All Day Construction Conference 2024

Thursday, 3 October 2024 • 11:00 - 16:30

Richard Wilmot-Smith KC

Marion Smith KC

Kate Grange KC

Karen Gough

David Sawtell

Camilla ter Haar

Kelly Stricklin-Coutinho

Andrew Deakin

Vivek Kapoor

Patrick Hennessy

Hannah McCarthy

Melissa Shipley

Samantha Jones

David Hopkins

Alexander Burrell

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Panel 1: Building Safety

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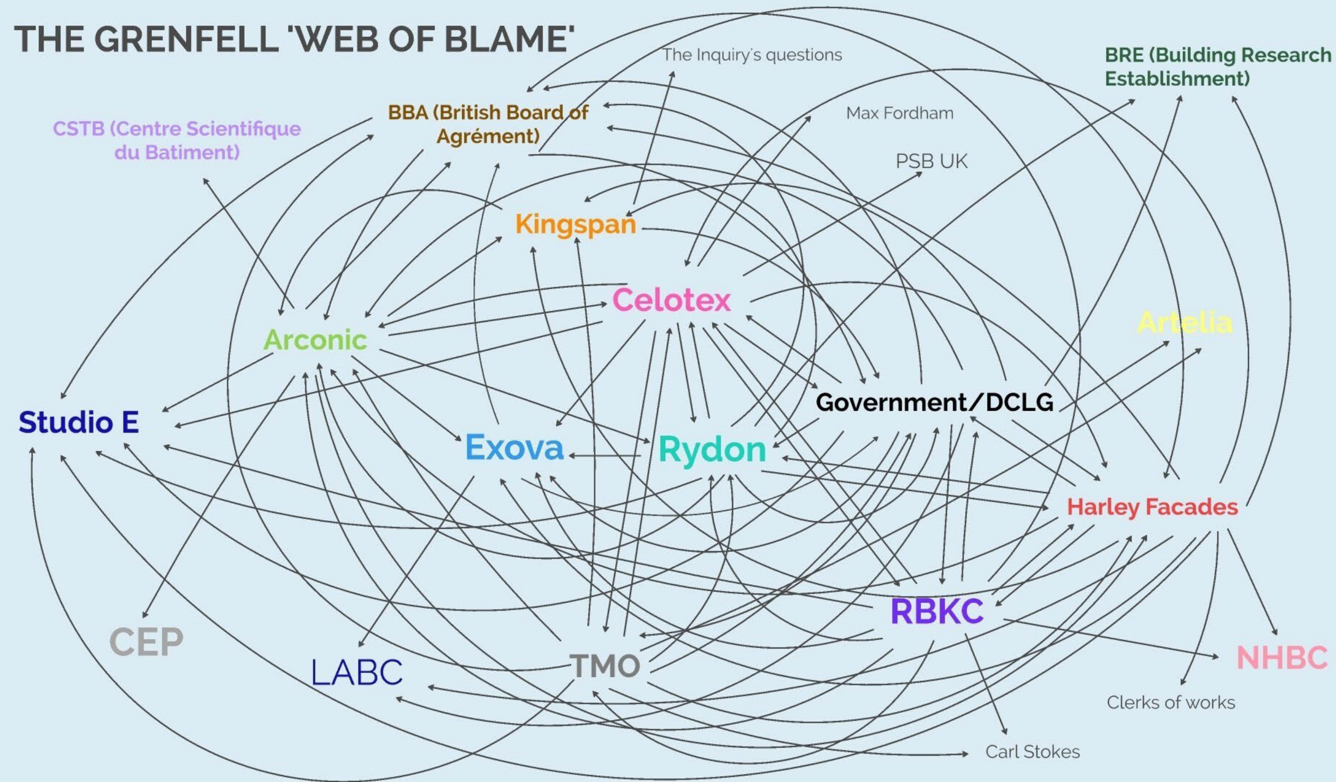
Overview

- Key findings from the Grenfell Tower Inquiry Phase 2 Report – Samantha Jones
- Potential implications of the findings for construction litigation – Alex Burrell
- Criticisms of the testing regime, impact for future external wall assessments and future implications – Kate Grange KC
- Key recommendations and the impact on the construction industry – David Hopkins

The Grenfell Tower Inquiry Phase 2 Report Key Findings

"How was it possible in 21st century London for a reinforced concrete building, itself structurally impervious to fire, to be turned into a death trap?"


THE GRENFELL 'WEB OF BLAME'
The Inquiry's questions
BRE (Building Research Establishment)
BBA (British Board of Agrément)
CSTB (Centre Scientifique du Batiment)
Max Fordham
PSB UK
Kingspan
Celotex
Arconic
Artelia
Government/DCLG
Studio E
Exova
Rydon
Harley Facades
RBKC
CEP
LABC
TMO
NHBC
Clerks of works
Carl Stokes

The path to disaster

"The fire at Grenfell Tower was the culmination of decades of failure by central government and other bodies in positions of responsibility in the construction industry to look carefully into the danger of incorporating combustible materials into the external walls of high-rise residential buildings and to act on the information available to them."

Testing and marketing of products

"Systematic dishonesty on the part of those who made and sold the rainscreen cladding panels and insulations products"

"Engaged in deliberate and sustained strategies to the testing processes, misrepresent test data and mislead the market"

"Those strategies succeeded partly because the certification bodies… failed to ensure that the statements in their product certificates were accurate and based on test evidence."

The refurbishment

- Identified significant problems in the use of ADB
- Cost-cutting led to the use of Reynobond 55 PE ACM panels.
- Choice of combustible materials for the cladding resulted from a series of errors : incompetence, failure to understand the guidance or their obligations, failure to take responsibility, a cavalier attitude.
- **Architect** – failed to recognise ACM as dangerous and to warn the client against its use, failed to act in accordance with standard of reasonably competent architect.
- **Fire engineer** failed to meet the standards of a reasonably competent fire engineer.

The refurbishment

- **Principal contractor** –inadequate and casual attitude to fire safety, did not ensure it or its sub-contractors understand were different responsibilities, inexperienced team, failed to take proper steps to investigate competence, complacent about the need for fire engineering.
- **Cladding contractor** – insufficiently concerned about fire safety, relied on others, failed to ask questions about materials expected of a reasonably competent cladding contractor, induced to buy Reynobond 55 PE ACM panels.
- **Client** – TMO – failed to take sufficient care in its choice of architect and paid insufficient attention to matters affecting fire safety.
- **Building Control** failed to properly scrutinise the design or choice of materials, or satisfy itself that it would comply with BR, failed to obtain information required.

Potential implications on construction litigation

- Claims against manufacturers and building professionals
- So far freeholders/developers/Government paying for remediation works – where to next?

Claims against manufacturers - 1 – Findings of the Inquiry

- Executive Summary:
  - One very significant reason why Grenfell Tower came to be clad in combustible materials was systematic dishonesty on the part of those who made and sold the rainscreen cladding panels and insulation products. They engaged in deliberate and sustained strategies to manipulate the testing processes, misrepresent test data and mislead the market.

Claims against manufacturers - 2 and 3

- 2 – Costs that have been incurred
- 3 – Recoverability

Claims against manufacturers – 4 - Recover options

- Section 148 and 149 of the Building Safety Act 2022
  - Legal and equitable interest
- Contribution Claims
- Assignment
- Reform?

Claims against Building Professionals

- Stage 2 Report findings against Studio E, Exova, Rydon and Harley

- Defective Premises Act 1972

Assessing the fire performance of external walls

- Chapter 111
- Important findings about the testing regime
- Clear implications for way external walls are assessed in future

Stay put strategy

- No hard recommendation to change
- But very strong pointers

  "…in a building with a "stay put" strategy for responding to fire, no significant spread of fire beyond the compartment of origin can be tolerated" (111.3)

  "A stay put strategy in response to a compartment fire will be acceptable only if there is negligible risk of fire escaping into and spreading through the external wall" (113.13)

Criticism of the fire testing regime

- Over-reliance on small scale tests (e.g. Class 0) which do not provide relevant information on external fire spread
- Limited relevance of large-scale BS 8414 test/BR 135 classification
- Lack of correlation with functional requirement – can get extensive fire spread and "pass" the test, yet still not compatible with functional requirement particularly if stay-put strategy
- Limited data from test

- Some materials don’t reach peak temperatures until 30 minutes after start of test e.g. HPL (Dagenham)
- Tells you what is a bad idea to include in the external wall, not what is a good idea
- Limited relevance of some European testing
- Lack of test evidence supporting the efficacy of cavity barriers

Implications?

- Reliance on BS 8414 testing
- PAS 9980 Guidance
- Scope for more buildings requiring remedial work
- Fire Safety Strategies – might become statutory documents

Other implications of Grenfell Report findings?

