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Construction Year in Review

January 2026

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Construction Year in Reviews

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Contents

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Construction Year in Reviews
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Contents continued

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Introduction Dan Preston

Welcome to what has now become our customary look back over some of the biggest legislative and common law developments to impact construction over the past 12 months and a look ahead to what 2026 may have in store for the industry.

In my introduction to last year's review of the year, I remarked on another difficult year for the construction industry with the shadow of the Grenfell tragedy and global pressures and conflicts. Whilst many of those same pressures continued to impact in 2025 (albeit the geographical locations of the political turmoil and conflicts may have changed or grown) how did the industry perform against the forecasted growth? Well, the good news is the industry grew but not to the extent of the predictions at this stage last year. Depending on the metrics considered, analyses estimate the construction sector grew in real terms by around 1.6% across 2025, supported by investment in commercial and energy sectors and a gradual rise in consumer confidence.

There was no 'casualty' of the size of ISG but construction remained one of the most distressed sectors in the UK with the collapse of Ardmore Construction arguably the highest profile. That said, annual insolvency totals edged down slightly (a reported 4%) compared with 2024. Unfortunately 2026 has already started with a high profile insolvency with façades specialist FK being placed in administration.

In terms of legal developments, as explored further in this review, there was legislative change, most notably the new and much debated Procurement Act coming into force, as well as the Planning and Infrastructure Bill working its way through Parliament. The TCC and the First Tier Tribunal continued to provide guidance on the Building Safety Act and the now more familiar concepts of Remedial Contribution Orders (RCOs) and Building Liability Orders (BLOs). We also saw further guidance on payment notices, a bumper year for adjudication enforcement challenges and, in a sign of the times, even an example of a construction contract concluded through an exchange of WhatsApp messages.

We hope this publication provides valuable insights and reminders whilst we conclude with our look ahead to 2026 with a sense of both momentum and caution. As always, our team of experts are here to support you through the challenges ahead.

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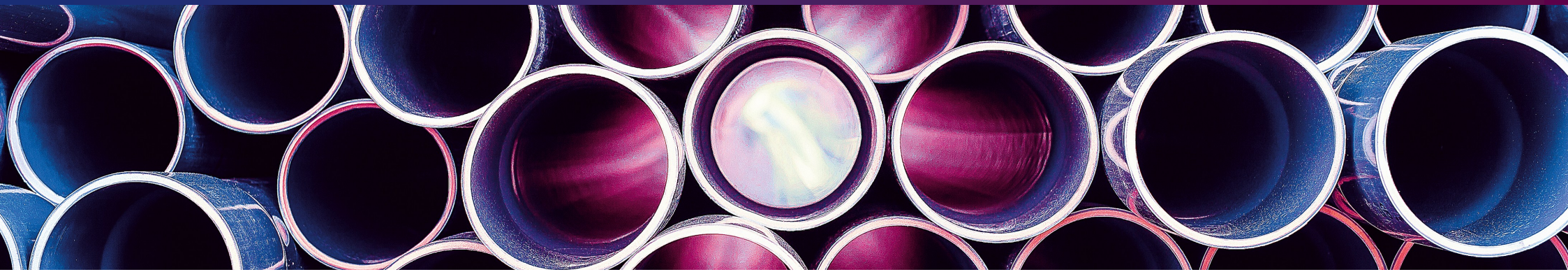
Case law review



Disclosure and Barring Service v Tata Consultancy Services Limited [2025] EWCA Civ 380

Steve Zhang

Background

Disclosure and Barring Service ("**DBS**") contracted with Tata Consultancy Services Limited ("**Tata**"), to take over the manually intensive Disclosure and Barring processes, whilst building in parallel a new digital system. Tata brought a claim against DBS for £125 million. DBS defended the claim and maintained a counterclaim. In the Autumn of 2023, Constable J ruled that DBS is to make net payment to Tata for just under £5 million.

DBS sought permission to appeal on the issue of construction, namely whether clause 6.1 of the Agreement created a condition precedent, breach of which prevented DBS from being able to recover £1.592 million by way of Delay Payments.

Relevant contractual provision

5. Implementation Delays - General Provisions

5.1 If, at any time, the CONTRACTOR becomes aware that it will not (or is unlikely to) Achieve any Milestone by the relevant Milestone Date it shall as soon as reasonably practicable notify the AUTHORITY of the fact of the Delay or potential Delay and summarise the reasons for it.

5.2 The CONTRACTOR shall then submit a draft Exception Report to the AUTHORITY for its approval not later than five (5) Working Days (or such other period as the AUTHORITY may permit and notify to the CONTRACTOR in writing) after the initial notification under clause 5.1.

5.3 The draft Exception Report shall give the AUTHORITY full details in writing of:

5.3.1 the reasons for the Delay;

5.3.2 the actions being taken to avoid or mitigate the Delay;

5.3.3 the consequences of the Delay;

5.3.4 if the CONTRACTOR claims that the Delay is due to an AUTHORITY Cause, the reason for making that claim.

5.4 The AUTHORITY shall not withhold its approval of a draft Exception Report unreasonably. If the AUTHORITY does not approve the draft Exception Report it shall inform the CONTRACTOR of its

Case law review continued

reasons in writing, promptly following its decision to withhold approval and the CONTRACTOR shall take those reasons into account in the preparation of a further draft Exception Report, which shall be resubmitted to the AUTHORITY within five (5) Working Days of the rejection of the first draft.

5.5 Whether the Delay is due to an AUTHORITY Cause or not, the CONTRACTOR shall make all reasonable endeavours to eliminate or mitigate the consequences of the Delay.

5.6 Where the CONTRACTOR considers that a Delay is being caused or contributed to by an AUTHORITY Cause the AUTHORITY shall not be liable to compensate the CONTRACTOR for Delays to which clauses 7 or 8 apply unless the CONTRACTOR has fulfilled its obligations set out in, and in accordance with, clauses 5.1, 5.2 and 5.3…"

Clauses 5.8 – 5.12 addressed TCS's obligation to serve a draft Correction Plan either when it became aware that it would not achieve a Milestone Date, or if it had failed to achieve a Milestone Date. An express link to DBS's Non-Conformance Report ("**NCR**"), explained in greater detail in clause 6, was provided by clause 5.10. That said:

5.*10 The draft Correction Plan shall be submitted to the AUTHORITY for its approval as soon as possible and in any event not later than eight (8) Working Days (or such other period as the AUTHORITY may permit and notify to the CONTRACTOR in writing) after the initial notification under clause 5.1 or the issue of a Non-conformance Report."*

6. Delays due to Contractor default

6.1 If a Deliverable does not satisfy the Acceptance Test Success Criteria and/or a Milestone is not Achieved due to the CONTRACTOR's Default, the AUTHORITY shall promptly issue a Non-conformance Report to the CONTRACTOR categorising the Test Issues as described in the Testing Procedures or setting out in detail the non-conformities of the Deliverable where no Testing has taken place, including any other reasons for the relevant Milestone not being Achieved and the consequential impact on any other Milestones. The AUTHORITY will then have the options set out in clause 6.2.

6.2 The AUTHORITY may at its discretion (without waiving any rights in relation to the other options) choose to:

6.2.1 issue a Milestone Achievement Certificate conditional on the remediation of the Test Issues, or the non-conformities of the Deliverable where no testing has taken place, in accordance with an agreed Correction Plan; and/or

6.2.2 if the Test Issue is a Material Test Issue, refuse to issue a conditional Milestone Achievement Certificate as specified in clause 6.2.1 then escalate the matter in accordance with the Dispute Resolution Procedure and if the matter cannot be resolved exercise any right it may have under clause 55.1 (Termination for Cause by the AUTHORITY); and/or

6.2.3 require the payment of Delay Payments, which shall be payable by the CONTRACTOR on demand, where schedule 2-3 (The Charges and Charges Variation Procedure) identifies that Delay Payments are payable in respect of the relevant Milestone. The Delay Payments will accrue on a daily basis from the relevant Milestone Date and will continue to accrue until the date when the Milestone is Achieved in accordance with the Correction Plan.

6.3 Where schedule 2-3 (Charges) does not identify the payment of Delay Payments in respect of a Milestone the AUTHORITY reserves its rights. Otherwise Delay Payments are provided as the primary remedy for the CONTRACTOR's failure to Achieve the relevant Milestone Date and it shall be the AUTHORITY's exclusive financial remedy except where:

6.3.1 the AUTHORITY is otherwise entitled to or does terminate this Agreement for the CONTRACTOR's Default or for Force Majeure; or

6.3.2 the failure to Achieve the Milestone exceeds a period of six months.

Case law review continued

The Court of Appeal addressed the following DBS arguments:

- → DBS argued that the contract does not clearly suggest that the absence of an NCR prevented a claim under clause 6.2 and that the words "condition precedent" were not used. The Court of Appeal ruled that it is not necessary to use the words "condition precedent" for it to be one and what matters is whether there is a conditional effect: that unless step one is taken, you are not entitled to the relief envisaged at step two.
- → DBS argued that the contract does not specify why the other remedies in clause 6.2 should only be available to DBS where it has provided an NCR promptly. The Court of Appeal ruled that an NCR was required whether or not a Milestone had been achieved: it was also required in circumstances where the Deliverable had been tested, but where there were test issues preventing some or all of the acceptance test criteria from being achieved. The NCR had to identify those issues: the reasons why it had failed the testing. Similarly, an NCR was required where a Milestone had not been achieved and no testing had yet taken place; it had to set out in detail the nonconformities of the Deliverable, any other reason for the Milestone not being achieved, and the consequential impact on any other Milestones.
- → DBS argued that because there was no precise time limit within which DBS had to provide an NCR, that was inconsistent with the requirement that it was a condition precedent. The Court of Appeal rejected this argument and said that the word “promptly” was sufficiently certain to be given effect.
- → DBS argued that too much emphasis has been placed on the word "shall" and it does not imply anything about the consequences of failing to comply. The Court of Appeal rejected this argument and ruled that "Shall" must be read with "if" part of clause 6.1 which created a mandatory obligation.
- → DBS argued that clause 5.6 uses different words to convey what the judge found to be a clear condition precedent. Since clause 6.1 uses different phraseology, it is to be presumed that it means something different. The Court of Appeal ruled that the court’s principal task remains to give meaning to the words actually used and even though the words are different, clause 6.1 ultimately has the same effect as clause 5.6: both are conditions precedent.

Ruling

The Court of Appeal dismissed DBS's appeal, ruling that the drafting of clause 6.1 is sufficiently clear as a condition precedent - on the occurrence of one or both of two different events, if:

a) where a Deliverable does not satisfy the Acceptance Test Success Criteria;

b) where a Milestone is not achieved due to TCS’s default.

DBS “shall promptly issue” an NCR.

Clause 6.1 goes on to state that DBS “will then have the options set out in clause 6.2”, one of which (clause 6.2.3) was to require Delay Payments. It means that on the happening of one or both of those events, a detailed NCR must be provided promptly by DBS and then – and only then – can the clause 6.2 options, including the levying of Delay Payments, be exercised.

Key takeaways

The court will examine the precise wording of contractual clauses to determine whether a condition precedent exists, even if the clause is not expressly labelled as such. If the clause has a conditional effect, the court will interpret it as a condition precedent.

Case law review continued

Jaevee Homes Limited v Mr Steve Fincham (trading as Fincham Demolition) [2025] EWHC 942 (TCC) Caitlin Reed

On 16 April 2025, Mr Roger Ter Haar KC handed down his judgment in ***Jaevee Homes Limited v Mr Steve Fincham (trading as Fincham Demolition) [2025] EWHC 942 (TCC)***, providing helpful guidance to construction practitioners on the implications of exchanging correspondence via email and WhatsApp.

Mr Haar KC held that a binding construction contract was formed between the Parties following an exchange of emails and subsequent WhatsApp messages on 17 May 2023 (the "**Contract**"). Accordingly, the judgment confirmed that informal communications can indeed create enforceable contracts when essential terms are agreed; Jaevee's argument that a subsequent formal contract governed the relationship between the Parties was rejected.

