjudication and enforcement mechanisms under the SOP Ordinance. Given the rich body of adjudication-related case law built up by the TCC in the UK, those cases may well provide an abundant source of cross-fertilisation when contentious issues regarding payment disputes and enforcement eventually come before the Hong Kong courts. Equally, English practitioners may wish to consider any future jurisprudence of the Hong Kong courts on issues which have not previously been considered or determined by the TCC.

Stakeholders in the Hong Kong construction industry should all familiarise themselves with the payment mechanism, adjudication procedure and enforcement mechanism under the SOP Ordinance, as those provisions will apply automatically to construction contracts entered into after 28 August 2025

Indeed, construction practitioners in the UK often look to the case law of the Hong Kong courts as persuasive authorities, either to compare and contrast against the approach taken in the UK (and sometimes invite the English courts to develop the law in a certain direction), or to offer a solution for a problem which has yet to be directly addressed in the English authorities. With that in mind, there were a number of notable Hong Kong judgments in 2025 which arose directly from construction disputes.

For instance, in *Sze Fung Engineering Ltd v Trevi Construction Company Ltd*,[208] the Hong Kong Court of Appeal had to interpret a clause in the quotation (Item 18) which provided that payment was to be based on a "back-to-back principle" and would be released within three days of receiving the same from the client. The dispute arose from a sub-subcontract for piling and pumping tests carried out by Sze Fung for Trevi's pipe and sheet pile walls and grouting works, in connection with the construction of a new combined gas turbine unit at a power station. The main contractor for the project was Leighton Contractors (Asia) Ltd.

[208] [2025] HKCA 278.

In the Hong Kong Court of First Instance, Mimmie Chan J concluded that Item 18 of the quotation was a pay when paid clause, such that Sze Fung would only be paid if Trevi was paid for the work by Leighton. This meant that insofar any claims by Sze Fung for additional payment were rejected by Leighton, Trevi would not be entitled to any such sums either. However, the Hong Kong Court of Appeal disagreed and allowed Sze Fung's appeal.

Anthony Chan J observed that the phrase "back-to-back" is not a term of art, and it is an ambiguous term which will have to be construed against the context and factual matrix.[209] He then pointed out that "[t]he time of payment is generally understood to be the lifeline for contractors in the construction industry" and is understandably governed by contract provisions, whereas it is "sound common sense" that the contractor's entitlement to payment "would not be lightly disturbed by the imposition of condition in the absence of clear words".[210] Such an approach is very much consistent with the approach taken by the English Courts when it comes to the interpretation of contracts.

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Taking into account the factual matrix, the judge considered an important fact to be the difference in scope between Trevi's subcontract and Sze Fung's sub-subcontract, and it was difficult to see why Item 18 of the quotation was a pay when paid clause in those circumstances.[211] The wider factual matrix (for example, the parties' conversations) did not support such an interpretation, and the subsequent conduct was not admissible for the exercise of contractual interpretation.[212] The judge therefore concluded that Item 18 of the quotation only governed the timing of payment.[213]

[209] Ibid, at para 21.
[210] Ibid, at para 36.
[211] Ibid, at para 38.
[212] Ibid, at paras 39 to 55.
[213] Ibid, at para 55.

This is an important case for any future disputes concerning contracts which are said to be "back-to-back", although one would expect "pay when paid clauses" to be less and less common in Hong Kong (as in the UK) given that such provisions are expressly prohibited under the SOP Ordinance. For legacy contracts made before the entry into force of the SOP Ordinance, however, the Hong Kong Court of Appeal's judgment provides helpful guidance on the interpretation of "back-to-back" provisions.

Another interesting case in 2025 was *Kat Yue Construction Engineering Ltd v Fai Lee Construction (HK) Ltd*,[214] where the Hong Kong Court of First Instance considered whether a stay in favour of arbitration should be granted where a construction contract contained an arbitration clause but the subsequent settlement agreement did not.