- Responsibility of Building Control
  - Serious failings RBKC Building Control at Grenfell Tower
  - NHBC – knowledge of scale of use of combustible insulation
  - Scope for revisiting responsibility?
- Government
  - Knowledge of risks posed by some combustible materials, including ACM PE
  - Failure to warn industry or properly regulate
  - Deregulation and cutting of red tape
  - Impact on e.g. “just and equitable” tests in BSA?

Recommendations

- Report makes recommendations under four headings:
  - The construction industry
  - The London Fire Brigade
  - Response and recovery
  - Vulnerable people

Recommendations: Construction industry

- In the Report, the Inquiry starts from the premise that the BSA is a big step in the right direction
- Though there are ways the Report recommends government and industry should go further

Recommendations: Construction industry

The construction regulator

- Most ambitious recommendation: establishment of a single construction regulator
- The regulator would be responsible for, among other things:
  - Construction products
  - Testing and certification
  - Regulation and oversight of building control
  - Monitoring the Building Regs and guidance

Recommendations: Construction industry

The construction regulator

- The construction regulator would also be responsible for other proposals recommended by the Inquiry:
  - Licensing of contractors to work on higher-risk buildings
  - Accrediting fire risk assessors

Recommendations: Construction industry

Definition of higher risk building

- Inquiry's view (para 113.7):

  "[…] we do not think that to define a building as "higher-risk" by reference only to its height is satisfactory, being essentially arbitrary in nature. More relevant is the nature of its use and, in particular, the likely presence of vulnerable people, for whom evacuation in the event of a fire or other emergency would be likely to present difficulty"

- The Inquiry recommends the BSA definition be reviewed urgently

Recommendations: Construction industry

Legislation and guidance

- Statutory guidance, AD B in particular, should be reviewed and revised as soon as possible
- Clear warning in each section that the legal requirements are contained in the Building Regs

Recommendations: Construction industry

Fire engineers

- Not a protected title currently
- The Report recommends an independent body be established to regulate the profession, define the standards required for membership, maintain a register of members and regulate their conduct

Recommendations: Construction industry

Fire engineers

- Pending establishment of the “Fire Engineers’ Council”, govt should convene a group of appropriate professionals to produce an authoritative competence statement
- Govt should take urgent steps to increase the number of places on high-quality masters level courses in fire engineering

Recommendations: Construction industry

Fire engineers/ fire safety strategy

- The Report recommends enacting a statutory requirement that a fire safety strategy produced by a registered fire engineer is:
  - submitted with building control applications (at Gateway 2) for the construction or refurbishment of any higher-risk building and
  - reviewed and resubmitted at the stage of completion (Gateway 3).

Recommendations: Construction industry

Fire risk assessors

- System of mandatory accreditation:
  - certify the competence of fire risk assessors
  - set standards for qualification and CPD and such other measures as may be considered necessary or desirable

Recommendations: Construction industry

Building control

- Govt should appoint an independent panel to consider whether:
  - it is in the public interest for BC functions to be performed by those who have a commercial interest in the process
  - all BC functions should be performed by a national authority

Recommendations: Vulnerable people

- Further consideration should be given to the recommendations made in the Phase 1 report – note, on 2 September 2024, two days before the Phase 2 report's release, the govt announced it will make proposals in relation to Residential PEEPs
- The advice contained in paragraph 79.11 of the LGA Guide should be reconsidered

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Hannah McCarthy

Vivek Kapoor

Flash update: Implications of Abbey Healthcare v Augusta

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Abbey v Simply: Background

Abbey v Simply: Warranty

4.1 The Contractor warrants that:

(a) the Contractor has performed and **will continue to perform** diligently its obligations under the Contract;

(b) in carrying out and completing the Works the Contractor has exercised and **will continue to exercise** all the reasonable skill care and diligence to be expected […];

(c) in carrying out and completing any design for the Works the Contractor has exercised and **will continue to exercise** all the reasonable skill care and diligence to be expected […].

Abbey v Simply: Adjudication

- 11 Dec 2020: Toppan and Abbey each refer to adjudication disputes against Simply regarding the defects
- Simply challenges jurisdiction in respect of Abbey's adjudication on the ground that the C/W is not a construction contract
- Adjudicator makes awards in each adjudication in favour of both Toppan and Abbey

Abbey v Simply: Enforcement

- Martin Bowdery QC refuses enforcement: [2021] EWHC 2110 (TCC); 197 ConLR 241
- Majority of the Court of Appeal allows Abbey's appeal: [2022] EWCA Civ 823; 203 ConLR 1
- Stuart-Smith LJ, dissenting: "One of the incidents of a warranty […] is that an injunction will not lie to enforce the underlying obligation": para 109

Abbey v Simply: Supreme Court

[2024] UKSC 23

- "*for* [...] the carrying out of construction operations"
- Difficult to see how the object of a C/W is the carrying out of construction operations: para 65
- Beneficiary has no control over the operations: para 67
- C/W not a construction contract unless there is a separate or distinct obligation to carry out construction operations for the beneficiary: para 70

Implications for beneficiaries and donors

Implications for the construction industry

- In "*the interests of certainty that there is a dividing line which means that [CW] are generally outside the 1996 Act …*" (78)
- Reverting to the position "*as it was generally understood to be before Parkwood*" *Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC) (83)

Implications for the construction industry

- Parties to a CW wanting to adjudicate:
  - Express provision in CW; or
  - Draft CW such that the warrantor owes a distinct and separate construction obligation to the beneficiary
- Existing disputes – into Court?
- Future disputes

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Justin Matthews
FRP Advisory

Adam Robb KC

Joe-han Ho

Hannah Fry

Panel 2: Insolvency

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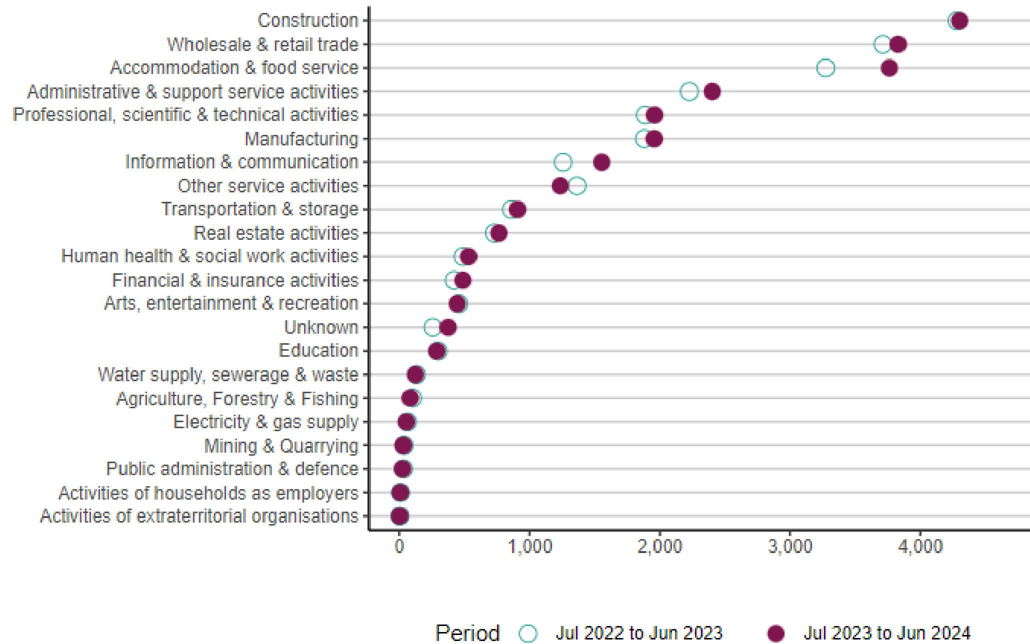
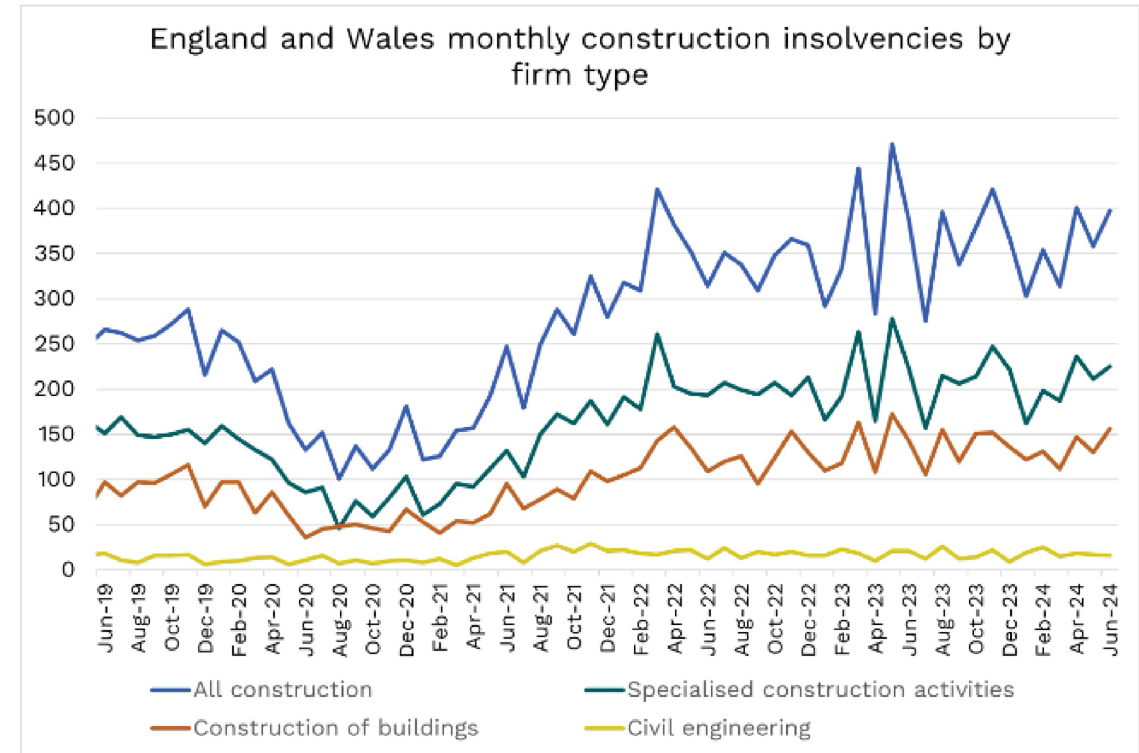
1. Statistics of insolvencies involving construction