However, Mr Haar KC held that while Fincham was entitled to submit one payment application per month, pursuant to the agreed terms of the Contract, only three of the four submitted invoices were valid applications. Further, the three valid invoices were deemed to meet the statutory requirements under the Housing Grants, Construction and Regeneration Act 1996 (the "**Act**") and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the "**Scheme**"), entitling Fincham to payment.

Background

Jaevee Homes Limited ("**Jaevee**"), a property developer, engaged Mr Steve Fincham (trading as Fincham Demolition) ("**Fincham**") (together the "**Parties**"), a demolition contractor, to carry out demolition works at the former Mercy nightclub in Norwich. In early 2023, Jaevee approached Fincham to attend site and discuss the works and thereafter, sent email correspondence as to the scope of works and price. Discussions then continued via WhatsApp and the following exchange was made between Mr Ben James of Jaevee and Fincham:

> "[*17/05/2023, 16:34:43] Steve Fincham: Hi Ben How did you get on mate is the job mine mate*
>
> *[17/05/2023, 16:38:32] Ben James: Can you start on Monday?*
>
> *[17/05/2023, 16:55:06] Steve Fincham: I can start with getting the scaffolding sorted and stuff on Monday mate but men will start the following Monday Tom needs to get the scaffolders there on Monday too mate to alter the scaffolding with ladder beams above the door way and make gates into the hoarding to get the equipment in He will know what we are talking about mate Appreciate this work I really do Ben*
>
> *[17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate*
>
> *[17/05/2023, 20:06:42] Ben James: Yes*
>
> *[17/05/2023, 20:06:51] Ben James: Monthly applications*
>
> *[17/05/2023, 20:11:50] Steve Fincham: Are you saying every 28 or 30 days from invoice that's a yes not on draw downs then good*
> *d) call you at 8.30 mate Thanks mate appreciated Ben*
>
> *[17/05/2023, 20:12:12] Ben James: Ok*
>
> *[17/05/2023, 20:12:16] Ben James: Chat in the am*
>
> *[17/05/2023, 20:17:49] Steve Fincham: Thanks Ben"*

On 26 May 2023, a ZIP file containing (i) a purchase order; (ii) a Short Form Subcontract (the "**Subcontract**"); and (iii) a marked-up ground floor plan of the works was emailed to Fincham. The Subcontract named Jaevee and Fincham as the Parties and stated the contract sum as £248,000 plus VAT.

Fincham commenced the demolition works on 30 May 2023 and issued the following invoices for payment:

- Invoice 1078 delivered by email on 9 June 2023 in the sum of £48,000 plus VAT;
- Invoice 1079 delivered by email on 23 June 2023 in the sum of £100,000 plus VAT;
- Invoice 1081 delivered by hand on 14 July 2023 in the sum of £38,750 plus VAT; and
- Invoice 1083 delivered by hand on 27 July 2023 in the sum of £9,107.50 plus VAT;

Totalling £195,857.50 plus VAT.

Jaevee made the following payments to Fincham:

- £10,000 on 16 June 2023;
- £10,000 on 26 June 2023;

Case law review continued

- £10,000 on 21 August 2023;
- £10,000 on 29 September 2023; and
- £40,000 on 27 October 2023;

Totalling £80,000.

Jaevee issued a final account stating the total value of the works amounted to £107,125 plus VAT and purported to terminate the Subcontract following a dispute between the Parties in respect of the value of the works. After serving a statutory demand against Jaevee, Fincham launched an adjudication seeking £125,650.38 as a notified sum on the basis no payless notices were issued by Jaevee.

By a decision dated 11 September 2024, the adjudicator agreed that the email and WhatsApp exchange between the Parties formed a binding contract, despite the issue of the ZIP file containing the Subcontract. On that basis, and as no pay less notices were issued by Jaevee, the invoices issued by Fincham were to be paid by Jaevee 28-30 days after issue. The adjudicator decided that Fincham was entitled to £145,896.31 (the sum sought and additional sums in respect of interest and the adjudicator's fees).

Following non-payment of the sum due despite an enforcement order being issued on 9 December 2024, Jaevee issued a Part 8 claim on 16 December 2024 to challenge the adjudicator's decision and sought to establish that the invoices were not valid payment applications and therefore, not payable to Fincham.

The issues

The two main issues for Mr Haar KC to address concerned:

1. Whether the Contract was binding and indeed formed following an email and WhatsApp exchange between the Parties; and
2. Whether the invoices submitted by Fincham were valid applications for payment under the Act.

WhatsApp formed contracts

Jaevee argued that the emails and series of WhatsApp messages exchanged between the Parties did not form a binding contract and that it was in fact the terms of the Subcontract that bound the Parties. Fincham disagreed with the argument put forward by Jaevee and contended that the contract binding the Parties was formed following the email and WhatsApp exchange between the Parties. Mr Haar KC agreed with Fincham and held that, although informally, a contract had been formed through the email and WhatsApp exchange on the basis that the messages evidenced the Parties agreement on:

- Start date;
- Scope of work;
- Price; and
- Payment terms (invoices submitted monthly to be paid 28-30 days following issue).

The following exchange was deemed sufficient evidence to determine that the agreement between the Parties had been concluded:

> *"[17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate*
>
> *[17/05/2023, 20:06:42] Ben James: Yes"*

Mr Haar KC confirmed that, for a binding agreement to exist between parties, a formal written contract is not always necessary so long as the essential elements of a contract (offer, acceptance, consideration and intention to create legal relations) are present. Clearly, the emails and WhatsApp messages exchanged between the Parties contained the elements required to satisfy Mr Haar KC.

Validity of payment applications

In respect of the payment applications made by Fincham, Jaevee sought to establish that they were invalid on the basis that the invoices submitted by Fincham were not intended to be payment applications. Firstly, while the WhatsApp exchange referred to "*monthly applications*" being made and payment of those applications to be made "*every 28 or 30 days from invoice*", the exchange failed to clarify how those monthly applications should be calculated. Due to this omission, Mr Haar KC determined that the Scheme would step in to calculate those monthly applications but would not displace the other matters agreed between the Parties such as the frequency of applications or when payment of those applications would fall due.

Advance JV v ENISCA Ltd [2022] EWHC 1152 (TCC) provided Mr Haar KC with the appropriate guidance to determine the validity of the payment applications made by Jaevee. Such guidance considered by Mr Haar KC included (but was not limited to):

- The construction of the payment application (to be approached on an objective basis) i.e. would the recipient of the payment application understand it.

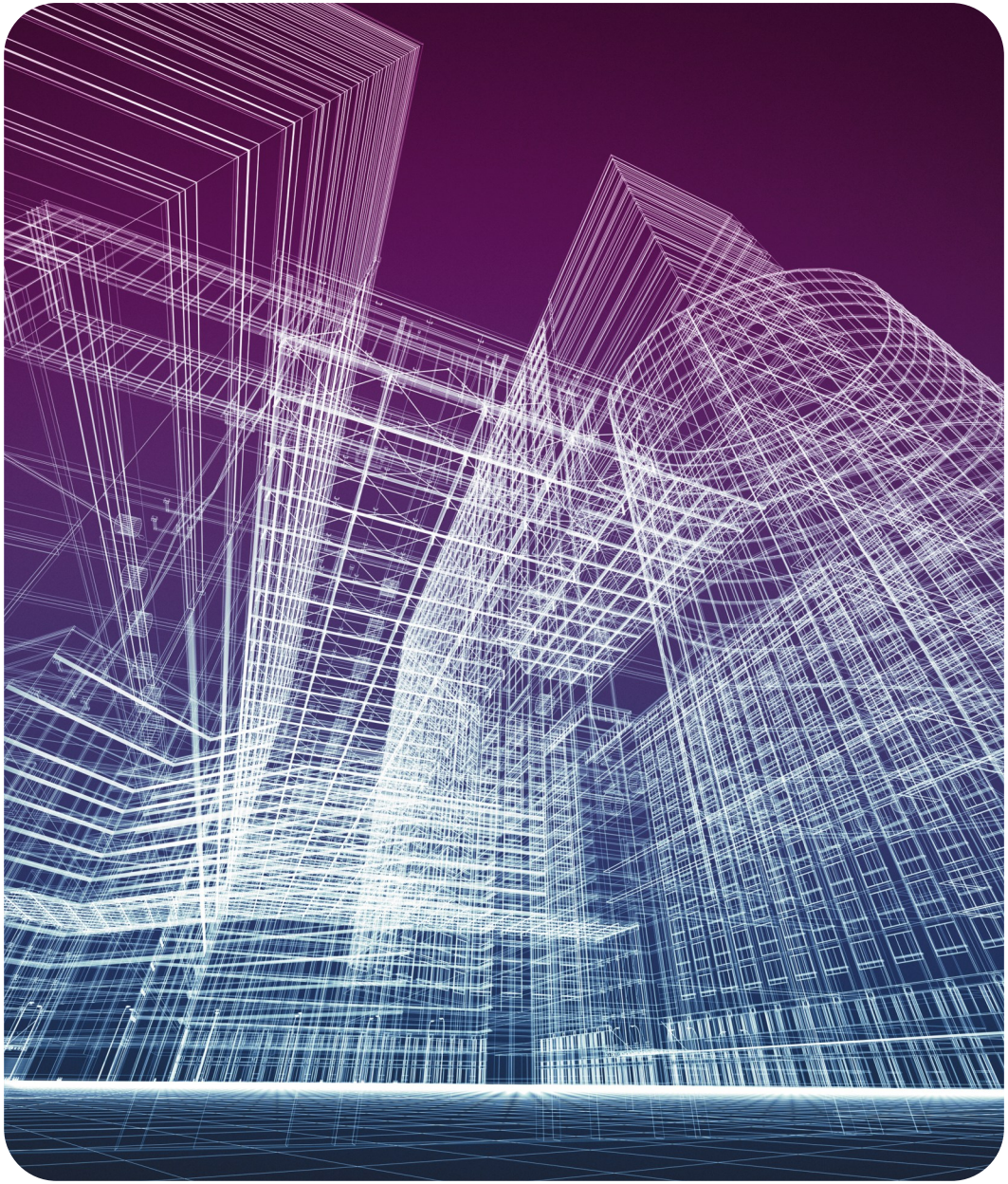
Case law review continued

- → Whether the payment application takes into account the "relevant objective contextual scene".
- → The purpose of the payment application.
- → Whether the payment application clearly sets out the sum claimed due.
- → Whether the payment application is "free from ambiguity" and there is a clear intention for it to fulfil its function as a payment application.

Taking Advance into account, Mr Haar KC found that all four invoices met the criteria for valid payment applications under section 110B(4) of the Act and as Jaevee failed to issue any relevant payless notice against them, the sums claimed in the applications fell due. However, pursuant to the terms agreed between the Parties, Fincham was only entitled to issue one payment application per month. Therefore, only three of the four applications were deemed valid.

Key takeaways

For those in the construction industry, the judgment highlights that sufficient consideration should be given when discussing proposed works or agreements via email or WhatsApp. Clearly, there is a risk that such correspondence may be considered to form a legally binding contract if the key elements of contract formation are present, this is irrespective of whether a formal contract is then subsequently entered into between the parties. Separately, this judgment also confirms that invoices can indeed be deemed valid payment applications and demonstrates the Court's willingness for the Scheme to step in, to fill any unintended gaps, caused by a lack of consideration or poor contract negotiation.



Case law review continued

National House Building Council v Peabody Trust [2025] EWCA Civ 932 Tyler Fitzpatrick

Interpretation of Insurance Policies—*National House-Building Council v Peabody Trust [2025] EWCA Civ 932*

The Court of Appeal (Coulson LJ, Lewison LJ, Moylan LJ) has provided guidance on interpretation of a Buildmark NHBC Insurance Policy approving a Technology and Construction Court decision that supported an insured's right to an indemnity for losses associated with contractor insolvency.

Background

Catalyst Housing Limited ("**Catalyst**") engaged Vantage Design and Build Limited ("**Vantage**"), pursuant to a JCT Design and Build Contract dated 20 November 2015, to build 175 new dwellings at the former RAF Stanbridge site at Bedfordshire. This included 88 social housing units. The total contract sum was almost £23.8 million, of which the cost attributable to the 88 social housing units was £10.3 million.