Deputy High Court Judge Sir William Blair took into account the "centre of gravity of the dispute" test in the case of multiple related commercial agreements, each dealing with different aspects of the parties' dealings, with its own provision for choice of jurisdiction, law and/or mode of dispute resolution.[215] He also considered the English Commercial Court decision of *Monde Petroleum SA v Westernzagros Ltd*,[216] and in particular the significance which can be attached to a "second in time" settlement agreements.[217]

Applying a "careful and commercially-minded construction" of the agreements providing for the resolution of dispute,[218] the judge held on the facts and on the particular terms of the contracts that the plaintiff's claims were brought under the settlement agreement, such that the dispute does not fall within the ambit of the arbitration agreement under the original construction contract and the plaintiff was entitled to bring legal proceedings in court.[219]

These cases demonstrate the continuing interaction between the common law systems in the UK and in Hong Kong, and how the case law in those two jurisdictions continues to be of interest to each other both academically and judicially. It is hoped that this longstanding tradition will continue in the years to come.

[214] [2025] HKCFI 3298.
[215] Ibid, at para 25, citing *Houtai Investment Holdings Ltd v Leung Yat Tung and Others* [2021] HKCFI 1504, at para 21 (Mimmie Chan J).
[216] [2015] EWHC 67 (Comm); [2015] 1 Lloyd's Rep 330.
[217] *Kat Yue*, at paras 26 and 27.
[218] Ibid, at para 28.
[219] Ibid, at paras 30 to 41.

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Singapore

The Singapore Courts were equally busy in 2025, and some of these disputes provide food for thought for Singaporean as well as English law practitioners.For example, in *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd*,[220] the Appellate Division of the Singapore High Court considered the important question of whether a party can claim the cost of rectification works even if it does not intend to perform them, which is also a matter of some debate in English law and a number of other jurisdictions.

In *Terrenus*, the dispute arose from a contract for the construction of a solar power generation facility in Changi Business Park. In essence, Terrenus argued that Attika's work was defective because the solar panel mounting structure rods were not embedded to the contractually specified depth of at least 500 mm below ground. Terrenus did not intend to rectify this defect, but it claimed the cost of rectification on the basis that the defect created a risk of structural failure of the solar panels during high winds.

Kannah Ramesh JAD (delivering the judgment of the court) examined the English, Australian and Singaporean case law in detail.[221] The judge noted, for instance, that the English courts have taken differing positions, with some indicating that the court was not concerned with the use to which a claimant puts an award of damages (although that may be relevant to the reasonableness of the cost of cure being sought),[222] whereas others suggest that the intention to cure was critical to the decision whether to award the cost of cure.[223] A similar tension is found in a number of Singaporean judgments, whereas the position in Australia is more or less well-settled.

The judge took as a starting point the objective of damages for breach of contract, which is to compensate the claimant for its expectation loss, and this can be done by reference to the diminution in value of the delivered product or the cost of cure.[224] He observed that considerations of reasonableness and proportionality operate as a pragmatic limitation to awarding the cost of cure as damages, because it may not make practice or economic sense in some cases to award the cost of cure. In his view, it is when the court assesses the reasonableness or proportionality of awarding the cost of cure that the intention to effect the cost of cure becomes relevant, but this is only one factor, and not a prerequisite for awarding the cost of cure.[225] Many cases which considered intention to cure to be vital might be explicable on a plain application of the reasonableness assessment.[226]

On the facts, there was no evidence of the alleged structural risk, and absent any confirmation of Terrenus' intention to remedy the defect, the court considered that there was no justification for awarding the cost of cure in response to any minimal deviation from the contractually specified embedment depth, as that would not be reasonable or proportionate.[227]

The decision of the Appellate Division of the Singapore High Court is notable for the clarity of its reasoning, and its holistic consideration of English, Australian and Singaporean case law. Given that this issue has not yet been authoritatively considered by the English courts, parties may wish to refer to *Terrenus* in future disputes where the relevance of the intention to cure is an important issue. More generally, the *Terrenus* judgment is a good

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[220] [2025] SGHC(A) 4.
[221] Ibid, at paras 26 to 38.
[222] See eg *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, at pp 359 and 372 to 373, *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), at para 263, *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC); [2011] BLR 274, at para 345.
[223] See eg *St James's Oncology SPC Ltd v Lendlease Construction (Europe) Ltd and Others* [2022] EWHC 2504 (TCC), at paras 345 to 349, and *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd* [2007] EWHC 2546 (TCC), at paras 659 to 673.
[224] *Terrenus*, at paras 39 and 40.
[225] Ibid, at paras 43 and 44.
[226] Ibid, at para 46.
[227] Ibid, at paras 63 and 64.