Company insolvency by industry, England and Wales, July 2023 to June 2024 compared with July 2022 to June 2023



Sources: Insolvency Service (compulsory liquidations only); Companies House (all other insolvency procedures)



Source: The Insolvency Service

HM Courts & Tribunals Data Overview

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Key statistics

Total WUPs

Last 12 months

6,035

HMRC % of WUPs

Last 12 months

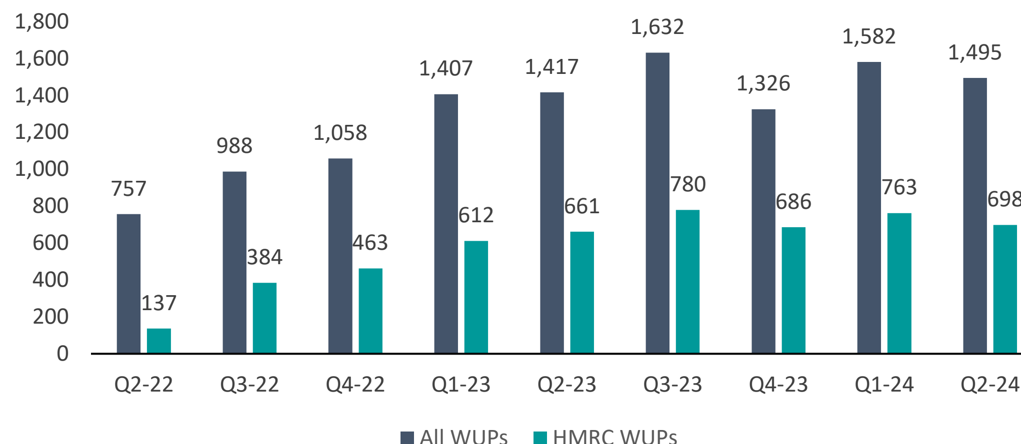
49% (2,927)

HMRC % WUPs to WUOs

Last 12 months

55% (1,621)

Source: HM Courts & Tribunals- Unadvertised Petitions & Gazette Data by Falcon. Date range: up to 30/06/2024 2024



Rank	Top 10 sectors by % HMRC WUPs vs All WUPs Q2 2024	Volume of All WUPs	Volume of HMRC WUPs	%HMRC WUPs in Top Sectors
1	Professional, scientific and technical activities	101	65	64%
2	Information and communication	92	58	63%
3	Administrative and support service activities	176	107	61%
4	Other service acitivies	67	36	54%
5	Transporation and storage	47	23	49%
6	Accommodation and food service activities	108	51	47%
7	Manufacturing	76	34	45%
8	Real Estate	134	54	40%
9	Construction	335	133	40%
10	Wholesale and retail	190	52	27%
	All others	169	85	50%

2. Why are construction firms especially vulnerable?

- ‘Construction industry’ – a very broad field!
- Nature of construction contracts: Cash is the lifeblood…
  - Capital intensive work
  - Not uncommon for delays to occur, with an impact up/down the chain
  - Not uncommon for disputes to arise, and non-cooperation if so
  - Parties often need cash to ‘get on with the job’ – a chicken and egg problem
- Recent and topical causes of vulnerability
- What does ‘insolvency’ even mean?

Sector considerations

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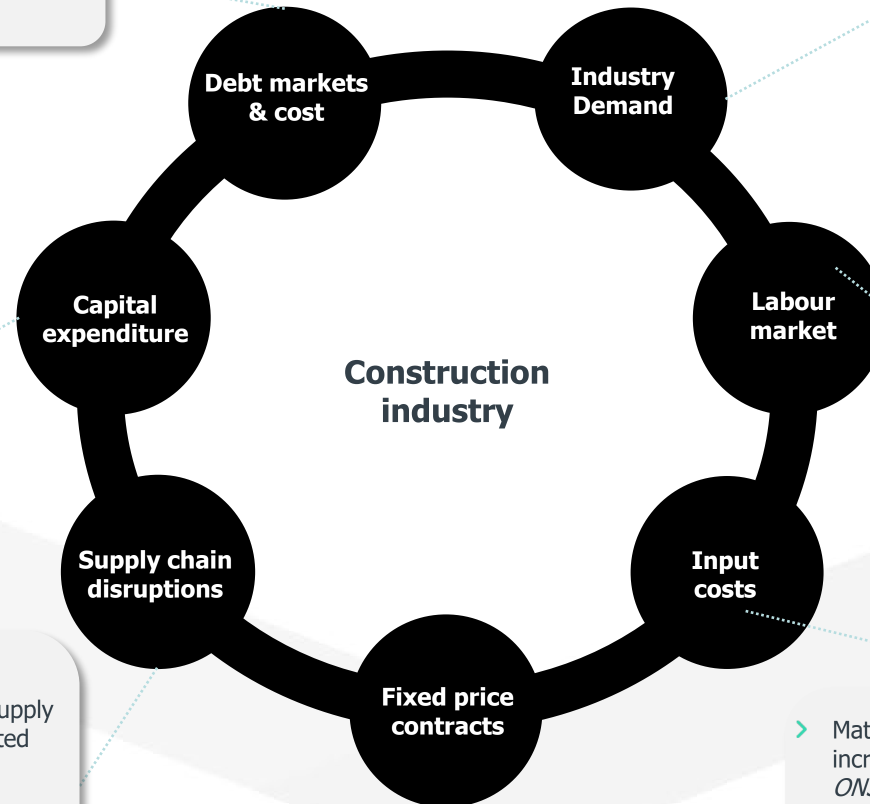
- Increased costs of borrowing negatively impacting cash flow.
- Withdrawal of government support.

- The industry is heavily reliant on the propensity to invest in activity and expansion tends to run in line with the wider economy.

- Despite shortfalls in construction investment in recent years, operators were able to find valuable contract opportunities in key growth markets.
- Economic growth is expected to accelerate in the medium-term, supporting a rise in tender opportunities.
- Due to lower level of competition which has arisen through industry consolidation, there are greater opportunities for firms with strong reputations.



- Tight labour markets and lack of a skilled workforce are contributing to increased wage costs and therefore lower margins within the industry.
- The impact of Brexit is still unclear, however, the increased barriers in relation to free movement of labour from the UK to Europe has required international firms to adapt to new market conditions.