The NHBC Buildmark Policy

Vantage provided a Buildmark NHBC Insurance Policy dated 2 March 2016. It related solely to the 88 social housing units (the "**Policy**").

Option 1 of the Policy confirmed that in the event of a contractor's insolvency before practical completion the Policy will provide cover if:

> *"… you lose the amount paid to the contractor in accordance with the building contract or have to pay more to complete the building of the home(s), because the contractor is insolvent or commits fraud…"*

The Policy went onto confirm that:

> *"the most we will pay for all claims under Option 1 is 10% of the original contract price. We deal with all claims in the order they are made. When the overall limit is reached, we will not pay further claims."*

Contractor's Insolvency & NHBC Notice

Vantage commenced work on or around 14 December 2015, but administrators were appointed on 29 June 2016 prior to completion of the works. It is common ground that the appointment of the administrators meant that, pursuant to the Policy, Vantage was insolvent.

Catalyst appointed Stack London Limited as construction manager to procure the completion of the works by individual trade contractors. Catalyst informed the NHBC of Vantage's insolvency and that it intended in due course to make a claim under Option 1 of the Policy. Later, Catalyst informed NHBC of the forecast additional cost to complete the works (circa £1.3m). Practical completion was eventually achieved on 19 January 2021.

Subsequently, Peabody acquired Catalyst and pursued the claim ultimately commencing proceedings in July 2023 claiming the ascertained additional cost of completing the works in the sum of £913,555.36 plus interest.

The Technology and Construction Court Decision

Peabody claimed that it was entitled to recover the additional cost incurred under the Policy because:

- → It was common ground between the parties that an insolvency had occurred for the purposes of the Policy.
- → Peabody had complied with the notice / formalities of the Policy.
- → Peabody has incurred additional cost to complete the construction works
- → The claimed sum was within the liability cap threshold.

NHBC made an application to strike out the claim on the basis that:

- → Time had started to accrue for Peabody's cause of action in contract on 29 June 2016 being the date of Vantage's insolvency.

Case law review continued

- More than 6 years had elapsed between Vantage's insolvency and the Claim being issued in July 2023.
- The claim was therefore statute barred under section 5 of the Limitation Act 1980 the proceedings having been issued more than 6 years from the accrual of the cause of action.

The Judge decided that he did not have sufficient time to decide all issues in dispute and instead of adjourning the claim, proceeded to issue a decision on when the cause of action accrued only. The Judge's key findings were that:

- NHBC was wrong to say that time runs from insolvency.
- NHBC was wrong to suggest that the fact of insolvency necessarily meant an insured would have to pay more to complete the works. An administration, in particular, might be successful and allow the completion of the project without undue difficulty, and without any extra spend by the insured.
- The judge accepted that the cover did not apply if the insured did not "have to pay more to complete" the works, and that the event insured against was not the insolvency per se but rather the insured having to pay more than the contract price to complete.
- He accepted Peabody's submission that it was not commercially sensible for the Policy to be interpreted to mean that the insurer would be liable to indemnify the insured at the moment of the insolvency regardless of whether there was in fact any loss caused by it.

NHBC Appeal

The NHBC appealed the decision on a number of grounds the key one being that Peabody's cause of action under the policy of insurance accrued on the date of Vantage's insolvency.

In dismissing this appeal, Coulson LJ, in his leading judgment, identified two criteria to be met to trigger liability under the Policy:

1. the insured must "have to pay more" to complete the building of the homes.
2. the payment of "more" must be because of the insolvency (or fraud) of the contractor.

In the Coulson LJ's view this was significant because the Policy was only engaged "i*f you…have to pay more to complete the building of the homes*". It is a condition without which Option 1 of the Policy cannot apply.

Whilst it is necessary to fulfil both criteria for the Policy to be engaged the words "*if you…have to pay more*" make plain that what is being insured against is a particular financial loss and that, without that eventuality, there can be no cause of action.

On this reasoning, Coulson LJ held that:

> *"… it seems to me that the proper construction of Option 1 is that the cause of action accrued if Peabody "have to pay more" as a consequence of the insolvency of Vantage. The insolvency point is not the natural meaning of the words used and is not a commercial outcome. I would therefore reject Ground 1 of the appeal."*

Conclusions and Takeaways

As confirmed by Coulson LJ, "*It is trite law that the cause of action under an insurance policy accrues on the happening of the event insured against*". Thereafter, the insured benefits immediately from a contractual right under the policy to be put by the insurer into the same position in which the insured would have been had the event not occurred.

The task for the court was to apply the usual principles applicable to the interpretation of contracts to ascertain the event insured against and, in turn, to ascertain the date of the accrual of the cause of action.

Applying these principles to the precise wording of the Policy, Coulson LJ had no difficulty in concluding that the occurrence of the need to pay more by Peabody to complete the project was the event insured against rather than the earlier date of Vantage's insolvency. Put simply, "*the words 'if you...have to pay more' make plain that what is being insured against is a particular financial loss and that, without that trigger, there can be no claim*".

This conclusion was reinforced by considerations of commerciality. Where the interpretation espoused by NHBC was a possible alternative interpretation it was in principle a legitimate exercise to test the relative commerciality of each interpretation. Coulson LJ acknowledged that Peabody's interpretation resulted in some uncertainty. In particular, did the cause of action accrue when it was possible, likely, probable or foreseeable that extra costs would be incurred, or alternatively when Peabody actually spent more to complete the project? However, this needed to be weighed against the far more

Case law review continued

significant uncertainty that would result from the NHBC interpretation which would mean that a cause of action accrued at a time when the consequences of the insolvency were entirely unknown.

However, in his supporting judgment Lewison LJ downplayed the importance of considerations of commerciality as an aid to interpretation. He stated, "*Commercial common sense does have a role to play in the interpretation of contracts, but its importance must not be overstated*" and referred to Lord Neuberger's warning in the Supreme Court decision of ***Arnold v Britton [2015] UKSC 36*** against over-reliance on commercial common sense to interpret the wording of a contract. Lewison LJ, therefore, approved Peabody's interpretation of the Policy in reliance on the plain words of the Policy rather than giving undue weight to the relative commerciality of the alternative interpretations.

This provides a key lesson for parties engaged in conflict over the meaning of commercial contracts. In such circumstances there can be a tendency, with an excess of hindsight, to overplay in negotiations what might have been the parties commercial intentions whilst relegating the natural meaning of the words used to a supporting act. In fact, the reverse is the correct approach and, as explained by ***Neuberger LJ in Arnold v Britten***, "*The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed*". That approach applies however imprudent the terms of agreement might appear with the benefit of hindsight.

Case law review continued

Vitsoe Ltd v Waugh Thistleton Architects Ltd [2025] EWHC 850 (TCC) Charlotte Gooch

Vitsoe Limited (the "**Claimant**") sought £4million in damages from Waugh Thistleton Architects (the "**Defendant**") in relation to rotted cross-laminated timber ("**CLT**") roof panels which needed repair or replacement.

In this judgment the Technology and Construction Court ("**TCC**") gave both a general indication as to how the scope of a consultant's duty is ascertained, and also specific findings on the scope of parties' duties in a construction management procurement.

Facts

The Claimant appointed the Defendant in relation to a project involving the construction of a headquarters, office and distribution facility at Princess Drive, Royal Lemington Spa (the "**Project**").

The Project included roof panels constructed from CLT. The CLT elements of the roof got wet during heavy rainfall and subsequently began to rot and decay and had to be repaired or replaced.

The Claimant appointed the Defendant as *"Architect, Design Team Leader and Principal Designer"* to provide architectural services in relation to the construction of the Project. The Claimant also appointed JCA Concept Construction Limited as construction manager alongside other trade contractors, notably Hess Timber GmbH and Co as timber frame contractor and Stoneleigh Services Limited as the roofing contractor.

Judgment

The court dismissed the Claimant's claim, finding that the Defendant was not liable for the rotted CLT roof and the Defendant had fulfilled its professional obligations.

Notably, the court found in favour of the Defendant in that the Defendant although serving as architect, design team leader and principal designer was not responsible for site works. Their duty was limited to design coordination.

Further, it was held that the Defendant was the designer under a duty to provide design information which it did via drawings and detailed specifications. It was for the trade contractors to complete detailed designs.

Additionally, the Defendant was not under a duty to protect the roofworks and this was owed by the trade contractors who were under an obligation to use reasonable skill and care to satisfy the performance requirements/specifications for the works, notably the architect's specification which included performance requirements for protection of the works and adverse weather.

Key takeaways

In terms of the scope of the architect's duties, the judgment demonstrates that in construction management frameworks, architects are responsible for design and design coordination but not for construction site management, protection of materials or programming of trades. Furthermore the judgment demonstrates that providing a technically sound design does not impose on architects a duty to ensure trades follow specifications on site.

Of particular interest in this judgment is the court's approach to ascertaining the scope of the Defendant's duty. Indeed, the judge did not simply look at the relationship between the Claimant and the Defendant. Instead, the judge defining the scope of the Defendant's duty by reference to the duties of other parties.

Lastly, the decision reiterates the critical importance of clearly defining each party's responsibility, particularly under construction management procurement.

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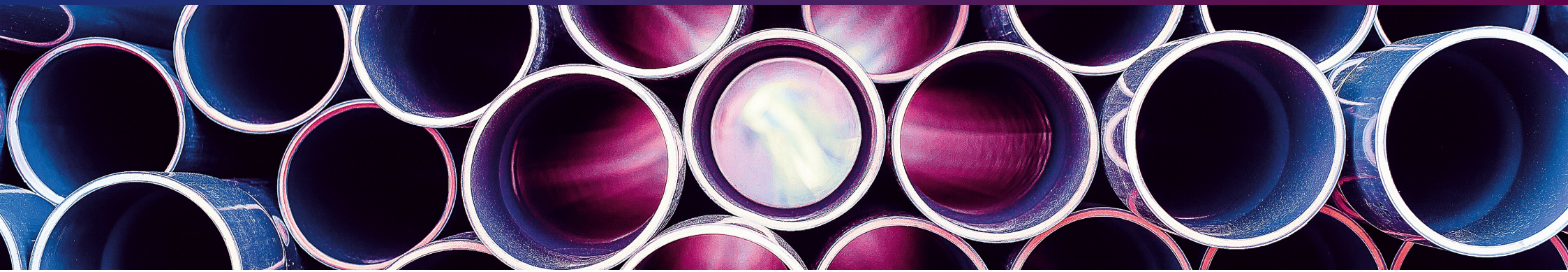
Adjudication update



Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] EWCA Civ 962 Tom McCumesky

Background

On 15 January the Supreme Court handed down its judgment (which can be found here) overturning the decision of the Court of Appeal in ***Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] EWCA Civ 962***, regarding the contractor's right to terminate for non-payment under an amended 2016 Edition of the JCT Design and Build contract.

By way of brief reminder, the Court of Appeal held that Providence Building Services Ltd ("**Providence**"), the contractor, could terminate its employment under clause 8.9.4 of the JCT Design and Build contract even if no right to terminate under clause 8.9.3 of the same contract had accrued.

Hexagon Housing Association Ltd ("**Hexagon**"), the employer, was given leave to appeal. The Supreme Court has now reversed the position, finding that a contractor can only terminate its employment under clause 8.9.4 once a right to terminate under clause 8.9.3 has accrued but not been exercised for whatever reason.

Stay of adjudication enforcement proceedings

This article considers Hexagon's application for a stay of adjudication enforcement proceedings, which took place in the period between the decision of the Court of Appeal and the decision of the Supreme Court.

Providence had sought summary judgment to enforce an adjudicator's decision dated 30 April 2025 relating to amounts awarded to Providence in respect of its termination account (which was submitted following termination of its employment under the contract).

While Hexagon did not resist those enforcement proceedings, it applied for a stay of execution (which would delay enforcement of the adjudicator's decision) pending the Supreme Court's decision in respect of Providence's underlying right to terminate the contract.