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illustration of the relevance of Singapore decisions to other common law jurisdictions such as the UK.

Another interesting Singaporean judgment in 2025 was *DRO v DRP*,[228] which concerned the question of whether one of the partners (DRP) in an unincorporated consortium could commence an arbitration independently of the other partner, in circumstances where the two partners are "jointly and severally" referred to as the contractor. The issue in this case is reminiscent of the question decided most recently by the TCC in *Darchem* (as discussed above).

In the Singapore High Court, Chua Lee Ming J held that one partner in the consortium could commence an arbitration independently, because the arbitration clause in clause 25.1 of the agreement could be invoked by the "Contractor", and the "Contractor" meant the two partners "jointly and severally", such that "as a matter of construction, clause 25.1 can be invoked by [CoA] and the respondent jointly, or by [CoA] or the respondent acting alone".[229] Insofar as the dispute in question was in respect of DRP's onshore works only and was therefore between the owner of the project and DRP, DRP could independently invoke the arbitration clause because the other partner is not involved either a member of the consortium or as the leader of the consortium.[230]

It is interesting that on a very similar exercise of contractual interpretation concerning the right of a member in the consortium to act severally and invoke a dispute resolution clause, the English TCC and the Singapore High Court reached two diametrically opposite conclusions. Given that permission is being sought to appeal against the *Darchem* decision, it will be interesting to see whether the English Court of Appeal will adopt a position which is similar to that taken in the Singapore High Court in *DRO v DRP*.

In terms of Singapore's position as a seat of arbitration, it remains one of the most popular seats in Asia-Pacific, thanks to the well-established pro-arbitration stance of the Singapore courts. Recent confirmation of this can be found in *DMZ v DNA*,[231] where the Singapore Court of Appeal reaffirmed the foundational principle of minimal curial intervention and clarified the limits of the courts' power to intervene under Article 5 of the UNCITRAL Model Law, which provides that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law".

DNA commenced arbitration proceedings against DMZ at the Singapore International Arbitration Centre (SIAC) shortly before the expiry of limitation, but due to DNA's delay in responding to the SIAC Registrar's queries, the Registrar initially deemed the arbitration to have been commenced on a later date after the expiry of limitation. Upon DNA's request and having reviewed the parties' submissions, the SIAC Registrar revised the commencement date of the arbitration to an earlier date, as Rule 3.3 of the SIAC Rules provides that the commencement date shall be determined by the SIAC Registrar.

DMZ sought declarations from the Singapore High Court to challenge the SIAC Registrar's revision of the commencement date. The Singapore Court of Appeal agreed with the High Court and rejected DMZ's application. In short, Sundaresh Menon CJ (delivering the judgment of the court) adopted a broad interpretation of Article 5

[228] [2025] SGHC 255. See *Arbitration Law Monthly*, February 2026, (2026) 26 ALM 2 3.
[229] Ibid, at para 29.
[230] Ibid, at paras 30 to 33.
[231] [2025] SGCA 52.

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of the UNCITRAL Model Law which construes "matters governed by this Law" as encompassing challenges against a procedural determination which would affect the progress or conduct of an ongoing arbitration.[232]

In doing so, the judge observed that "[i]t would be most exceptional ... that we would countenance a court intervening in an ongoing arbitration by seeking in essence to second-guess a procedural determination absent express empowerment to do so under the Model Law or IAA",[233] and he emphasised the nature of arbitration and the "high degree of procedural autonomy in the hands of the parties".[234] In the circumstances, the SIAC Registrar made a determination as it was empowered to do under the SIAC Rules, and "where the rules, which the parties have agreed to, provide that certain decisions may be made by a particular decision-maker, that is as much a part of the agreement of the parties as to how their arbitration is to be conducted; and hence, as much a part of the process that is beyond the intervention of the court at this stage of the proceedings".[235]

This is a welcome reaffirmation by the Singapore Court of Appeal of the Singapore courts' ongoing commitment to upholding the autonomy of arbitral proceedings and avoiding any unnecessary intervention in that process. The continuing pro-arbitration approach of the Singapore courts will no doubt provide parties with the confidence to continue looking to this jurisdiction as one of their preferred seats of arbitration in the region.