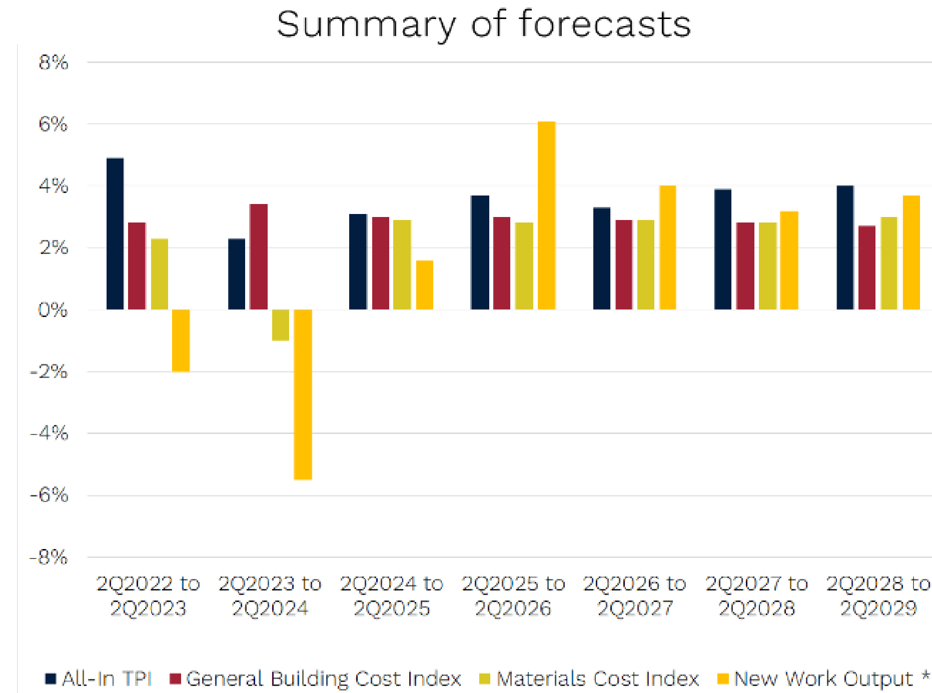
- In early 2023, despite an anticipated increase in industry output, industry supply chains are expected to remain dislocated leading to project slippage.
- Supply chain disruption, particularly regarding materials procurement, is expected to persist in the short-term, maintaining pressure on cash flows and increasing project delays.

- Companies being unable to pass on the inflationary cost to the end customer has led to losses on previously profitable contracts.

- Materials price index for construction work increased by 13.5% in October 2022 (*source: ONS – All work*) when compared year on year.
- Impact of the war in Ukraine has adversely affected other inputs such as energy costs which have increased significantly over the last 12 months.

3. Broader industry outlook for construction companies

Summary of forecasts



Source: BCIS, ONS

* BCIS forecast of new work output at constant 2019 prices

4. Warning signs of insolvency

- Red flags: Qualitative. About credit intelligence. A judgment call.
- A key red flag: Delayed payment or non-payment. Renegotiation of terms.
- Other red flags: Invoicing issues, supplier issues, direct requests from 3rd parties.
- Other red flags: Internal turmoil, external turmoil.
- Red flags: Always fact-specific. Keep communication lines open.

5. Tools to manage risks and challenges

- Due Diligence
- Contractual Rights
- Termination
- Corporate and Insolvency Governance Act 2020 - *26 June 2020*

6. Insolvency and contractual rights in construction contracts - JCT

- Updated Insolvency Definition – Clause 8.1
- Practical effect for Employers and Contractors – Clause 8.5 and 8.10

7. Post-insolvency risk to directors of construction companies

- Common causes of action against directors post-insolvency:
  - Section 212 IA 1986 (Misfeasance)
  - Section 213 IA 1986 (Fraudulent trading)
  - Section 214 IA 1986 (Wrongful trading)
  - Section 238 IA 1986 (Transactions at an undervalue)
  - Section 239 IA 1986 (Preferences)
  - CDDA 1986 (Director disqualification)

- <u>Spotlight</u>: Fraudulent trading
- <u>Spotlight</u>: Wrongful trading
- <u>Spotlight</u>: Preferences

8. Practical experiences and case law update

- Inland Homes
- *Peabody Trust v National Housing-Building Council* [2024] EWHC 2063 (TCC)

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Panel 3: Delay and Disruption

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Drax v Wipro – key facts

Drax Energy Solutions Ltd v Wipro Ltd [2023] EWHC 1342 (TCC)

Preliminary issues hearing, Waksman J

January 2017: IT system contract - the Master Services Agreement (“MSA”)

Drax: Customer

Wipro: Supplier

August 2019: Drax terminates

Drax's claims

(1) Misrepresentation - £31.7m

(2) Delay - £9.7m

(3) Quality - £9.8m

(4) Termination - £12m

MSA liability cap – Clause 33.2

Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date **the claim** first arose. If **the claim** arises in the first Contract Year [*e.g.* misrep, delay, quality claims] then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months [£11.5m].

Preliminary issues

(1) A single aggregate cap (Wipro) or multiple caps (Drax)?

(2) If multiple caps, then what were Drax's claims?

Effect of the rival interpretations

	Sum claimed by Drax (£m)	claim arose	cap according to Drax (£m)	cap according to Wipro (£m)
Misrep	31.7	Y1	11.5	11.5
Delay	9.7	Y1	11.5	
Quality	9.8	Y1	11.5	
Termination	12.0	termination	3.78	

Liability cap – Clause 33.2

Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's total liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date **the claim** first arose. If **the claim** arises in the first Contract Year then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months [£11.5m].

Royal Devon

Royal Devon and Exeter NHS Trust v ATOS [2017] EWCA Civ 2196

Clause 9.2

"… The aggregate liability of the Contractor in accordance with sub-clause 8.1.2 paragraph (b) shall not exceed:

9.2.1 for any claim arising in the first 12 months of the term of the Contract, the Total Contract Price as set out in section 1.1 [c £5m]; or

9.2.2 for claims arising after the first 12 months of the Contract, the total Contract Charges paid in the 12 months prior to the date of that claim."

Liability cap – Clause 33.2

Clause 33.2

[1] Subject to clauses 33.1, 33.3, 33.5 and 33.6, the Supplier's <u>total</u> liability to the Customer, whether in contract, tort (including negligence), for breach of statutory duty or otherwise, arising out of or in connection with this Agreement (including all Statements of Work) shall be limited to

[2] an amount equivalent to 150% of the Charges paid or payable in the preceding twelve months from the date **<u>the claim</u>** <u>first arose</u> [£3.78m, for the termination claim]. If **<u>the claim</u>** <u>arises</u> in the first Contract Year then the amount shall be calculated as 150% of an estimate of the Charges paid and payable for a full twelve months [£11.5m].

Other clauses of the MSA - Clause 33.3

Clause 33.3

The Supplier's total aggregate liability arising out of or in relation to this Agreement for any and all claims related to breach of any provision of clause 21 [data protection] whether arising in contract (including under an indemnity), tort (including negligence), breach of statutory duty, laws or otherwise, shall in no event exceed 200% of the Charges paid or payable in the preceding twelve months from the date **the claim first arose** or £20m (whichever is greater).

Triple Point considerations

Drax v Wipro, Waksman J, paragraph 87:

"In theory, all of that is true, but one has to be realistic. If, as Drax alleges here, the project was proving or threatening to be a disaster within the first year, it was hardly likely to commission yet further work and indeed at some point, it would surely terminate. That, of course, is exactly what Drax did in 2019. It should also be pointed out that clause 29.3 provides a right of partial termination and clause 31 provides for step-in rights. So I do not think that these arguments raised by Drax show that Wipro's interpretation makes no business sense, or was commercially absurd or anything like that."

Practical lessons from *Drax v Wipro*

(1) Words, words, words

(2) Does the cap fit?

(3) The perennial human element

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

Photo credit: Microsoft Designer AI

- A single, aggregate cap.
- Applied to all claims rather than multiple, separate caps.

Tata Consultancy Services Ltd v Disclosure and Barring Service

The Facts

TCS was engaged by DBS in 2012 to modernise and digitise its manual paper-based processes.

The modernisation project suffered from delays.

TCS brought claims for breach of contract in the value of £110.2 million, plus a claim of £14.3 million for underpaid charges.

DBS brought counterclaims for losses arising from delays and defects in the system with a value of £108.7 million.

Tata Consultancy Services Ltd v Disclosure and Barring Service

The Clause

- The clause:

"52.2.6 in respect of all other claims, losses or damages, shall in no event exceed £10,000,000 (subject to indexation) or, if greater, an amount equivalent to 100% of the Charges paid under this Agreement during the 12 month period immediately preceding the date of the event giving rise to the claim under consideration less in all circumstances any amounts previously paid (as at the date of satisfaction of such liability) by the CONTRACTOR to the AUTHORITY in satisfaction of any liability under this Agreement."

Tata Consultancy Services Ltd v Disclosure and Barring Service

The Issues

Did the cap on TCS's liability apply to each of DBS's counterclaims or was it a single, aggregate cap that applied to all claims under the contract?

Was TCS's liability for delay payments limited to 10% of implementation charges (and what were the implementation charges)?

Tata Consultancy Services Ltd v Disclosure and Barring Service

DBS Arguments

- As per [107] of the judgment:
  - The words *"in respect of all other claims, losses or damages"*.
  - The monetary limit is an alternative to a limit based on *"the Charges paid under this Agreement during the 12 month period immediately preceding the date of the event giving rise to the claim under consideration".*
  - A separate limit defined by the charges over a separate period.

Tata Consultancy Services Ltd v Disclosure and Barring Service
TCS Arguments

- As per [108] of the judgment:
  - The clause defines the *"total aggregate liability"*.
  - The mechanism requiring the deduction of amounts previously paid suggests one cap rather than multiple caps.
  - Relied on the decisions in *Royal Devon* and *Drax Energy Solutions*.