Hexagon's application for the stay relied on the principles set in the case of ***Wimbledon Construction Company 2000 Ltd v Derek Vago [2005] EWHC 1086 (TCC)***. It argued that Providence's financial position was such that, if Hexagon were ultimately successful in the Supreme Court, Providence would be unable to repay the adjudication award.

Adjudication update continued

Providence opposed the application on the basis that granting the stay of execution would result in manifest injustice. Providence argued that a stay would likely result in one of its creditors issuing a winding-up petition, causing irreversible harm to its ability to participate effectively in the Supreme Court proceedings and thereby giving Hexagon a "victory by default".

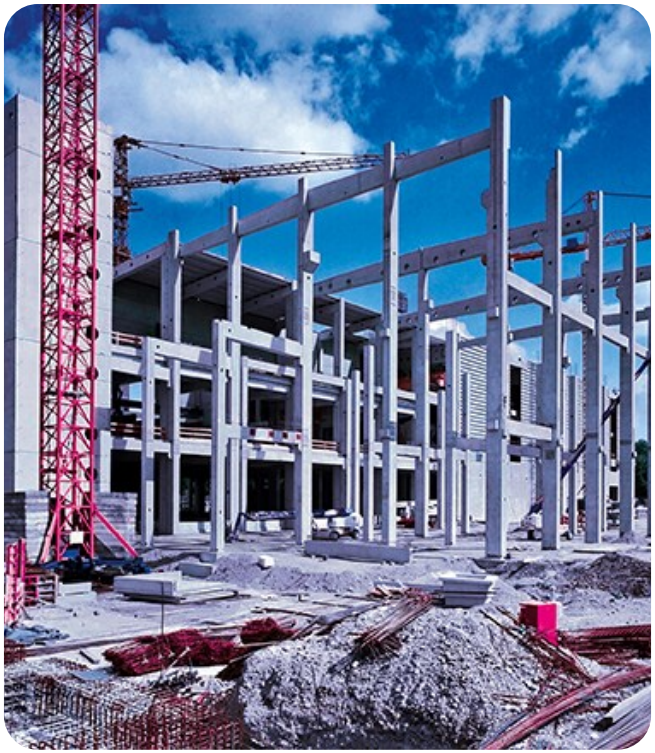
In considering the application for a stay, Parfitt J reiterated that CPR 83.7(4) confers a discretion on the court to stay enforcement of a judgment *"if the court is satisfied that – (a) there are special circumstances which render it inexpedient to enforce the judgment … either absolutely or for such period and subject to such conditions as the court thinks fit"* and emphasised that *"..the touchstone is special circumstances which would make it inexpedient to enforce the judgment".*

Decision and commentary

The judge granted the stay of execution sought by Hexagon.

Summarising the rationale provided in the decision:

1. The facts of the case sat within and were best governed by the principles outlined in ***Wimbledon v Vago.*** Providence's position was not that it would immediately fall into a terminal insolvency process if a stay was granted but rather that there was a real risk of a creditor presenting a winding-up petition, which would impair Providence's ability to take part in the Supreme Court proceedings; this was not the form of insolvency contemplated in ***Wimbledon v Vago***.
2. The judge found it unhelpful to Providence's position that it had relied on its own potential insolvency as a reason to refuse a stay of execution, whereas this would typically be presented as a reason supporting a stay of execution.
3. The risk of Hexagon succeeding in the Supreme Court and subsequently being unable to recover the judgment sum from Providence (due to Providence's insolvency) outweighed the risks associated with non-payment of the judgment sum to Providence unless and until Hexagon lost in the Supreme Court. At the time of granting the stay, the Supreme Court hearing was scheduled to take place within a few months and so the proposed stay would be of limited duration and not open-ended.



4. Providence's financial position had materially worsened between the date of the contract and the date of judgment for reasons which were not substantially caused by Hexagon but due to both unrelated matters and the foreseeable costs which have arisen following the termination of the contract.
5. The judge also noted that although Providence was entitled to rely on its success in the Court of Appeal, it had chosen to commence the second adjudication with full knowledge that Hexagon's Supreme Court appeal was pending and it was foreseeable that a termination account adjudication would be lengthy and costly. Providence proceeded with adjudication knowing there was a real risk that any success could be overturned if the Supreme Court disagreed with the Court of Appeal.
6. Ultimately the Court decided that due to the interplay between the adjudication regime and the financial difficulties of Providence it would be inappropriate to allow the judgment to be enforced prior to the outcome of the hearing before the Supreme Court, notwithstanding the importance of preserving the statutory payment regime in enabling cashflow in the construction industry.

Adjudication update continued

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

Sohini Saujani

RNJM Ltd v Purpose Social Homes Ltd [2025] EWHC 2224 (TCC)– When Crying "Conflict" Became the Real Conflict

The Technology and Construction Court's decision in ***RNJM Ltd v Purpose Social Homes Ltd*** was one of the most talked about adjudication enforcement cases of 2025. Centred on a single statement in an adjudicator nomination form, the judgment underscores the Courts' insistence on procedural honesty

Background

Purpose Social Homes Ltd ("**PSHL**") appointed RNJM Ltd ("**RNJM**") under a JCT Minor Works Building Contract 2016 in respect of the construction of six residential apartments in Harrogate.

The relationship between the parties had significantly deteriorated over the course of the project with five adjudications taking place in 2024. A central figure in this saga was Mr Bunker, the adjudicator in the second, third and fourth adjudications.

Although RNJM were successful in the second adjudication, Mr Bunker found in favour of PSHL in the third and fourth adjudications and ordered RNJM to pay his fees. RNJM, however, failed to do so. Mr Bunker threatened both parties with legal action as they were jointly and severally liable. PSHL eventually made the payment and pressed RNJM for an explanation as to why they refused to comply with the adjudicator's directions but were unable to elicit any substantive response.

RNJM then initiated a fifth adjudication and declared in the RICS adjudicator nomination form that there was a "conflict of interest" with Mr Bunker, citing a "dispute over payment with the Referring Party". No further detail was given.

For context, guidance from RICS describes a "conflict of interest" as *"An involvement between the dispute resolver and one of the parties, one of the parties and representatives or the subject matter of the dispute, or any other circumstances that raises justifiable doubts of bias or apparent bias."*

Adjudication update continued

With this in mind, PSHL contacted RICS and advised that there was in fact no genuine conflict or dispute, and that the position was that RNJM had simply failed to comply with the adjudicator's order to pay his fees. RICS nonetheless appointed a different adjudicator, Mr Wood, who awarded RNJM £132,884.72.

Issues to Consider

RNJM immediately applied to the Court for summary enforcement which PSHL resisted on the basis that RNJM's "conflict of interest" declaration was deliberately or recklessly misleading and that, under the principles established in ***Eurocom Ltd v Siemens Plc [2014] EWHC 3710 (TCC)***, this invalidated the adjudicator's appointment altogether.

The key issue before the Court was therefore whether PSHL had a real prospect of successfully arguing that RNJM had deliberately or recklessly made a false statement in the process of applying to RICS for the appointment of an adjudicator for the fifth adjudication. The Court had to consider:

1. What information was provided by RNJM to RICS?
2. Was this information false?
3. Was this false information given either deliberately or recklessly as to its truth?

RNJM's position was that they genuinely thought that the dispute around fees in respect of the previous adjudications was a potential conflict and that it was reasonable to believe that the adjudicator would be biased going forwards. On the other hand, PSHL noted that they had never been given an explanation by RNJM as to the existence of a dispute around fees and that RNJM had never challenged Mr Bunker's order. Instead, RNJM had just not made the payment to Mr Bunker.

Court Findings

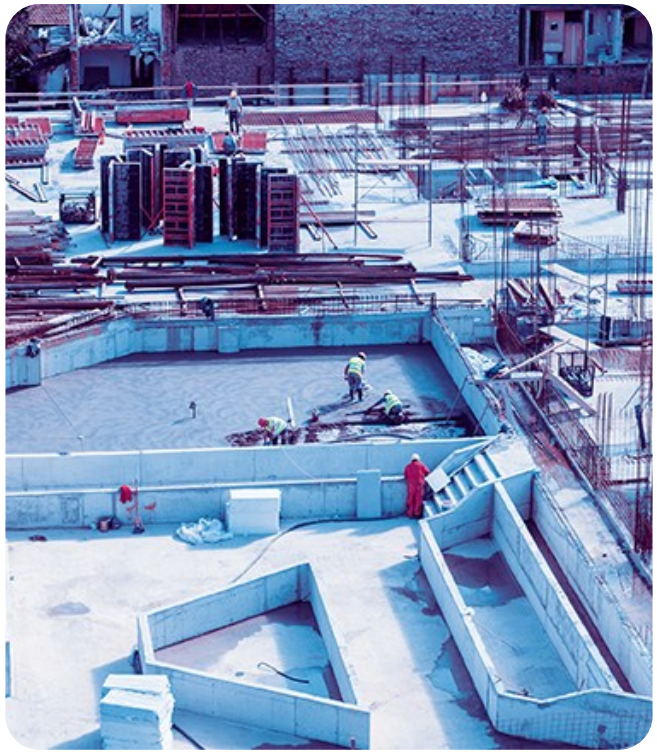
HHJ Kelly held that the evidence provided by RNJM was inadequate in establishing that there was a dispute with Mr Bunker in respect of the fees and that RNJM had made no effort at any point to provide any explanation or evidence to demonstrate the existence of a dispute which in itself was telling.

Accordingly, PHSL had a real prospect of showing that the adjudicator lacked jurisdiction on the basis that the "conflict of interest" statement made by RNJM was false.

The application for summary enforcement of the adjudicator's award was accordingly refused.

Key Takeaways

1. **Honesty is the best policy** – parties should not overstate or fabricate conflicts as a false or misleading representation, even at the nomination stage vitiates jurisdiction, including where the nominating body (e.g. RICS in this case) is not actually deceived.
2. **Procedure has a purpose** – the TCC will not rubber-stamp enforcement where procedural honesty is in doubt, even in long-running disputes, and this can impact on the adjudicator's jurisdiction.
3. **Non-payment disputes are not a "conflict of interest"** – the RICS guidance aligns with the Court's position that a conflict must raise "justifiable doubts of bias" so a simple failure to pay fees is not enough.
4. **Securing the future (and fees)** – it would not be surprising if adjudicators now seek to protect themselves by asking for upfront security for their fees, particularly in the context of parallel or back-to-back adjudications.



Adjudication update continued

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

Tom McCumesky

In *Clegg Food Projects Ltd v Prestige Car Direct Properties Ltd [2025] EWHC 2173 (TCC)*, the Technology and Construction Court delivered its judgment clarifying the limits of natural justice challenges to adjudication decisions.

Background

Clegg Food Projects Ltd ("**Clegg**"), the contractor, and Prestige Car Direct Properties Ltd ("**Prestige**"), the employer, entered into an amended JCT Design and Build contract for the construction of a leisure and retail centre in County Durham.

After practical completion of the works, a dispute arose in respect of the amount applied for by Clegg in its payment application number 37 ("**Application 37**"). Amongst other issues, the dispute included the valuation of a number of instructed variations; the parties agreed that the 8 Employer's Agent instructions in question were "Changes" giving rise to contractor entitlement to additional sums under the contract but disputed the valuation of those variations.

Adjudication

Clegg brought the adjudication and both parties put forward what they said should be the gross valuation of Application 37 and importantly, in their submissions, both parties gave the adjudicator the latitude to award "such other sums as the adjudicator shall see fit".

For five of the eight variations in question, neither party's proposed rate was adopted and instead the adjudicator applied his own "fair and reasonable" rates derived from his "first principles" review of the work involved. The adjudicator also remeasured one of the variations.

The adjudicator awarded Clegg the payment of a principal sum of £541,880.12 plus VAT together with statutory interest. The decision was supported by 88 pages of reasoning, which explained the adjudicator's approach as to the valuation of the variations and how he derived his conclusions from the material submitted by the parties.

Enforcement proceedings

Prestige refused to pay the adjudicator's award, forcing Clegg to apply to the Technology and Construction Court for summary judgment to enforce the adjudicator's decision.