UAE

Turning finally to the UAE, one of the most important legislative changes directly affecting the construction industry is no doubt Dubai Law No 7 of 2025, which was introduced on 8 July 2025 and regulates construction and engineering activities in Dubai. This applies to all contractors working in Dubai and extends to all contracting activities including construction, demolition, engineering and the like.

The new law comprises 29 articles, and its detailed implementation will be facilitated by regulations and decisions to be issued by the Committee for Regulating and Developing Construction Activities and/or other Competent Authorities. Some of the changes introduced include:

- Mandatory registration and licensing of all contractors in a central register managed by the Dubai Municipality.
- A new system for the classification of contractors based on their technical, financial and administrative capabilities, which will determine the nature and scope of the projects a contractor can undertake.
- Requirement for contractors to employ a minimum number of qualified technical staff holding a professional competency certificate issued by the Dubai Municipality.
- Approval by the Dubai Municipality of subcontractors (who must also be licensed and classified), and requirement for all members of a consortium or joint venture to be registered and approved.
- Formal recognition of "turnkey" contracts governed by a single agreement.
- Introduction of a code of conduct and ethics for contractors, breach of which may lead to fines, suspensions of the contractor's licence, downgrading of the contractor's classification, or the de-registration of the contractor or its technical staff.

It seems that that the Dubai government is hoping to improve the competence of contractors and their employees working on projects in Dubai, and in turn to enhance the quality and safety of construction works, in line with internationally recognised standards and the need for greater digitisation and transparency. Construction practitioners who are advising on projects in Dubai should ensure that all parties involved in a project are aware of these new legal requirements, and compliance with the new law will also help reduce the risk of delays and/or cost overruns in ongoing and future projects.

In terms of recent judicial decisions, the DIFC Courts have published a number of notable judgments in 2025. For instance, the Technology and Construction Division of the Dubai International Finance Centre (DIFC) Courts gave its decision in *Architeriors Interior Design (LLC) v Emirates National Investment Co (LLC)* in July 2025 after a four-day hearing.[236] The dispute arose from refurbishment works at the Amber Residency in Dubai and concerned a contractor's claims for extensions of time, prolongation costs, variation costs and other additional costs, and an employer's competing claims for liquidated damages, defect rectification costs and the like.

[232] Ibid, at para 43.
[233] Ibid, at para 43.
[234] Ibid, at para 44.
[235] Ibid, at para 47.

[236] [2024] DIFC TCD 001.

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It is noteworthy that the decision, delivered by HE Justice Roger Stewart, is very much in the style of a detailed judgment of the English TCC in a complex construction dispute, addressing various granular claims which were disputed between the parties. This shows that the Technology and Construction Division of the DIFC Courts is increasingly being trusted with complex construction dispute and called upon to determine such disputes in a manner which is familiar to stakeholders and legal practitioners in the UK and other common law jurisdictions.

A particularly interesting aspect of the judgment is its treatment of Article 390 of the UAE Civil Code, which allows the UAE courts to vary the amount of liquidated damages fixed by the parties so as to make the compensation equal to the actual harm. The judge stated that although Article 390 "gives the court power to vary the parties' agreement ... it will be a rare case in which such power is exercised where the parties have entered into a detailed written agreement for the provision of building works in an internationally recognised standard form",[237] noting the function of liquidated damages is the allocation of risks and the avoidance of the uncertainties of proof and dispute resolution.