Tata Consultancy Services Ltd v Disclosure and Barring Service

Tata: "far from a model of clarity".

Devon: "least bizarre".

Drax: "linguistic quirks".

Tata Consultancy Services Ltd v Disclosure and Barring Service

The Decision

- As per [114]:
  - The words “the aggregate liability … in respect of all other claims, losses or damages, shall in no event exceed” are a clear indicator.
  - The simple language of “per claim” is absent.
  - The ‘netting off’ exercise.
  - The alternative calculation.
  - Implementation charges.
- The clause:

  “52.2.6 in respect of all other claims, losses or damages, shall in no event exceed £10,000,000 (subject to indexation) or, if greater, an amount equivalent to 100% of the Charges paid under this Agreement during the 12 month period immediately preceding the date of the event giving rise to the claim under consideration less in all circumstances any amounts previously paid (as at the date of satisfaction of such liability) by the CONTRACTOR to the AUTHORITY in satisfaction of any liability under this Agreement.”

Key Takeaways

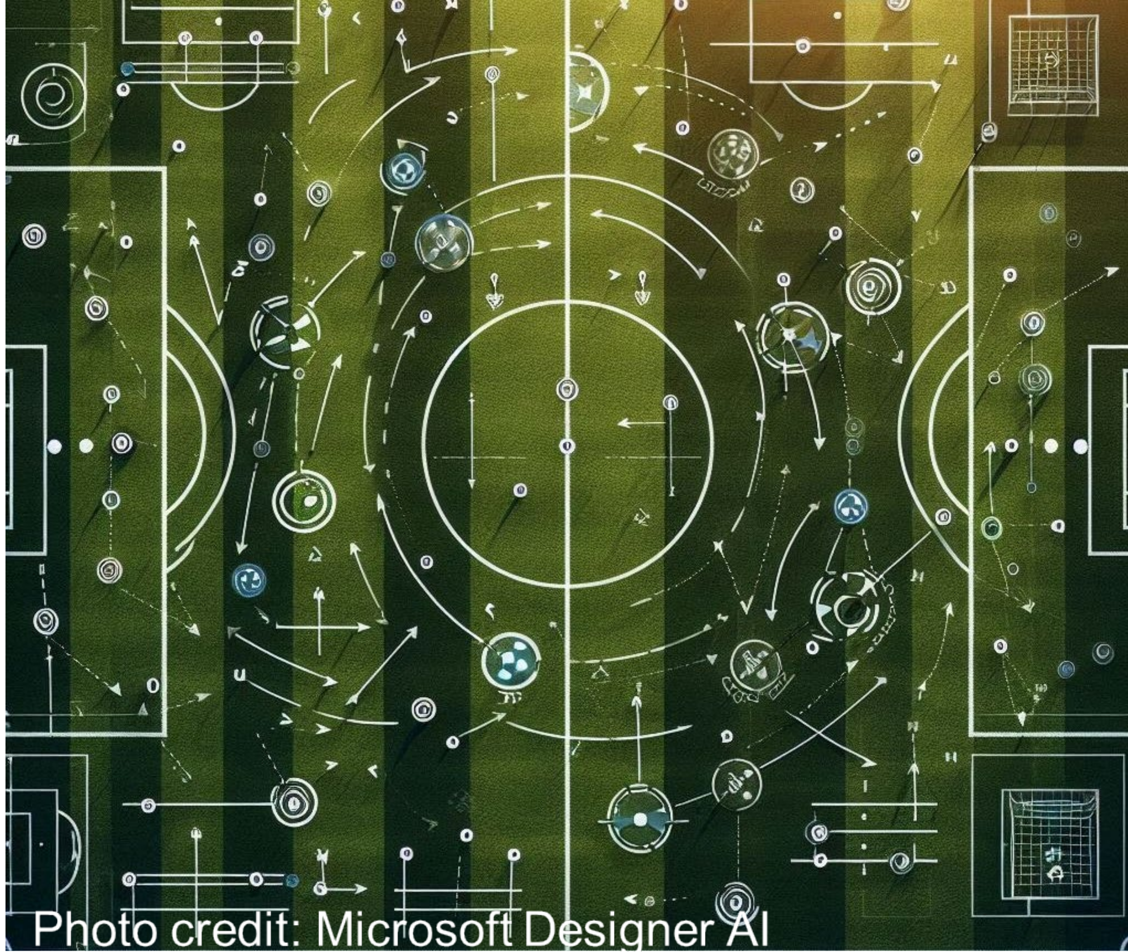
Photo credit: Microsoft Designer AI

- Negotiated at the outset.
- Understand the practical implications.
- Consider the different options.
- Defining terms.

Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29

- *Drax v Wipro* and *Tata Consultancy Services v Disclosure and Barring* and a number of other recent cases refer to the July 2021 Supreme Court judgment in *Triple Point Technology*

- Important guidance and clarity on drafting and interpretation of liquidated damages and liability cap clauses and the relationship between the two

Triple Point – Background

- PTT - a Thai state-owned energy company which *inter alia* carries out business as a commodities broker trading in oil and gas.
- Triple Point - a US software developer specializing in commodities trading platforms.
- PTT sought to replace its existing trading platform with an improved software system and in February 2013 appointed Triple Point to design, install, maintain and license a new Commodities Trading and Risk Management software system (the **CTRM Contract**, which was governed by English law).
- The Project was to be implemented in two phases: Phase 1 comprised the replacement of the existing trading platform with the new CTRM system and Phase 2 the development of the CTRM system to allow new types of trade.
- Phase 1 was to be completed within 460 days and was priced at USD$6.9m

Triple Point – Key contractual terms

- Article 5.3 of the CTRM Contract provided for liquidated damages for delay in these terms:

"If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work, provided, however, that if undelivered work has to be used in combination with or as an essential component for the work already accepted by PTT, the penalty shall be calculated in full on the cost of the combination."

Triple Point – Key contractual terms

- Article 12.1 of the CTRM Contract provided:

"CONTRACTOR shall exercise all reasonable skill, care and diligence and efficiency in the performance of the Services under the Contract and carry out all his responsibilities in accordance with recognized international professional standards. [...]"

Triple Point – Key contractual terms

Article 12.3 of the CTRM Contract provided the liability cap:

"CONTRACTOR shall be liable to PTT for any damage suffered by PTT as a consequence of CONTRACTOR's breach of contract, including software defects or inability to perform 'Fully Complies' or 'Partially Complies' functionalities as illustrated in Section 24 of Part III Project and Services. The total liability of CONTRACTOR to PTT under the Contract shall be limited to the Contract Price received by CONTRACTOR with respect to the services or deliverables involved under this Contract. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for CONTRACTOR, upon written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to CONTRACTOR for the Services or Deliverables related to the breach. This limitation of liability shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."

Triple Point – the Dispute

- Triple Point's services were significantly delayed from the outset. In March 2014 the parties agreed that PTT would accept the work performed in respect of the first two milestones of Phase 1 (around 5 months late): PTT paid Triple Point for that work (amounting to 15% of the total Phase 1 value).
- However, in May 2014 Triple Point demanded payment in respect of other invoices: PTT refused to make those payment and Triple Point refused to continue performance of the CTRM Contract.
- Triple Point undertook no further work and in March 2015 PTT terminated the CTRM Contract.

Triple Point – Three Key Issues

- Were liquidated damages payable under the contract in respect of work which had not been completed before the contract was terminated?
- Were damages for negligent breach of contract excluded from the contractual cap on liability?
- Did liquidated damages fall within the contractual cap on liability?

Triple Point – TCC

The case was heard at first instance by Jefford J who handed down judgment in August 2017 [2017] EWHC 2718 (TCC) dismissing Triple Point's claim and awarding PTT just under USD$4.5M, finding:

- Triple Point was responsible for the delay in performance of the CTRM Contract (in breach of its obligation to exercise reasonable skill, care and diligence in the performance of its services, Art 12.1) ([2021] UKSC 29, para 20).
- PTT was entitled to *inter alia:* (i) damages for breach of contract; (ii) wasted costs and termination loss; and (iii) liquidated damages for delays prior to termination ([2021] UKSC 29, para 21).
- Triple Point's liability for wasted costs and termination loss was capped pursuant to article 12.3 but PTT's entitlement to liquidated damages was <u>not</u> subject to the cap ([2021] UKSC 29, para 22).

Triple Point – Court of Appeal

The Court of Appeal (Lewison and Floyd LLJ and Sir Rupert Jackson) [2019] EWCA Civ 230 took a very different approach and set aside the award of liquidated damages finding:

- That PTT was only entitled to liquidated damages in respect of works that had been completed and that no liquidated damages were payable in respect of milestones not completed by Triple Point at termination.
- That PTT's entitlement to liquidated damages and general damages was subject to the liability cap and that the exception to the limitation of liability for "negligence" did not apply to negligent breach of contract.