Prestige argued i) that the adjudicator had breached the rules of natural justice by introducing the new "fair and reasonable" rates, and the remeasurement, without consulting the parties or inviting further submissions, thereby depriving them of the opportunity to address those new elements; and ii) that the adjudicator's reasons were insufficient in that the decision only provided bare figures and new rates instead of detailed reasoning as to how those figures and rates were arrived at.

Clegg denied that there had been any breach of natural justice, arguing that the adjudicator was entitled to use his own knowledge and experience to reach an overall valuation of Payment Application 37 and had not been asked to set specific rates on a line-by-line basis. Clegg also highlighted that the adjudicator had valued every item within the range of the parties' two respective positions and that the majority of the new rates adopted by the adjudicator were closer to Prestige's position than they were to Clegg's position.

HHJ Kelly granted summary judgment in favour of Clegg, enforcing the adjudicator's decision.

The judge held that because both parties expressly invited the adjudicator to determine the amount due or "such other sum as he saw fit", the adjudicator was legitimately empowered to form his own valuation, including applying "fair and reasonable" rates and was not confined to choosing between the parties' figures. HHJ Kelly explained that:

> *"…it is relevant that the adjudicator was asked to provide an overall gross valuation…Inevitably, an adjudicator given that task has to look at the individual items which make up the payment application as a whole…However…it is acceptable for an adjudicator to*

Adjudication update continued

> *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."*

The court also rejected Prestige's argument that the adjudicator should have sought further submissions before applying his own rates. In doing so HHJ Kelly noted that the parties' submissions had already provided the adjudicator with sufficient materials to assess the valuation, the adjudicator did not need to consult the parties on every element of his thinking and that there had been no material prejudice to Prestige.

As to the sufficiency of the adjudicator's decision, the judge found that while the adjudicator's reasons did not include the detailed workings for each new rate adopted, there was nothing improper in the decision and it did sufficiently explain the adjudicator's overall valuation approach.

Commentary

Clearly a key difficulty with Prestige's position was that the rates used by the adjudicator were all within the range of the parties' two respective positions and that the majority of the new rates adopted by the adjudicator were closer to Prestige's position than they were to Clegg's position.

The judgment also reiterates the fundamental notion that adjudication is designed to be a quick and practical dispute-resolution mechanism and that adjudication decisions are not to be judged by the meticulous standards of a court trial. The Courts clearly remain pro-enforcement of adjudicators' decisions, even where there are reasoning imperfections, provided that there has been no material breach of natural justice.

Adjudication update continued

RBH Building Contractors Ltd v James [2025] WEHC 2005 (TCC) Craig Longhurst

In this case, the Technology and Construction Court ("TCC") refused to grant summary judgment to enforce an adjudicator's decision on the basis that the employer defendant had a real prospect of establishing that the residential occupier exception in section 106 of the Housing Grants, Construction and Regeneration Act 1996 (the "Act") is engaged.

The Law

Generally, adjudicators' decisions are binding unless and until the issue in dispute is determined by the courts and, where an adjudicator's award is not adhered to, the unpaid party can seek to enforce that payment pursuant to Part 7 or Part 8 of the Civil Procedure Rules ("**CPR**"). That claim is usually accompanied by an application for summary judgment, to curtail the proceedings.

CPR Part 24 provides, relevantly, that the court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if it considers that the party has no real prospect of succeeding on the claim, defence or issue.

The prospects of succeeding on a claim, defence or issue is subjective and a defence that the adjudicator had no jurisdiction to hear a dispute referred to it in the first place because the statutory adjudication scheme should not have applied could, as in this case, raise the prospect of a successful defence.

Background

Mr and Mrs James (the "**Jameses**") appointed RBH Building Contractors Ltd ("**RBH**"), under an oral contract, to build a large luxury house on a site in North Devon from January 2022. By April 2024, the Jameses and RBH had fallen out whilst the works were incomplete. On 18 November 2024, an application for payment in the net sum of £663,016.16 was issued on RBH's behalf (the "**Application for Payment**") and on 27 November 2024, the Jameses responded to the Application for Payment, essentially valuing it at £nil (the "**Pay Less Notice**").

The adjudication

RBH brought, and won, a "smash and grab" adjudication on the basis that the Pay Less Notice was invalid. The adjudicator ordered that the Jameses (as the unsuccessful 'responding party') pay his fees and the £663,016.16 award (the "**Award**").

Adjudication update continued

In reaching his decision, the adjudicator rejected the Jameses objection to the adjudicator's jurisdiction which was raised on the basis that they, at the time of the contract, intended to occupy the property. As there was no adjudication procedure in the parties' oral contract, if the Jameses did indeed intend to occupy the house, Section 106 of the of the Act would have the effect of disapplying the statutory adjudication right to adjudicate, causing the adjudicator to have no jurisdiction to hear the dispute.

The Jameses did not pay the adjudicator's fees or the Award and, given that non-payment, RBH made a summary judgment application for enforcement pursuant to CPR Part 7 and CPR Part 24.

The subsequent proceedings

The Jameses successfully defended the summary judgment application

In dismissing RBH's application for summary judgment, the TCC found that, given the evidence put forward by the Jameses, including that they sold their previous home in Essex, moved to Devon, personalised the specifications for the house, registered locally, and joined the electoral roll there, the Jameses had a real chance of proving they intended to live in the property, making them “residential occupiers” and exempt from the statutory adjudication scheme as set out above.

The Jameses also obtained a CPR Part 8 declaration

The TCC made a CPR Part 8 declaration that the adjudicator was wrong and that the Pay Less Notice was indeed valid because any reasonably objective reader who had knowledge of the contract works will have known it related to the relevant application for payment and that it set an adequate agenda for an adjudication by identifying specifically which elements of the Application for Payment were not accepted and, briefly, why they were not accepted (each as per the established legal position).

The Jameses remained liable for the adjudicator's fees, as apportioned by him

The TCC considered that it did not have the power to alter the adjudicator’s decision in relation to his fees and, consequently, the Jameses remained liable in accordance with his award.

Discussion

This case is a rare example of the residential occupier exception being successfully used to challenge the enforcement of an adjudicator's decision. It also reinforces the importance of clarity in pay less notices and the finality of adjudicators’ fee apportionments.

Adjudication update continued

VMA Services Ltd v Project One London Ltd [2025] EWHC 1815 (TCC) Iain Moore

VMA Services Ltd v Project One London Ltd [2025] EWHC 1815 (TCC) provides the industry with clarification regarding the precedence of 'smash and grab' adjudications over True Value Adjudications ("TVA") under the Housing Grants, Construction and Regeneration Act 1996 (the "Act").

The Technology and Construction Court ("**TCC**") reaffirmed the primacy of the statutory payment regime, confirming that:

a) a responding party can rely on a 'smash and grab' defence to defeat a TVA; and

b) that adjudicators have jurisdiction to order payment of a Notified Sum to a respondent.

Background

16 October 2023	VMA Services Limited (**VMA**) and Project One London Limited (**POL**) enter into a JCT Design and Build Sub-Contract for mechanical works.
21 June 2024	VMA submits Application for Payment No. 8, seeking £106,434.88. POL did not serve any Payment Notice or Pay Less Notice.
16 December 2024	POL served a Notice of Intention to commence a True Value Adjudication.
7 January 2025	VMA issue its Response, in which it raised POL's failure to pay the Notified Sum (as contained within its Payment Application No. 8) by way of Defence and Counterclaim.
10 February 2025	The Adjudicator finds that: (a) the TVA brought by POL could not be entertained as POL had not paid the Notified Sum; and (b) the Notified Sum stated in VMA's Payment Application is due in full and payable forthwith by POL.

Legal framework

The policy objectives behind the Act and the Scheme for Construction Contracts 1998 were designed with the improvement of cash flow within the construction industry in mind. These objectives are well-known and frequently cited by those seeking to refer 'smash and grab' disputes.

As such, the Act operates such that where a valid payment application is made and the payer fails to serve a Payment Notice or Pay Less Notice, the sum applied for becomes a 'Notified Sum' and is immediately payable. The Employer's right to commence a TVA is suspended until the Notified Sum is paid.

In his judgment, Adiran Williamson KC, noted that this principle has been affirmed by the Court on a number of previous occasions, including:

1. ***Davenport v Greer [2022] EWHC 936 (TCC)***, where Stuart-Smith J noted:

   '"[21] … it seems to me consistent with the policy underlying the adjudication regime that a defendant who has discharged his immediate obligation should generally be entitled to rely upon a subsequent true value adjudication and that a defendant who has not done so should not be entitled to do so. In answer to the question whether a person who has not discharged his immediate obligation should be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to

Adjudication update continued

implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision.

…

[25] To my mind these statements are clear and unequivocal: the employer becomes free to commence his true value adjudication when (and only when) he has paid the sum ordered to be paid by the earlier adjudication."

2. ***Bexheat Ltd v Essex Services Group Ltd***, where the Court set out the following principles:

   i) where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the "notified sum" in accordance with section 111 of the 1996 Act;

   ii) section 111 of the 1996 Act creates an immediate obligation to pay the "notified sum";

   iii) an employer is entitled to exercise its right to adjudicate pursuant to section 108 of the 1996 Act to establish the "true valuation" of the work, potentially requiring repayment of the "notified sum" by the contractor;

   iv) the entitlement to commence a "true value" adjudication under section 108 is subjugated to the immediate payment obligation in section 111;

   v) unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a "true value' adjudication under section 108".

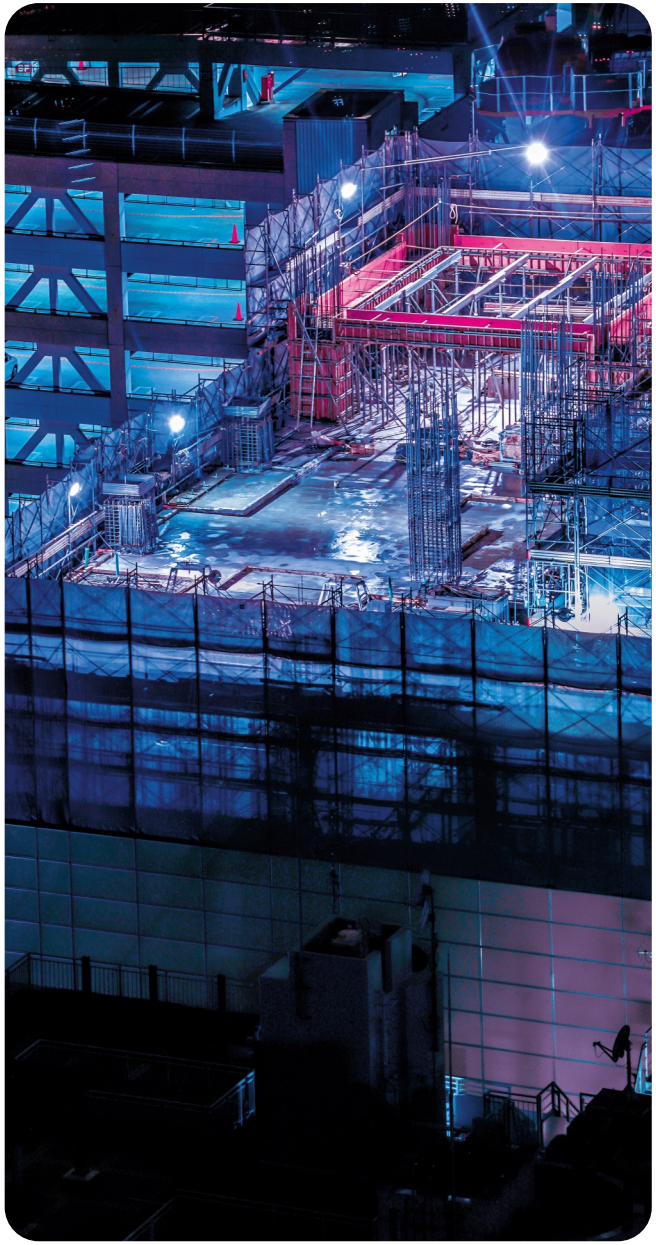
Before arriving at its decision, the Court re-stated the principle that a Responding Party will not generally be able to make a monetary recovery from its defence and counterclaim. The Court made reference to the decision of Lord Bridgs in ***Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25***:

*"44. However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off. This much was common ground, but it is supported by authority: see Bailey Construction Law 3rd edition (2020), paragraph 24.57 and **PC Harrington Contractors Ltd v Multiplex Constructions (UK) Ltd [2007] EWHC 2833 (TCC); [2008] BLR 16**, paragraphs 40 to 41 per Christopher Clarke J. The set-off may be advanced by way of defence to the exclusion of the claim referred to adjudication, but not as an independent claim for a monetary award in favour of the respondent to the reference."*

Arguments and decision

In line with the Court's guidance in Bresco, POL argued that the adjudicator lacked jurisdiction to make a monetary award in favour of VMA as the respondent.