The judge held that, on the facts of that case, there was nothing to suggest that the rate selected was other than sensible and appropriate, and the evidence adduced by the employer was insufficient to show that there was a loss of rental causally linked to the culpable delays. Indeed, "[i]nvestigating and deciding that issue increases expense in a commercially undesirable manner".[238]

The *Architeriors* decision therefore provides some insight into how judges and arbitrators (especially those from a common law background) will apply Article 390 of the UAE Civil Code, which has no equivalent in English law and other common law jurisdictions. One might expect judges and arbitrators from a civil law background to be potentially more receptive to arguments regarding the variation of a liquidated damages rate, but even then, clear and cogent evidence is required to show that the actual loss which is said to have been incurred as a result of the alleged breach, and the evidential threshold to be met would inevitably be a high one. The *Architeriors* decision will therefore be of interest to practitioners who are regularly involved in construction arbitrations in the UAE and other civil law jurisdictions.

[237] Ibid, para 46.
[238] Ibid, para 47.

Finally, it is worth mentioning that the DIFC Courts has also recently published two judgments which reinforce their pro-arbitration stance and the principle of minimum curial intervention, while clarifying a few issues under the DIFC Arbitration Law. This is of interest to those in the construction, infrastructure and energy industries, given the increasing number of projects in the Middle East and North Africa (MENA) region and the prevalence of arbitration clauses in the relevant contracts.

In *Oswin v Otila and Another*,[239] there was a dispute under a joint venture agreement because the parties were in a deadlock over key management and operational decisions, and Oswin sought interim relief to prevent unauthorised unilateral acts by Otila pending the arbitration. The DIFC Court of First Instance confirmed its supervisory jurisdiction over DIFC-seated arbitrations and rejected the argument that the Courts of Abu Dhabi (which had exclusive jurisdiction under the joint venture agreement) had jurisdiction over interim measures. The court therefore decided to continue an interim injunction granted earlier this year to preserve the status quo pending the appointment of the arbitral tribunal.

Further, in *Obert and Another v Ondray*,[240] there was a dispute under a consultancy agreement which had been the subject of a termination and settlement agreement. The defendant sought to set aside the arbitral award on the basis that the arbitrator exceeded his jurisdiction because the claims were based on the settlement agreement. It was argued that the award was contrary to public policy and procedurally unfair. The DIFC Court of First Instance granted recognition and enforcement of the arbitral award, rejecting the jurisdictional and public policy challenges, emphasising that an arbitration clause survives the termination of the underlying contract, and that the annulment of awards would only occur in exceptional circumstances.

The growing body of case law from the DIFC Courts confirms its robust pro-arbitration approach and will no doubt reinforce the confidence of parties in the DIFC as the seat of arbitrations in the MENA region. This is particularly encouraging given that there were previous concerns in earlier years regarding the tension between the jurisdictions of the Dubai courts and the DIFC Courts when it comes to matters referred to arbitration. It is hoped that the DIFC Courts will continue this approach towards arbitral matters, as it will help further cement its place as one of the leading centres of arbitration.

[239] [2025] ARB 032/2025.
[240] [2025] ARB 014/2025.

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The year ahead

It is clear from this analysis that the year 2025 and the first few months of 2026 have witnessed a significant number of legal developments which have a direct bearing on the domestic and international construction, infrastructure and energy professions. There is no sign that this trend will stop over the course of this year. In fact, there are already a number of upcoming developments in the pipeline which all stakeholders should look out for in the next 12 months.

Pending appeals

In terms of pending appeals on important points of law, a number of cases discussed above will come before the appellate courts later this year. The Court of Appeal has granted permission to appeal against the *RBH* decision, and this will the first time that it will have the opportunity to consider the scope of the "residential occupier" exception under section 106 of the HGCRA. This is due to be heard later in the year, and a decision is likely to be handed down before the end of 2026.

In a similar vein, the *Darchem* judgment on the right of a member of an unincorporated joint venture to adjudicate independently is the subject of a pending application for permission to appeal. If permission is granted, then the Court of Appeal is again likely to hear the appeal later this year, with a decision to follow in late 2026 or early 2027. This will also be the first time that an appellate court has been asked to consider the right of the constituent members of an unincorporated joint venture to act jointly and severally, especially in relation to constructions adjudications.