Triple Point – Supreme Court

In a welcome judgment, the Supreme Court (Lord Hodge, Lady Arden, Lord Sales, Lord Leggatt and Lord Burrows) resolved the uncertainty created by the Court of Appeal and provided guidance on the correct interpretation of liquidated damages clauses: The Supreme Court:

- In respect of the liquidated damages clause, was unanimous in rejecting the Court of Appeal's judgment;
- In respect of the limitation of liability clause:
  - By a majority (Lords Hodge and Sales dissenting) rejected the Court of Appeal's construction of the limitation clause in respect of the exclusion of negligence; and
  - Agreed with the Court of Appeal that liquidated damages were subject to the liability cap.

Triple Point – Key Findings

In respect of the liquidated damages clause:

- The orthodox position was restored: uunless the parties clearly provide otherwise by the terms of their agreement) will be that liquidated damages will accrue and be payable if the agreed event for which they are payable occurs before termination

- Emphasis on commercial reality - the fundamental commercial purpose of a liquidated damages clause is directly relevant to its construction (Lady Arden [35]): "*Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. […]*"

Triple Point – Key Findings

In respect of the limitation of liability clause:

- Importance of full textual and contextual analysis in considering the liability cap provisions (Lady Arden)

- Lord Leggatt's analysis paras 106-113 most notable:
  - Clear words needed to restrict valuable rights;
  - The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation.

Triple Point – Application by the courts

- "*Triple Point Considerations*" per Waksman J in *Drax v Wipro*
- Also para 52 of *Tata Consultancy Services* per Constable J (Leggatt para 108)

Triple Point – Practical Application

- “CTRM Contract clauses were bespoke but the need to take care to define in clear words the intended scope of any clauses which seek to limit or exclude liability is clear and particular care should be taken when a limitation clause is expressed not to apply to certain types of liability to ensure that the effect of that exception is understood.

McGee v Galliford Try

McGee Group Ltd v Galliford Try Building Ltd [2017] EWHC 87 (TCC)

"Anyone who has ever put together, argued or been obliged to decide a claim for loss and expense under a building contract, knows that no sensible distinction can be drawn between delay and disruption. One man's delay is another man's disruption." [49] Coulson J

McGee v Galliford Try

- McGee were GT's subcontractor for Resort World in Birmingham.
- GT claimed £3.3m for delay and disruption due to McGee's delayed completion.
- McGee relied upon a 10% cap = £1.5m
- GT accepted £1m of their claim was subject to the cap but maintained further £2.3m was not caught by the cap.
- Part 8 claim for declarations as to construction of the subcontract.

McGee v Galliford Try

2.21 If the Sub-Contractor **fails to complete the Sub-Contract Works or such works in any Section within the relevant period or periods for completion**, … the Sub-Contractor shall pay or allow to the Contractor the amount of any **direct loss and/or expense** suffered or incurred by the Contractor and caused by that failure.

2.21A If the **Sub-Contractor fails to complete the Sub-Contract Works** or fails to undertake such of the Sub-Contract Works or such works in any Unit within the relevant period or periods **such that the Contractor is unable to achieve the Access Condition for the given Unit** under the Main Contract… the SubContractor shall pay or allow to the Contractor the amount of any direct loss and/or expense suffered or incurred by the Contractor and caused by the Sub-Contractor's failure. …

McGee v Galliford Try

2.21B Provided always that the **Subcontractor's liability for direct loss and/ or expense and/or damages** shall not exceed 10% (ten percent) of the value of this Subcontract order.'

McGee v Galliford Try

4.21.1 If the **regular progress of the Main Contract Works** or any part of them is materially affected by any **act, omission or default of the Sub-Contract** [sic] … the Contractor shall within a reasonable time of such material effect becoming apparent notify the SubContract in writing…

4.21.2 Any sum reasonably estimated by the Contractor as due in respect of any **loss, damage, expense or cost** thereby caused to the Contractor may … be deducted from any monies due or to become due to the Sub-Contractor or shall be recoverable by the Contractor from the Sub-Contractor as a debt.

McGee v Galliford Try

- Did “and/or damages” make Cl 2.21B too wide and therefore ineffective?
- Could a distinction be drawn between claims under Cl 2.21 and Cl 4.21 (i.e. between delay and disruption)?
- Did the cap in Cl 2.21B apply to all claims for delay /disruption?

Key Takeaways

(1) Ensure amendments are consistent

(2) Clarity of purpose

(3) Recognise reality

All Day Construction Conference 2024

Thursday, 3 October 2024

Andrew Deakin

Flash update on Sanctions

39 Essex Chambers
#39Events

Mints etc v (1) PJSC National Bank Trust (2) PJSC Bank Otkritie Financial Corp [2023] EWCA Civ 1132

- What the case was about
- The core issues and what the CoA found
- “Control”
- What next …

Russia (Sanctions) (EU Exit) Regulations 2019/855

7.— Meaning of "owned or controlled directly or indirectly"

(1) A person who is not an individual ("C") is "owned or controlled directly or indirectly" by another person ("P") if either of the following two conditions is met (or both are met).

…

(4) The second condition is that it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's **wishes.**

Russia (Sanctions) (EU Exit) Regulations 2019/855

- Regulation 11(1):

A person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources.

- Regulation 12(1):

A person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.

(1) THE JUDGEMENT ISSUE

"The court system in England and Wales does not have outlaws or, as they were described in Taruta, pariahs." [178]

(2) THE LICENSING ISSUE

- *"there is no question of these grounds being exceptions to sanctions to be construed narrowly. They are grounds for the grant of licences to be construed in the ordinary way"* [214]

- *"However, the cases in which the court awards damages on a cross-undertaking are pretty few and far between and the particular circumstances in which the need for a licence might arise, as set out above, would be out of the ordinary and, effectively, unanticipated."* [223]

(3) CONTROL

At first instance …

"Reg "7(4) is essentially "backstopping" any form of ownership and control which falls slightly outside 7(2); for example a situation where a designated person has established a discretionary trust, the trustees of which own various companies, which in turn own underlying assets, and where the designated person might in fact have retained effective control of the companies within it, and be able to cause their affairs to be conducted in accordance with his wishes." Cokerill J [233]

(3) CONTROL (cont)

In the Court of Appeal…

*"the use of the words: "in all the circumstances" and "by whatever means" makes it clear that the provision **<u>does not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control, that the affairs of the company are conducted in accordance with his wishes".</u>** Mr Rabinowitz KC's description of Regulation 7(4) as applying when the designated person "calls the shots" is an apt one."* [229]

(4) CONTROL (cont)

"…the absurd consequences arise not from giving the Regulation its clear and wide meaning but from the subsequent designation by the Government of Mr Putin, without having thought through the consequences that, as he put it, Mr Putin is at the apex of a command economy. In those circumstances, consistently with the concession I mentioned in [63], in a very real sense (and certainly in the sense of Regulation 7(4)), ***Mr Putin could be deemed to control everything in Russia****."* [233]

What next?

- "Ownership and Control: Public Officials and Control guidance"
- *Litasco SA v Der Mond Oil and Gas Africa SA* [2023] EWHC 2866 (Comm)
- *Hellard v OJSC Rossiysky Kredit Bank* [2024] EWHC 1783 (Ch)
- Supreme Court …

AND REMEMBER…

- Trade, Aircraft and Shipping Sanctions (Civil Enforcement) Regulations 2024 come into force **10 October 2024** ..
- Statutory Guidance published 12 September 2024
- We will now be dealing with the Office of Trade Sanctions Implementation and the DfT as well as OFSI …

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39 Essex Chambers
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All Day Construction Conference 2024

Thursday, 3 October 2024

Jonathan Cope
MCMS Limited

Karen Gough

David Sawtell

Melissa Shipley

Panel 4: Adjudication

39 Essex Chambers
#39Events

Adjudication case law update: SET-OFF, ADJUDICATOR FEES AND INTEREST

39 ESSEX CHAMBERS CONSTRUCTION LAW CONFERENCE

3 October 2024

KAREN GOUGH,

Barrister, Attorney-at-Law, Adjudicator and Chartered Arbitrator

The cases

1. SET-OFF IN ADJUDICATION:

   CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED

   [2024] EWHC 2188 (TCC)

2. ADJUDICATOR'S FEES AND INTEREST

   A & V BUILDING SOILUTION LIMITED V J & B HOPKINS LIMITED

   [2024] EWHC 2295 (TCC)

SET-OFF IN ADJUDICATION
CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED
[2024] EWHC 2188 (TCC)

The principles restated through the cases:

Bexheat Ltd v Essex Services Group Limited [2022] EWHC 936

- Where there exists a valid payment application and no payment notice or pay less notice under s111 HGCRA: the Adjudicator will order payment and parties are obliged to comply with the decision and pay [immediately];
- The Courts take a positive approach to enforcement;
- A Party wishing to pursue a "true value" adjudication may do so only when it has paid pursuant to the first decision, albeit that there is no blanket principle to this effect: see S&T (UK) Ltd v Grove Developments Ltd [2018] EWHC Civ 2448, and Lidl GB v Closed Circuit Cooling Limited [2023] EWHC 3051.