VMA relied upon the judgment of ***WRW Construction Limited v Datblygau Davis Developments Limited (2020)***



Adjudication update continued

EWHC 1965 (TCC), in particular the following comments of Mr Singer KC:

> *"18. I accept on the basis of the authorities quoted above (and the Claimant does not argue otherwise) that the Adjudicator did not have jurisdiction to award a monetary sum to the Claimant as the responding party to the adjudication. However that, in my judgment, is not the relevant issue, nor was it an issue which arose for determination in Harrington or Bresco. The issue before me is whether on the basis of a valid, binding valuation of the post-termination account a court's enforcement of that valid award can include an order for payment of the sum due as a consequence of the binding valuation, or not.*
>
> *19. In my judgment, there is no bar on the basis of the authorities cited to me to the Court enforcing a temporarily binding valuation in an adjudication award by making an order for payment of the monies due as a result of that valuation. Indeed, in my judgment it would be contrary to principle and established authority for the Court to effectively force a party who has the benefit of an award in its favour as far as a balance being due to it, thereafter to have to commence a further adjudication (to which there is no defence) for the purpose of obtaining an order for payment from the Adjudicator before returning to the Court if necessary, for further enforcement proceedings.'*

On the basis of the above, Mr Williamson KC agreed with VMA's argument noting that:

1. The adjudicator had jurisdiction to order payment of the Notified Sum to the respondent.
2. The failure to serve a Payment Notice or Pay Less Notice was a complete defence to the TVA.
3. Requiring VMA to commence a separate adjudication to recover a sum which had already been determined to be due to them, would be futile and would frustrate the Act's policy objectives.
4. The Notified Sum had to be paid before POL could proceed with its TVA.

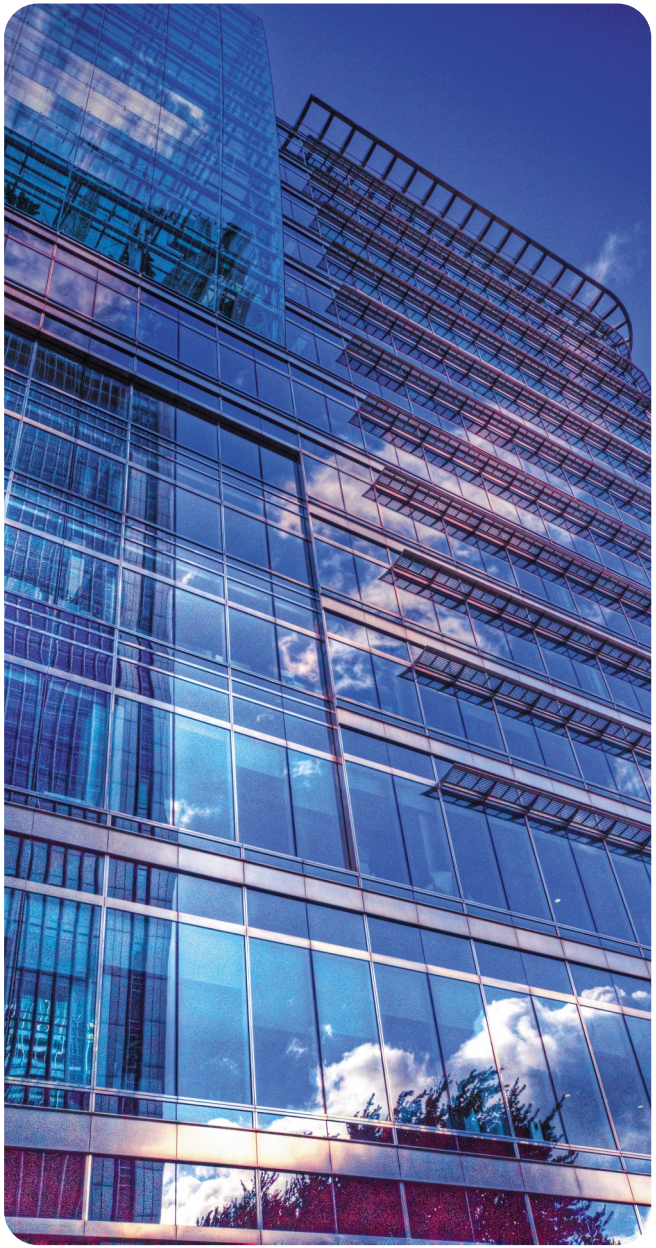
Practical implications

The decision offers several important practical lessons for employers, contractors, and consultants:

First, reiterates the need for strict compliance with notice provisions; failing to meet deadlines for Payment Notices or Pay Less Notices can result in immediate liability for the total amount claimed.

Second, the importance of maintaining disciplined cash flow processes is also critical. Employers should establish strong internal procedures to ensure payment applications are promptly reviewed and addressed.

Finally, when considering risk management in adjudication, it is vital to verify that all statutory payment obligations have been met before initiating a TVA. Effective contract administration depends upon project teams being aware of the significance of statutory timelines, and the value of submitting clear and timely notices.



Adjudication update continued

London Eco Homes Ltd v Raise Now Ealing Ltd [2025] EWHC 1505 (TCC) Tyler Fitzpatrick

In this case, DJ Baldwin sitting in the TCC (Liverpool) granted summary judgment to enforce an adjudicator's decision on the basis that the parties' settlement agreement was a variation of their original contract (which was based on a JCT Intermediate Building Contract) rather than a standalone contract and therefore included for adjudication.

Background

In November 2021, Raise Now Ealing Ltd ("**RNE**") employed London Eco Homes Ltd ("**LEH**") as a building contractor on a construction project in West Ealing, pursuant to a JCT Intermediate Building Contract (the "**Contract**").

The Contract contained the standard JCT suite of contracts dispute resolution clauses and, relevant to this dispute, Article 7 and clause 9.2 provided an express right to refer a dispute arising under the Contract to adjudication.

Various disputes did arise, but the parties negotiated a settlement and entered into a settlement agreement dated 8 August 2023 (the "**Settlement Agreement**"). Following non-payment by RNE of the settlement sum as agreed in the Settlement Agreement, an amended payment schedule was agreed on 25 September 2023 (the "**Amended Schedule**"). Again, RNE failed to make the necessary payments in accordance with Amended Schedule and LEH referred that non-payment to adjudication, claiming the sum of £95,000.

During the course of the adjudication, RNE contested the adjudicator's jurisdiction on the grounds that the Settlement Agreement did not provide an express right to refer a dispute to adjudication nor was it a construction contract as defined by Sections 104 and 105 of the Housing Grants, Construction and Regeneration Act 1996 (the "**Act**") thus LEH did not have a contractual or statutory right to adjudicate.

The adjudicator rejected RNE's challenge and proceeded to decide in LEH's favour.

Enforcement proceedings

RNE refused to make the payment as required by the adjudicator's decision and LEH issued Part 7 proceedings in the Technology and Construction Court ("**TCC**"). The key issue for the court to consider when deciding to enforce the adjudicator's decision was whether the adjudicator had jurisdiction.

Adjudication update continued

Briefly, the parties' positions were as follows:

RNE argued: The Settlement Agreement was a standalone contract and pointed to the absence of express adjudication terms and clause 7 of the Contract (an entire agreement clause).

LEH argued: The Settlement Agreement was a variation to the Contract and the adjudication provisions survived or, alternatively, that it was a construction contract under the Act due to clause 2.7, which provided for potential remedial construction works.

The Judgment

In dismissing RNE's defence and enforcing the adjudicator's decision, DJ Baldwin held that:

1. The Settlement Agreement was not for carrying out Construction Operations:

1.1 Clause 2.7 of the Settlement Agreement did not provide for Construction Operations and thus did not create a standalone construction contract. Clause 2.7 was relevant to the issuance of a warranty for the basement works insofar as if one was not provided, no payment would become due under the Settlement Agreement. In those circumstances, RNE was obligated to carry out all works necessary or modifications to obtain a valid warranty.

1.2 Clause 2.7 of the Settlement Agreement did make provision for construction operations, namely for all necessary works or modifications which might be required for a sign off on the basement warranty.

Beyond this, however, the agreement related to other matters which clearly were not construction operations, namely the residual terms of settlement agreed to. As such, section 104(5) of the Act is engaged (i.e. the Settlement Agreement is a hybrid construction contract). However, as the dispute between the parties arose not out of the provision of "necessary works or modifications", but rather out of the timing and/or acceptability of the provision of the basement warranty, DJ Baldwin held that the dispute referred was not sufficiently connected with or related to construction operations to allow for section 108 of the Act to be engaged.

2. The Entire Agreement Clause was not effective

2.1 DJ Baldwin held that the only way that clause 7 of Contract could be read in a sensible way, that is to make commercial sense, in that it was an agreement as to the termination of and not in substitution for the Contract, was to imply the words "termination of the" before "JCT Contract" or otherwise construe the clause in this way. The clause might then be sensibly read or understood as to mean:

"7. Entire agreement

This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to the termination of the JCT Contract and the Project."

2.2 Clause 7 did not therefore impact the status of the Settlement Agreement because termination was not an issue in dispute (neither party had sought to terminate the Contract).

3. The Settlement Agreement is a variation to the Contract

3.1 The Contract provided a mechanism for termination by LEH on the grounds of default by RNE (clause 8.4).

Adjudication update continued

3.2 The termination mechanism involved the provision of a default notice and a termination notice (consistent with clauses 8.4.1, 8.4.2 or 8.4.3) and the consequences in terms of sums due to LEH (clause 8.7.3).

3.3 The Settlement Agreement drew directly upon the original termination mechanism both in its recitals and in section 1, where the parties saw fit to ensure that it was agreed that both the default notice and the termination notice were deemed to have been accepted and served correctly "*in accordance with the [JCT] Contract*".

3.4 The Settlement Agreement then went on to vary the Contractual mechanism for determining a final sum due, by the agreement of the RNE to pay to LEH the agreed sum of £188,750 by way of the (defined) Termination Payment:

> *"in full and final settlement of the final account in relation to the Project and the JCT Contract and all claims that may have existed prior and after this agreement between LEH and RNE ",*

thus providing consideration for the variation.

Discussion

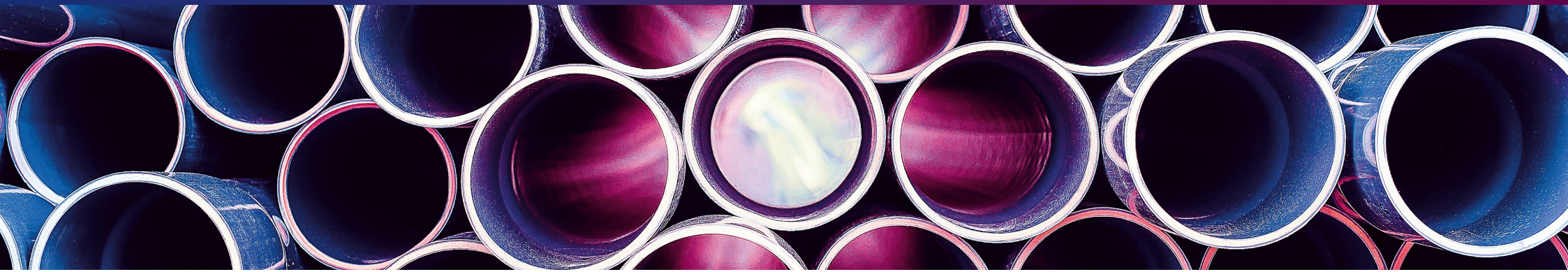
The Court held that the Settlement Agreement was a hybrid construction contract and, in the event a dispute arose under the warranty obligation, a statutory right to refer a dispute to adjudication would have arisen. Whether or not a carefully worded referral notice would have circumvented this issue altogether remains to be seen.