In relation to fire safety disputes, the *Adriatic* decision was granted permission to appeal to the Supreme Court on the issue of retrospectivity in November 2025. Although this is very much confined to the provisions of the BSA relating to service charges, it will be interesting to see the Supreme Court's approach to the question of retrospectivity, which may well be relevant to future construction disputes touching on the retrospectivity of the BSA, especially aspects which have not been considered directly in *URS v BDW*.

It is somewhat unfortunate that the appeal against the *BDW Trading Ltd v Ardmore Construction Ltd*[241] judgment in 2014 will never proceed to a full hearing, given that Ardmore Construction Ltd entered into administration in August 2025 and a statutory moratorium on all proceedings has since kicked in. However, this is not the end of the story for disputes relating to Ardmore, as other developers have sought to pursue other associated companies in Ardmore Group.

One such example is Taylor Wimpey's claim for £40 million of remedial costs, which it seeks to recover by way of a building liability order under section 130 of the BSA. This is heavily contested by Ardmore Group, on the basis that the only breach in question is a settlement agreement which does not give rise to a "relevant liability" under section 130 of the BSA.[242] Many will no doubt watch this ongoing litigation with interest, and it will not be long before the dispute over the building liability order comes before the court – unless, of course, the parties settle or more companies in the group enters into an insolvency procedure.

In last year's annual review, it was announced that the TCC Guide (which was last revised in October 2022) was the subject of an ongoing review by the TCC Guide Working Group. That review has now concluded and the TCC Guide will be published imminently as soon as it has received the judicial imprimatur – construction practitioners should watch this space and note any updates to the procedural guidance on routine matters such as preparation for case management conferences and best practice for the preparation of expert evidence.

Legislative developments and industry reform

Aside from updates coming out of the courts, there are also a number of important legislative developments on the horizon in the year ahead. On 31 December 2025, the consultation on the British Standards Institution's PAS 9980 (which sets out a methodology for fire risk appraisal of external wall construction and cladding of existing blocks of flats) came to an end. There is a lively debate within the building industry as to whether the drafting of PAS 9980 goes far enough, and the UK Government's plans to turn PAS 9980 into law are equally controversial.[243]

[241] [2024] EWHC 3235 (TCC); [2024] BLR 14.
[242] See www.constructionnews.co.uk/legal/ardmore-fights-taylor-wimpeys-40m-remediation-lawsuit-26-01-2026/.
[243] See www.bbc.co.uk/news/articles/cev8mrgky9eo.

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It is expected that the government will introduce draft legislation to that effect later in 2026, and it is important for all stakeholders within the construction industry to keep abreast of any new developments in this regard.

Last but not least, the construction products regime in the UK is ripe for reform and has been the subject of heavy criticism and extensive recommendations in Dame Judith Hackitt's "Building a Safer Future" report[244] and also the Morell and Day "Testing for a Safer Future" report.[245] The UK Government published a "Construction Products Reform Green Paper" in February 2025,[246] and the consultation ended on 21 May 2025. The responses to the consultation have since been published, and on 25 February 2026, a "Construction Products Reform White Paper" was further published.[247] The latest consultation will close on 20 May 2026, and it is important that stakeholders within the industry provide their views on the proposed reform package. It is expected that the government will table a bill after it has considered the consultation responses, so this is another area to keep an eye on in the coming months.