SET-OFF IN ADJUDICATION
CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED
[2024] EWHC 2188 (TCC)

The principles restated:

FK Construction Limited v ISG Retail Limited [2023] EWHC 1042 (TCC).

- **The general position**: no set off or withholding against payment should generally be permitted;
- **Three limited exceptions**:
  - [Rarely] where there is a specific contractual right to set off;
  - Where it follows logically from an adjudicators decision that the adjudicator is permitting a set off against the sum otherwise payable;
  - "…at the discretion of the Court where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other."

SET-OFF IN ADJUDICATION
CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED [2024] EWHC 2188 (TCC)

The principles restated:

The exercise to be undertaken by the Court has not changed: **HS Works Ltd v Enterprise Managed Services Limited [2009] EWHC 729 (TCC):**

- At the time the issue is before the Court, are both decisions valid? If not, or if it is not possible to decide if they are both valid, go no further – no set off.
- If both are valid, are both capable of enforcement or being given effect to, if not, no set off.
- If both are valid and capable of enforcement, **and provided** enforcement proceedings have been brought to enforce them both, enforce them both.
- How each decision is to be enforced is a matter for the court. It may be inappropriate to permit a set off of a 2nd financial decision if the first decision is predicated on a basis there could be no set off.

SET-OFF IN ADJUDICATION
CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED
[2024] EWHC 2188 (TCC)

The Facts: C issued an application for interim payment [IP] in December 2023; no payment notice or pay less notice was served. It wasn't paid so C commenced an adjudication[A1] and on 5 March 2024 secured a Decision in its favour against D for the full sum.

D did not pay. On 15 March 2024, D commenced a "true value" adjudication for the final account [A2] and repayment of any sums overpaid based on C's September 2023 application. The sums were the same as claimed by C in its December 2023 IP application.

C challenged the adjudicator's jurisdiction in A2. The adjudicator continued and in his decision of 14 April 2024 awarded C a lesser sum which D paid less CIC contributions allegedly owed by C.

C also issued a third adjudication on 15 March 2024 based on its September 2023 application claiming payment of the sum applied for or such other sum as the adjudicator decided proper.

C commenced proceedings by way of summary judgment application to enforce the decision in A1 on 21 March 2024. D did not issue proceedings to enforce the decision in A2.

D invited the Court to set off the decision in A2 or withhold enforcement on the basis of the decision in A2. D did not raise any other defence to enforcement of the decision in A1.

CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED [2024] EWHC 2188 (TCC)

The judgment: The Court decided it should not exercise its discretion to permit a set off. Set off is not generally permitted, decisions are to be enforced summarily and expeditiously.

- Discussing Akenhead J's decision in HS Works, enforcement proceedings were issued in respect of both decisions, the Court determined that each was valid. Here C challenged jurisdiction in A2, D had not made any application to determine that issue, it had yet to be determined. It was not inevitable that A2 would be enforced.
- If set off should be considered in any event, the Court held that while the payment cycles may be different [dates], the subject matter and claims were the same final account issues, therefore any distinction was artificial.
- The jurisdiction challenge was relevant to the exercise of the Court's discretion. Absent enforcement proceedings to decide the jurisdiction challenge, it was not possible to decide if D was entitled to commence A2.

CNO PLANT HIRE LIMITED V CALDWELL CONSTRUCTION LIMITED [2024] EWHC 2188 (TCC)

Lessons:

- There are limited grounds to resist enforcement of a valid Adjudicator's Decision under the HGCRA 1996:

Possibly:

  - Want of jurisdiction or breach of natural justice.

Rarely:

- By set off of a subsequent Adjudicator's Decision, especially if:
  - The first decision has not been honoured/paid; and/or
  - There is no application to enforce the second decision before the Court.

Takeaways: Successful claims to set off in adjudication enforcement proceedings are rare. If there is a worthwhile claim to set off of a second adjudication decision, issue proceedings to enforce it so the Court can decide if both decisions are valid and enforceable.

ADJUDICATOR'S FEES AND INTEREST
A & V BUILDING SOILUTION LIMITED V J & B HOPKINS LIMITED
[2024] EWHC 2295 (TCC)

- Principles:
- Adjudicator's fees: An adjudicator's decision as to liability to pay fees is final and is not subject to challenge in subsequent arbitration/litigation: Castle Inns (Stirling) Ltd v Clark Contracts Ltd. [2005] Scot CS CSOH 178

- Statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act") applies to a debt created by virtue of an obligation under a contract. An award of damages for loss of profit was not such a debt: National Museums and Galleries on Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013] EWHC 3025 (TCC).

ADJUDICATOR'S FEES AND INTEREST
A & V BUILDING SOILUTION LIMITED V J & B HOPKINS LIMITED
[2024] EWHC 2295 (TCC)

Facts:

In proceedings C succeeded in overturning an adjudicator's decisions in favour of D. In the adjudication the adjudicator found against C and also awarded his fees and expenses to D, which decision the court had enforced earlier, including the award of the adjudicator's costs and expenses against C.

C argued that D should [now the adjudicator's decision had been reversed] also be ordered to pay the fees and expenses. C Also claimed interest under the 1998 Act.

D argued that the adjudicator's decision as to liability for fees and expenses was not reviewable, and also argued that the sub-contract provided for simple interest at 2% over base rate for late payment and that C acknowledged that that was a "substantial remedy" under s9 of the Act.

ADJUDICATOR'S FEES AND INTEREST
A & V BUILDING SOILUTION LIMITED V J & B HOPKINS LIMITED
[2024] EWHC 2295 (TCC)

- **Judgment:**
- Case law in England supported the view that an adjudicator's decision as to liability to pay his fees was not reviewable: Coulson on Adjudication [10.25] and Castle Inns (Stirling) Ltd v Clark Contracts Ltd. [2005] Scot CS CSOH 178 considered. There are arguments suggesting Castle Inns should be reconsidered, but as they were not pleaded, no order was made.
- C was entitled to statutory interest on its measured works claim at the statutory rate pursuant to the 1998 Act since the terms of the relevant sub-contract did not provide a substantial remedy for late payment so as to oust the application of the Act. Claims for interest on sums awarded as damages for loss of profit were rejected – they were not a qualifying debt under the Act (see National Museums and Galleries ibid.) Other claims were awarded simple interest at 4% over base rate.

ADJUDICATOR'S FEES AND INTEREST
A & V BUILDING SOILUTION LIMITED V J & B HOPKINS LIMITED
[2024] EWHC 2295 (TCC)

Lessons:

- Pay attention to issues of liability for adjudicators fees when arguing in the adjudication because they are not [currently] reviewable in court or arbitration.

Takeaways:

- Even if you succeed in reversing an adjudicator's decision on the merits of the dispute at trial, there is no right to review or change their decision as to liability for their costs and expenses.
- Nonetheless, if you have a good argument as to why the court could or should review the Adjudicator's award as to costs, make sure you plead it! (And be prepared to appeal it?)
- When claiming interest distinguish between damages and debt and unless the contract provides a substantial remedy for late payment, claim the higher statutory rate for anything which could be conceived as a debt.

Case One:

Henry Construction Projects LTD v ProMep LTD
[2024] EWHC 1825 (TCC)

Background

- 25 October 2021: ProMep entered into a CVA (para 5).
- 23 November 2022: ProMep's Referral Notice. Claimed that Henry was in repudiatory breach of contract, which ProMep had accepted as terminating the contract. Promep claimed payment for work done and damages (para 20).
- Henry counterclaimed. ProMep argued that the counterclaim was settled by the CVA.
- Henry then submitted in the Rejoinder that ProMep's claim was settled by the CVA (para 23).
- ProMep summarised advice from counsel in the Surrejoinder that was said to support its position (para 24).

Background

- 5 January 2023: Adjudicator decided in ProMep's favour that Henry had repudiated the contract and that ProMep was entitled to be paid £90,380.49.
- Henry started Part 8 proceedings seeking a final determination of the issue as to whether the CVA settled all claims as between ProMep and Henry.
- ProMep started Part 7 proceedings to enforce the Adjudicator's decision.

Counsel's advice

- Henry argued that there was a material misrepresentation of fact as to the contents of counsel's advice, that the Adjudicator relied on that representation and that was a ground for not enforcing his decision (para 40).
- Court found that the only way that could assist is if they were sufficient to give rise to an arguable defence that the decision was procured by fraud (para 41).
- However:
  - Counsel's advice is not evidence (para 42).
  - In any event, no arguable case that ProMep had fraudulently misrepresented counsel's advice (para 45). Summary before the Adjudicator contemplated that the ProMep claims might or might not be within the CVA (para 54).
  - Henry could have, but did not, raise the issue of whether the summary was clear in the adjudication. *SG South v Kingshead Cirencester LLP* [2009] EWHC 2645 (TCC).