In this case, the settlement agreement was sufficiently connected to the contract which gave rise to a variation of the same and thus preserved a contractual right to adjudicate.

While this issue remains to be determined on the facts of each case and the specific drafting, it appears that a settlement agreement will seldom be held as an entirely separate contract because the very nature of a settlement agreement is usually directly connected to the terms of the underlying contract. If the settlement agreement was not so, one would question whether it would serve to settle a dispute at all.

As with collateral warranties following the Supreme Court decision of ***Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) [2024] UKSC 23***, one way to ensure that parties are able to adjudicate under these documents would be to expressly incorporate a contractual right to adjudicate in the document itself.

Building safety



URS Corporation Ltd v BDW Trading Ltd [2025] UKSC 21 Tyler Fitzpatrick

Supreme Court dismisses all grounds of appeal in *URS Corporation Ltd v BDW Trading Ltd* - developers are owed a duty of care under the Defective Premises Act 1972 ("DPA")

The Supreme Court's decision in ***URS Corporation Ltd v BDW Trading Ltd [2025] UKSC 21*** was handed down on 21 May 2025, dismissing the appeal on all grounds, re-confirming the Court of Appeal's decision that developers may be owed duties under S.1.1 of the Defective Premises Act 1972 and providing a useful analysis of the interaction between the Building Safety Act 2022 ("**BSA**") and the Civil Liability (Contribution) Act 1978 ("**Contribution Act**").

Background

Following the events giving rise to the Grenfell Tower tragedy in 2017, the government encouraged developers to carry out investigations into medium and high-rise developments and to remedy any safety defects discovered.

In 2019, BDW Trading Ltd ("**BDW**") found structural design defects in two high-rise developments (the "**Developments**") - both of which designed by URS Corporation Ltd ("**URS**").

Having sold long leases of the flats to residential purchasers, BDW no longer had a proprietary interest in the Developments. Despite this, following the discovering of the defects, in 2020 and 2021, BDW carried out remedial works to the Developments. BDW sought to claim for their losses in relation to carrying out the remedial works from URS and issued a negligence claim in the Technology and Construction Court ("**TCC**").

The TCC found that that BDW's cause of action accrued no later than the date of practical completion and the losses were recoverable because BDW did hold a proprietary interest at the point of the cause of action. URS appealed – the grounds of which are set out in our earlier article Developers are owed duties under the Defective Premises Act 1972 (DPA).

The Court of Appeal upheld the finding of the TCC dismissing all grounds of the appeal but, on 5 December 2023, the Supreme Court granted URS leave to appeal on four grounds and eventually hearing the case in early December 2024.

Building safety continued

Ground one

The ground

Did BDW suffer actionable and recoverable damage or was this damage outside the scope of the duty of care as they voluntarily completed the remedial works? If it was to be found that this was out of the scope, did BDW already have an accrued cause of action in negligence when it sold the Developments?

Judgment

It was not disputed that URS was in breach of their duty of care owed to BDW in respect of the structural designs of the Developments and that in order to remedy this breach, BDW incurred losses.

URS, however, argued that due to the voluntary action taken by BDW to remedy the defects, the losses were too remote. Finding that the loss was not too remote, the Court turned its attention to whether a principle of voluntariness applied.

The Court held that due to three factors, the actions taken by BDW were not voluntary:

1. If BDW did not remedy the defects, there was a risk of personal injury or death;
2. BDW had a legal liability to the homeowners under the DPA; and
3. There would be reputational damage to BDW if they did not take any action.

Finding that BDW had no realistic alternative but to carry out the works, the Court held that there was no rule of law which meant that the carrying out of the repairs by BDW rendered the remedial costs outside the scope of the duty of care owed or too remote. As a result of the finding, and to the frustration of some practitioners, the Court did not continue to consider the correctness of the House of Lords decision in ***Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 A.C.1***.

Ground two

The ground

Section 135 of the BSA came into force on 28 June 2022 and retrospectively extended the limitation period for accrued claims under section 1 of the DPA from six years to up to 30 years. Did this apply to these circumstances and what effect does it have?

Judgment

The question before the Court was not whether section 135 applied retrospectively (it is clear that it does). Instead, the issue before the Court was whether the retrospectivity of s.135(3) of the BSA applies to other claims which are dependent on the time-bar applicable to claims under s.1 of DPA. For example, the claims in this case in negligence and for contribution

The Court held that, as a matter of language, the wording of section 135(3) is not intended to restrict the extended limitation period to actions under section 1 of the DPA; it can apply to claims reliant on Section 135(3) but not brought under Section 1 of the DPA. It does not however apply to questions of mitigation and/or causation - if there is an issue as to the reasonableness (as a matter of legal causation or mitigation) then that issue would be determined by reference to the facts as at the time of the relevant actions.

Ground three

The ground

Under section 1(1)(a) of the DPA, did URS owe a duty to BDW? If so, were the losses claimed from BDW recoverable for a breach of this duty?

Judgment

When considering the wider context behind the words of section 1(1)(a) of the DPA, the Court deemed that they should be interpreted as applying to any person, including the developer who ordered the dwelling to be built.

As such, the wording of section 1(1)(a) of the DPA would apply to BDW as the first owner who had ordered the relevant works to be carried out by URS meaning that a duty was owed to BDW.

Where a duty is found to be owed, the DPA does not prohibit the recovery of certain costs. It follows that BDW would be entitled to recover any losses incurred by them when acting as a developer remedying defects caused by its contractor's breach of duty.

Building safety continued

Ground four

The ground

The Contribution Act gives a person ("**D1**") who is liable for damage suffered by another person ("**C**") a right to recover contribution from anyone else (e.g. "**D2**") who is liable for the "same damage". In this way the cost of compensating C can be allocated between D1 and D2 according to their relative responsibility for the damage that C has suffered. Here BDW, having paid for the repairs, claimed contribution from URS under the Contribution Act on the basis that BDW and URS are each liable to the homeowners for damage resulting from the defects.

The Court was asked to determine whether, despite the fact that no third party had brought a claim against BDW in relation to the defects, could BDW bring a claim pursuant to section 1 of the Contribution Act?

Judgment

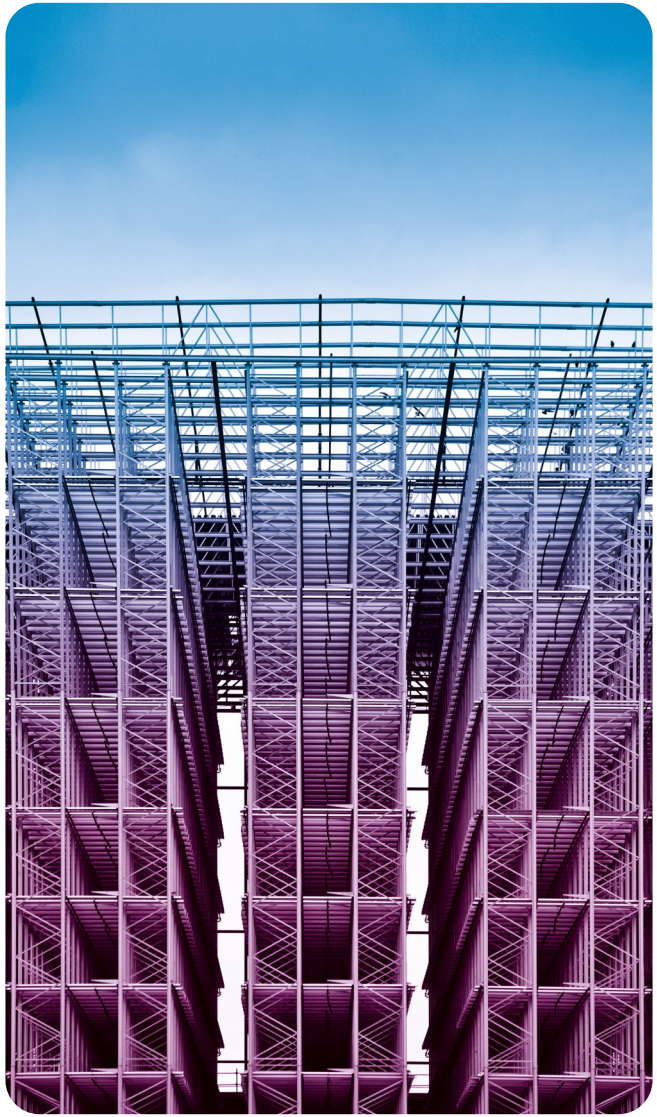
Referring to the judgment of Lord Leggatt, Ground 4 was also dismissed.

In his judgment, Lord Leggatt, stated that BDW was not prevented from bringing a claim for contribution against URS by the fact that there has been no judgment against BDW, third party settlement or Claim asserted against BDW.

Ultimately finding that as BDW made a payment in kind by performing the remedial works in compensation for the damage, it was sufficient for them to bring a claim pursuant to section 1 of the Contribution Act

Summary

This case set out to apply several key acts impacting the construction industry with numerous important takeaways. The most important of which is that a contractor on the duty of care owe a duty of care for pure economic loss - even after the developer had sold their interest in the development.



Building safety continued

Triathlon Homes LLP v Stratford Village Development Partnership and others [2025] EWCA Civ 846

Natasha Leo and Dan Preston

Developers won't escape remediation contribution orders under the Building Safety Act 2022

The legacy of the London 2012 Olympics continues to shape legal debate in the construction sector over a decade later. In *Triathlon Homes LLP v Stratford Village Development Partnership and others [2025] EWCA Civ 846*, the Court of Appeal considered who should pay for remediating fire safety defects at the former athletes' village.

Background

Central to this case is the East Village residential estate at Stratford, formerly the London 2012 Olympic athletes' village. The accommodation was converted after the games to provide near 3,000 residential housing units, mostly contained in 66 tower blocks of between 8 and 12 storeys.

Social housing association Triathlon Homes LLP ("**Triathlon**") as long lessee successfully obtained remediation contribution orders ("**RCOs**") in relation to five blocks under Part 5 of the Building Safety Act 2022 (the "**BSA**") at the First -tier Tribunal ("**FTT**") against the developer Stratford Village Development Partnership ("**SVDP**"). Our Insights article published on 1 February 2024 summarised the FTT findings.

SVDP and the associated effective superior Landlord, Get Living Plc ("**Get Living**"), appealed the FTT decision. East Village Management Limited ("**EVML**"), as estate manager and Landlord to Triathlon, was joined to proceedings as a respondent, and the Secretary of State for Housing, Communities and Local Government ("**Secretary of state**") was represented as an intervener.

On 8 July 2025 the Court of Appeal ("**CoA**") rejected both grounds of appeal.

Decision

SVDP and Get Living brought the appeal on two Grounds. First that the FTT were wrong in concluding that it was just and equitable to make an RCO against them for the cost of remediation works, or that the RCO should have been made following the outcome of litigation against the original contractor. Second that the FTT were wrong in concluding that an RCO could be made in respect of costs incurred prior to section 124 of the BSA coming into force on 28 June 2022.

Arguments for Ground 1 were heard as ten sub-grounds:

Ground 1.1

The appellants submitted that the FTT had been wrong to presume it was always just and equitable to make an RCO against the developer. The CoA agreed with the FTT that this was the essential purpose of section 124 of the BSA and the public Building Safety Fund ("**Public Fund**") should not step in when there was a developer or associated company able to fund remedial works, nor should the Public Fund provide interim support in anticipation of future litigation against the contractor.

Building safety continued

Nugee LJ commented that it may not always be just an equitable to make an RCO against an associated company that had nothing to do with the development, e.g. a *"charitable company to which the director had given his time voluntarily"*, leaving remediation costs to be borne by the Public Fund.