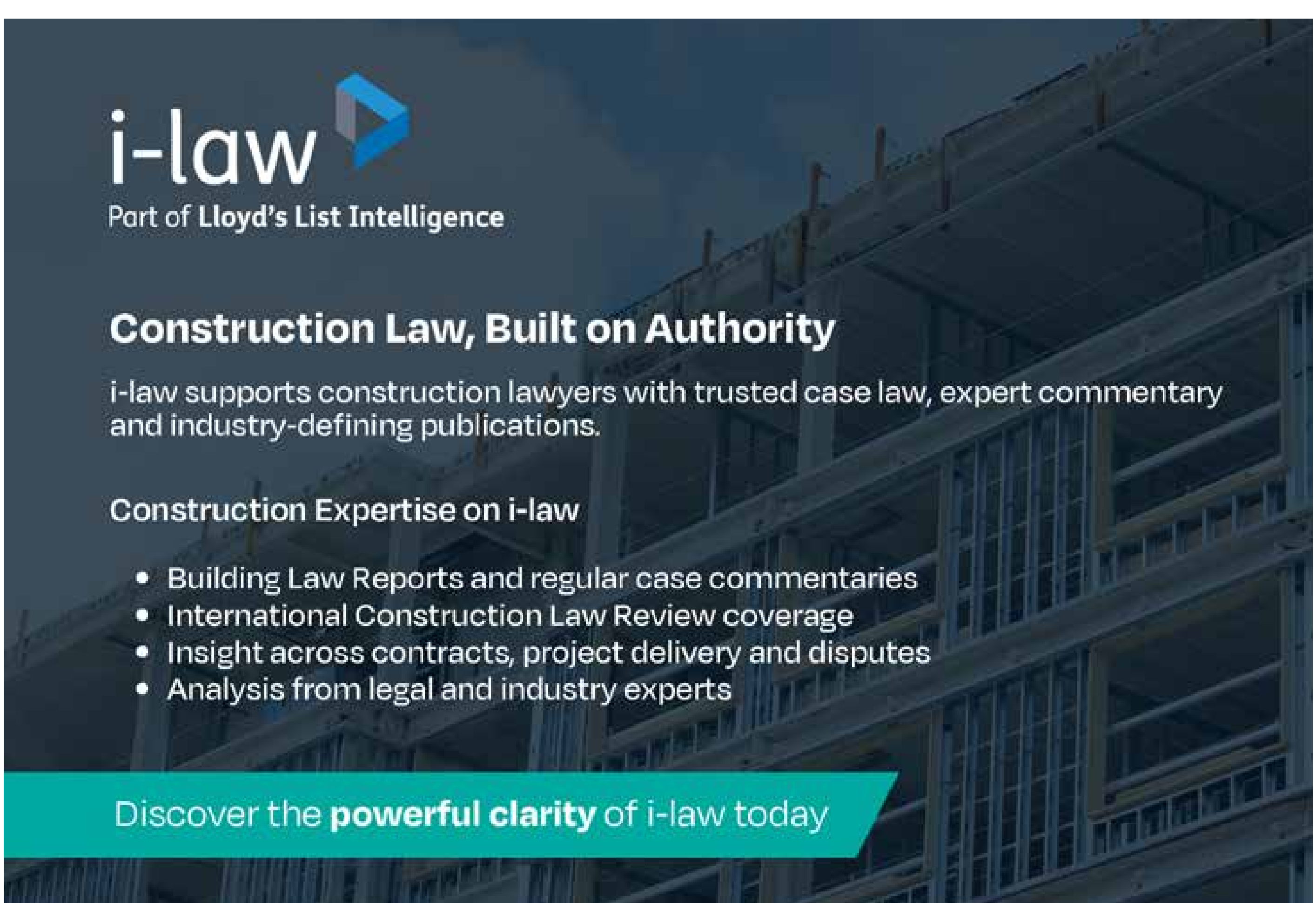
With such a wide range of ongoing and pending developments already in train, it is clear that the rest of 2026 will see another flurry of activity in the judicial and legislative spheres which will have significant implications for the construction, infrastructure and energy industries. That is certainly something to look forward to as this review approaches its 10th anniversary next year, and with all the anticipated new changes and challenges ahead, there will hopefully also be new opportunities as we all try to progress towards a better future for the construction industry as a whole.

244 Dame Judith Hackitt DBE FREng, "Building a Safety Future – Independent Review of Building of Regulations and Fire Safety: Final Report" (May 2018, Cm 9607), Chapter 7, assets.publishing.service.gov.uk/media/5afc50c840f0b622e4844ab4/Building_a_Safer_Future_-_web.pdf.