Counsel's advice

- Even if there was a misrepresentation of counsel's advice or ProMep's understanding of it, it was not material.
- *"At the risk of repetition, presenting an adjudicator with advice from counsel is a technique commonly adopted to persuade but no more than that…the adjudicator is simply being presented with a legal argument and had to reach his own decision on the law…"* (para 62).
- *"I do not go so far as to completely exclude the possibility that there may be circumstances in which a legal opinion is so badly misrepresented to an adjudicator that it is capable of amounting to fraud but such circumstances are extremely difficult to envision"* (para 62).

Case Two:

Bell Building Ltd v Tclarke Contracting Ltd
[2024] EWHC 1929

Issue

Could the adjudicator award more than the sum claimed in the Referral?

The Facts

- Smash and grab adjudication in relation to IPA 18. Adjudicator found that no valid Pay Less Notice had been issued.
- TCL argued that the decision should not be enforced due to lack of jurisdiction and/or breach of natural justice.
- TCL argued that the Adjudicator had taken it upon himself to value the work done in IPA 18 and award a sum that was higher than that sought in the Referral.

The Facts

- In the Referral, Bell sought £1,443,981.51 plus applicable VAT.
- In his decision, the Adjudicator awarded £2,129,672.69 plus applicable VAT.
- Reason for the difference was that Adjudicator did not take into account payments made in relation to IPA 19, which TCL said he did not have jurisdiction to take account of.

The Law: Recap

- Jurisdiction: *Cantillon Limited v. Urvasco Limited* [2008] EWHC 282 (TCC) at paragraph 55.
- Natural justice: *Cantillon Limited v. Urvasco Limited* [2008] EWHC 282 (TCC) at paragraph 57.

The Judgment

- Natural justice (para 25):
  - Did not go off on a frolic of his own.
  - Decision was a product of responding to and accepting the case put forward by TCL.
  - Did not carry out a valuation exercise, corrected the arithmetic.

The Judgment

- Jurisdiction (para 26):
  - Reached the decision that he had been invited to by TCL, i.e. ignored the payments under IPA 19.
  - TCL's submissions "*…opened up the possibility of a different, greater assessment of the sum due than claimed*".

LAST CHANCE SALOON
·EST·1913·

LAST CHANCE TO DO AN ADJUDICATION

Dr David Sawtell FCIArb

The issue – conclusive evidence provisions

- JCT DB 2024:

  *"1.8.1. As from the due date for the final payment… the Final Statement… shall, except as provided in clauses 1.8.2 and 4.24.6 (and save in respect of fraud) have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration, or legal proceedings) **as conclusive evidence**…"*

  "1.8.2 The effects on the relevant statement specified in clauses 1.8.1 and 4.24.6 shall be suspended pending the conclusion of any adjudication, arbitration, or other proceedings, and shall be subject to the terms of any decision, award or judgment in and any settlement of those proceedings:

  … where those proceedings are commenced before or within 28 days after the due date for the final payment…"

The issue – conclusive evidence provisions

- NEC4:
  - *"53.3 An assessment of the final amount due issued within the time stated in the contract **is conclusive evidence** of the final amount due under or in connection with the contract unless a Party takes the following actions…"*

The policy of conclusive evidence clauses

- *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689
- *Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd* [2015] EWHC 70 (TCC)
  - Provide some limits to uncertainties and expense of arbitration and litigation.
  - Conclusive evidence clauses were devised "*to obviate cumbersome and painstaking enquiries to prove out-standings on running accounts…*".
  - Conclusive evidence clauses are intended "*to provide contractually agreed limits to the scope of disputes and to provide clarity as to the parties' obligations once a project is complete*".
- *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC), 213 ConLR 204

- JCT DBSub/A 2011 contract, as amended.
- **27 January 2022** - Practical Completion certified.
- **19 December 2022** – QFS serves Notice of Adjudication respect of the calculation of the final sub-contract sum.
- **22 November 2022** - Final Payment Notice issued
- Parties agreed to extend time for the referral until at least 13 January 2023.
- **31 January 2023** – BPS ends 'waiver' on 3 February 2023.
- Settlement negotiations continue.
- **17 May 2023**: QFS serves same Notice again.

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC), 213 ConLR 204

"1.8.2 If adjudication, arbitration or other proceedings are commenced:

.1 by either Party prior to or within 10 days after the date of receipt of Final Payment Notice;

…

*the Final Payment Notice shall not have the effects specified in clause 1.8.1 in relation to the subject matter of those proceedings **pending their conclusion**. Upon such conclusion, **the effect of the Final Payment Notice shall be subject to the terms of any decision, award or judgement in or settlement of such proceedings**."*

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC), 213 ConLR 204

- BPS brought a Part 8 claim, QFS brought Part 7 enforcement proceedings.
- Lucy Garrett KC (Walker Morris) for BPS; Marion Smith KC and David Sawtell for QFS (Ward Hadaway).
- Alexander Nissen KC sitting as a High Court judge.

HELD:

- There was an agreed variation to the time within which the Referral should be served. BUT only until 13 January 2023.
- Question – what was the ‘conclusion’ of the adjudication?
  - The lapse of the notice?
  - The decision?

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC), 213 ConLR 204

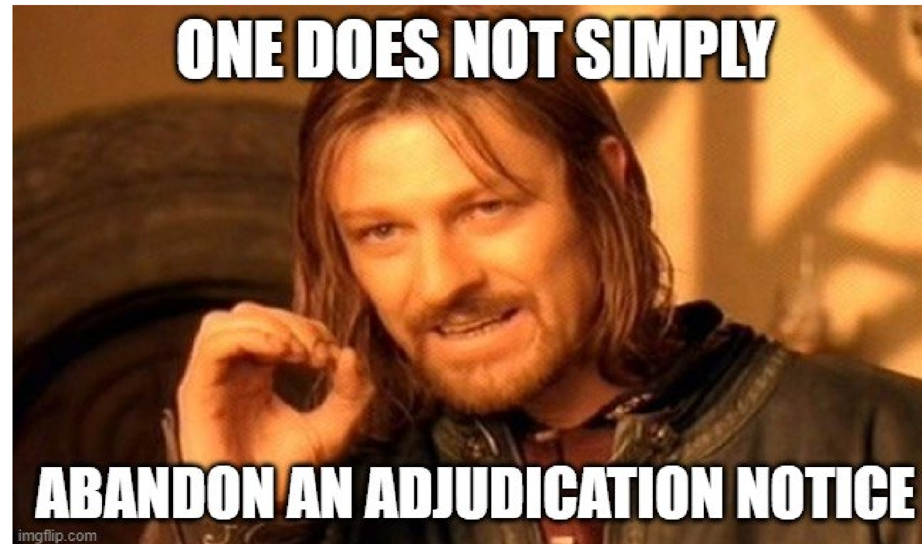
- *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC) – the saving provision is triggered once proceedings are ‘commenced’.
- If the proceedings then become a nullity, this is not a ‘conclusion’. The wording of the clause assumes that the proceedings conclude in either a decision or a settlement.
- The alternative interpretation could result in a harsh outcome e.g. if the adjudicator breaches natural justice.
- BUT – what about abandonment?

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC), 213 ConLR 204

- *Tracy Bennett v FMK Construction Ltd* [2005] EWHC 1268 (TCC)
  - if the referring party abandons adjudication proceedings by not pursuing them, then the saving provision ceases to apply.
- Did QFS abuse its timely commencement of proceedings either by lacking or losing any genuine intention to resolve the underlying dispute raised by the Notice?
- Objective analysis.
  - Did not serve a Referral because it erroneously concluded it did not need to.
  - Substantive negotiations between the parties.
  - QFS always made it clear that it intended to pursue the adjudication if a settlement was not reached.

Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd [2024] EWHC 591 (TCC), 213 ConLR 204

- Held that QFS did not abandon the adjudication proceedings.
- The Decision was enforced.



Take away points

- Conclusive evidence provisions attract their own body of case law.
- Need to be careful to commence a challenge to a certificate in a timely fashion.
- Once adjudication commenced, you have your ‘foot in the door’.
- Relatively easy to abandon proceedings.

Thank you for listening!

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What parties can do to help an adjudicator?

3rd October 2024

Jonathan Cope
Adjudicator | Arbitrator | Expert Determiner | Mediator

What parties can do to help an adjudicator?

1. Be collaborative (where possible)
2. Ask for what you want
3. Get good advice
4. Summarise and explain
5. Remember that more is not necessarily better
6. Try to avoid taking bad points
7. The importance of evidence

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Thursday, 3 October 2024

Kelly Stricklin-Coutinho

Flash Update: Consequences of Churchill v Merthyr Tydfil and ADR

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