245 Paul Morrell OBE and Anneliese Day KC, "Testing for a Safer Future – Independent Review of the Construction Products Testing Regime" (Department for Levelling Up, Housing and Communities, April 2023), assets.publishing.service.gov.uk/media/6440f2596dda69000d11e15e/Independent_Review_of_the_Construction_Product_Testing_Regime.pdf.

246 Ministry of Housing, Communities & Local Government, "Construction Products Reform Green Paper" (February 2025, CP1278), assets.publishing.service.gov.uk/media/67befa24a0f0c95a498d1f96/CCS0924294540-001_PN8889787_SECURE_Construction_Green_Paper_2024_Web_Accessible.pdf.

247 Ministry of Housing, Communities & Local Government, "Construction Products Reform White Paper" (February 2026, CP1515), assets.publishing.service.gov.uk/media/699c68cad2b9c6ec5b6fbbe8/Construction_Products_Reform_White_Paper.pdf.



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Appendix: judgments analysed and considered in this review

2025 and 2026 judgments analysed

1st Formations Ltd v Lapp Industries Ltd [2025] EWHC 1526 (TCC); [2025] CILL 5169; (2025) 42 BLM 08 10

381 Southwark Park Road RTM Company Ltd and Others v Click St Andrews Ltd (in liquidation) and Another [2024] EWHC 3569 (TCC); [2025] BLR 261

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856; (2025) 42 BLM 08 1

Architeriors Interior Design (LLC) v Emirates National Investment Co (LLC) [2024] DIFC TCD 001

BDW Trading Ltd v Ardmore Construction Ltd and Others [2025] EWHC 434 (TCC); [2025] BLR 216

Clegg Food Projects Ltd v Prestige Car Direct Properties Ltd [2025] EWHC 2173 (TCC); [2025] BLR 563

Darchem Engineering Ltd v Bouygues Travaux Publics and Another [2026] EWHC 220 (TCC); [2026] CILL 5261

Disclosure and Barring Service v Tata Consultancy Services Ltd [2025] EWCA Civ 380; (2025) CILL 5162; (2025) 42 BLM 05 1

DRO v DRP [2025] SGHC 255; (2026) 26 ALM 2 3

Grove Construction (London) Ltd v Bagshot Manor Ltd [2025] EWHC 591 (TCC); (2025) 42 BLM 05 4

Jaevee Homes Ltd v Fincham [2025] EWHC 942 (TCC)

John Sisk and Son Ltd v Capital & Centric (Rose) Ltd [2025] EWHC 594 (TCC); [2025] BLR 268

Kat Yue Construction Engineering Ltd v Fai Lee Construction (HK) Ltd [2025] HKCFI 3298

King Crude Carriers SA and Others v Ridgebury November LLC and Others [2025] UKSC 39; [2026] BLR Plus 12; [2025] 2 Lloyd's Rep 560

Obert and Another v Ondray [2025] ARB 014/2025

Oswin v Otila and Another [2025] ARB 032/2025

Paragon Group Ltd v FK Facades Ltd [2026] EWHC 78 (TCC); [2026] BLR Plus 15

Placefirst Construction Ltd v CAR Construction (North East) Ltd [2025] EWHC 100 (TCC); [2025] BLR 175

Project One London Ltd v VMA Services Ltd [2025] EWHC 3304 (TCC); (2026) 43 BLM 02 8

Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC 1; [2026] BLR Plus 14; (2026) 43 BLM 02 1

RBH Building Contractors Ltd v James and Another [2025] EWHC 2005 (TCC); [2025] BLR 517

RNJM Ltd v Purpose Social Homes Ltd [2025] EWHC 2224 (TCC); [2025] BLR 577

Sze Fung Engineering Ltd v Trevi Construction Company Ltd [2025] HKCA 278

Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd [2025] SGHC(A) 4

Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago [2026] UKPC 2; (2026) 43 BLM 03 1

URS Corporation Ltd v BDW Trading Ltd [2025] UKSC 21; [2025] BLR 379

Vision Construct Ltd v Gypcraft Drylining Contractors Ltd [2025] EWHC 2707 (TCC); [2026] BLR 1

Judgments considered

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

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

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

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

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

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