Ground 1.2

It was submitted that the FTT were wrong to allow Triathlon's claim against the developer under regulation 3 of the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022 as neither SVDP nor Get Living were the Landlord. Nugee LJ agreed with the FTT that this did not matter as the primary purpose of the "associated company" provisions of section 124 of the BSA was to allow an RCO to be made against the original developer.

Ground 1.3

The appellants argued Triathlon's motive in obtaining the RCO was so it would not have to pay for the works itself and either EVML or the Secretary of State should have made the application. The CoA agreed with the FTT that in the absence of malice, the identity nor motive of an RCO applicant was not important provided that they were eligible (which they were).

Grounds 1.4 and 1.10 (argued together)

It was submitted that the RCO was not needed as the remediation works were being funded by the Public Fund, or could be awarded once the outcome of any litigation against the original contractor was known. Again, the CoA agreed with the FTT that the Public Fund is not listed in the hierarchy of potential funders in the BSA and should be a measure of last resort, asking *"Why should the public continue to fund remediation works when the developer and associated companies are available and able to pay?"*.

Ground 1.5

The appellants argued that Triathlon ought to have pursued other claims before applying for the RCO, and that had a claim against SVDP or Get Living been initiated, it would then have been able to join the original contractor and others. This ground was also dismissed since the BSA makes no obligation on eligible applicants to exhaust other claims first.

Ground 1.6

The CoA heard argument that since Triathlon had caused EVML to make an application for public funding of the remediation works with the support of SVDP and Get Living, and that the scope of the works was formed with a view to obtaining successful public funding, its subsequent application for an RCO was inconsistent with that intent. The CoA dismissed this argument stating *"It is not as if it is suggested that Triathlon ever promised not to apply for an RCO, or had estopped itself from doing so."*, finding that Triathlon had not precluded itself from applying for an RCO by previously advocating for public funding.

Ground 1.7

It was submitted that the public funding was granted for remediation works without expectation of recovery from SVDP or Get Living. Nugee LJ disagreed, quoting the standard form grant funding agreement that *"the Applicant shall use all reasonable endeavours to pursue reasonable remedies available to it …"* which would include applying for an RCO and handing any monies recovered back to the Public Fund.

Ground 1.8

The appellants argued that the changing identity of SVDP and, in particular, Get Living, were such that they were different entities to the original developer. SVDP had originally been in public ownership, was sold to an investment entity, and the chain of subsequent

Building safety continued

transactions was such that Get Living was in no sense a developer and had no connection with the development. Both the FTT and CoA highlighted that Get Living had the option to instead purchase land and buildings but chose to acquire the company and with it, its liabilities, and dismissed the argument.

Ground 1.9

Finally, it was submitted that Get Living was protected from an RCO being made against it as since its subsidiaries held qualifying leases in the blocks, it fell within the definition of "Leaseholder" under the grant funding agreement and EVML was prohibited from recovering from leaseholders any expenditure covered by the Public Fund. Since the RCO applicant was Triathlon, this did not matter, however, Nugee LJ considered EVML's position in applying for the RCO in its own name and found that the prohibition only protected the actual leaseholder from a contribution claim against it.

Ground 2

Under the second Ground of appeal, the appellants submitted that the FTT were wrong to find that an RCO could be made in respect of costs incurred by Triathlon prior to enforcement of section 124 of the BSA on 28 June 2022. This was largely answered by ***URS Corporation Ltd v BDW Trading Ltd [2025] UKSC 21*** and Nugee LJ considered the Supreme Court judgment that Part 5 of the BSA was clearly intended to have retrospective effect. Whilst not following the same analysis, Nugee LJ concluded that *"It is far more consonant with the purposes of the [BSA] to interpret section 124 as providing the statutory mechanism for leaseholders who have paid to seek to pass on the costs they have already incurred – whether before or after the Act came into force."*. Newey LJ added that the aims of the BSA *"…are furthered by construing section 124 in such a way that RCOs can be made in favour of leaseholders, and against developers and persons associated with them, in respect of costs pre-dating the BSA".*

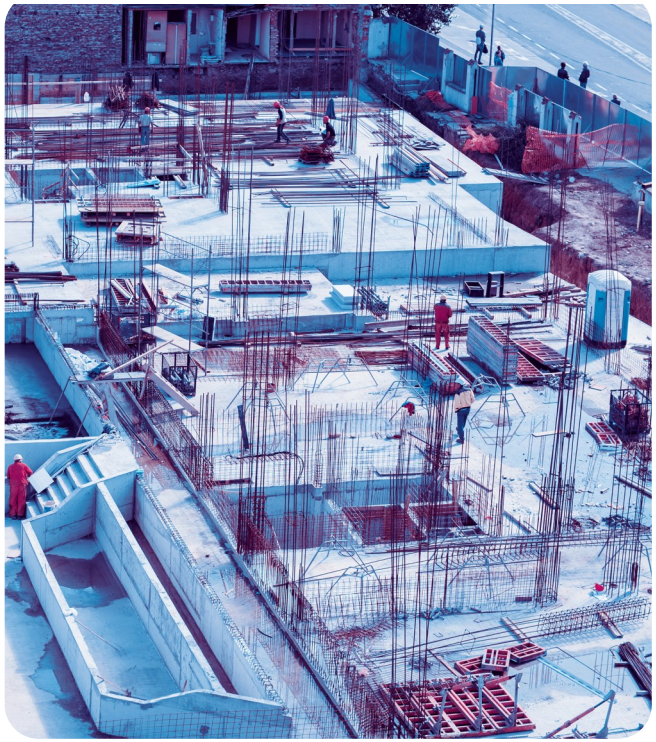
Commentary

Unpicking the relationships between the parties in this case and the dispute that arose between them sheds light on how the matter found its way before the CoA. EVML as the party ultimately responsible for the remediation works, has a board comprised of directors on both sides of the dispute. SVDP was originally formed from a public body, a point raised in argument with a suggestion that this meant there was no loss in remediation works being publicly funded. SVDP has since been sold into private ownership and that argument was dismissed.

As one of the first RCOs granted and appealed against, it is clear that the courts will give little weight to arguments that it is not just and equitable to award an RCO under section 124 of the BSA when there is a developer or associated company available and able to pay. On the back of the Supreme Court's judgment in ***URS v BDW***, this decision by the CoA reaffirms that the main purpose of the BSA is to place primary responsibility for building safety remediation costs on the developer.

Update

On 6 November 2025, SVDP and Get Living were granted a right of appeal before the Supreme Court on Ground 2 (retrospectivity). The application to appeal the CoA's decision that it was just and equitable to award the RCO against SVDP was not allowed. As in the CoA, the Supreme Court will consider retrospectivity alongside ***Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point and another [2025] EWCA Civ 856***.



Building safety continued

General update (2025) Kelly Meijers and Sam Thompson

After another pivotal year in the building safety landscape, here's a short overview of what you need to know about two of the developments: the Building Safety Act Working Group and the Building Safety Levy:

Building Safety Act Working Group

The BSA Working Group, set up in May 2024, has spent the last year tackling one of the biggest practical challenges in building safety litigation: inconsistency. Its mission is simple but ambitious — bring order to a rapidly expanding and highly technical area of law.

In June 2025, the Working Group proposed significant amendments to the TCC Guide aimed at making BSA claims easier to manage and more predictable. Key proposed changes include:

→ Formally recognising BSA claims as "TCC claims", removing any jurisdictional ambiguity and ensuring these matters fall squarely within the specialist court best equipped to handle them.

→ Clarifying that the Pre-Action Protocol for Construction and Engineering disputes applies to BSA related claims, promoting early engagement and narrowing of issues before proceedings are issued.

→ Setting clear expectations for ADR, signalling continued judicial encouragement for early, proactive settlement in complex multi-party disputes.

→ Providing tailored procedural guidance to reflect the technical, evidential and multi-disciplinary nature of BSA litigation.

→ Creating a streamlined process for cases that span the First-tier Tribunal and the TCC, recognising that BSA matters often involve overlapping tribunal orders and civil claims.

The direction of travel is clear: as BSA related claims continue to progress and develop, the courts are taking steps to ensure that the system operates with greater structure, coherence and efficiency.

Building Safety Levy

The Building Safety Levy (England) Regulations 2025 come into force on 1 October 2026 and introduce a new tax ensuring developers contribute directly to the cost of improving building safety across England. The levy applies to building control applications that create or increase residential floorspace — for example, new dwellings, new PBSA bedspaces, and conversions to residential use.

The Levy will be collected by local authorities and transferred to central government to support the wider building safety programme.

Some developments are excluded from the regime, including those delivered by non-profit registered providers of social housing, social housing projects, supported housing and developments such as schools or hospitals.

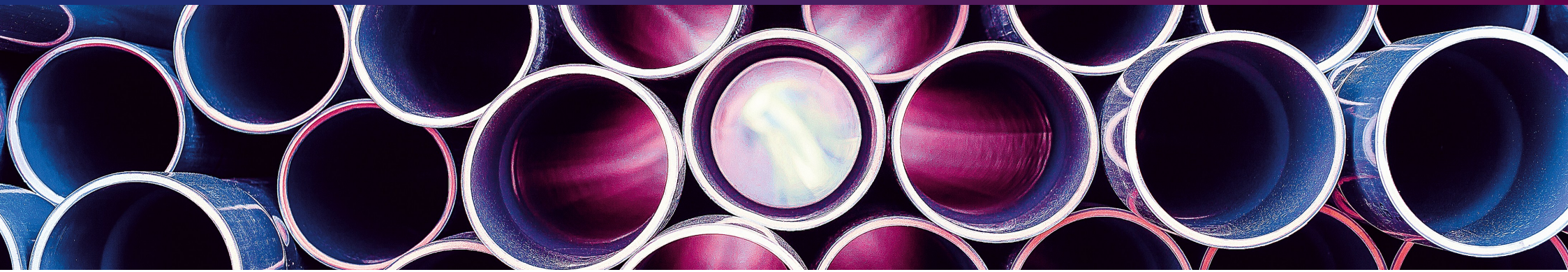
To ensure the payment can't be sidestepped, a completion certificate will not be issued until the Levy has been paid — a clear enforcement mechanism that embeds the charge into the development process itself.

Final thoughts

The Working Group's procedural reforms and the introduction of the Building Safety Levy mark a shift towards a more structured, rules-driven era of building safety regulation. For developers, landlords and practitioners, 2026 will be the year these changes start to bite — bringing greater predictability to the regime, but also heightening the demands placed on those operating within it.

fieldfisher

Industry update



HS2 review and regulatory consultation Cecily Davis

James Stewart – Review of HS2

For anyone with even a passing interest in how well equipped the UK is to deliver major infrastructure projects, James Stewart's review of HS2 is a compelling read. In the Autumn of last year, James joined us and a small group of clients to discuss the principal recommendations of his review and to share his candid thoughts on how UK Plc's report card might improve.

James pulled a few punches in his review and his observations over dinner were equally forthright. There has been no shortage of commentary and criticism of what, on any analysis, is a complex and highly ambitious programme. Few have alighted on the conclusion that the project did not go wrong, but was in fact doomed to fail from the start. Stewart's Review does not entertain any discussion of whether the project was ill conceived. This was not part of the terms of reference. Stewart asserts that once the decision to proceed with the project was made a number of mis-steps were made and although he recognises the contribution which Brexit, Covid-19, the war in Ukraine and crippling inflation played in the project's failure, he is uncompromising in his criticisms of both the Department of Transport as shareholder and HS2 Limited as the delivery body. Perhaps unsurprisingly, the private sector partners making up the supply chain face their share of blame. The damning conclusion reached is that the UK construction industry is simply not fit to deliver the scale of infrastructure required to underpin the economic growth sought and promised by Starmar's government.

Slating H2S has almost become a national pastime, but it is easy to forget that the project was ambitious, complex and of a scale unprecedented in UK infrastructure development. Criticisms of the project are only helpful where they constructively contribute to a road map for success for future. Of particular relevance, are the observations made in relation to the use of Early Contractor Involvement or "**ECI**". For many years the prevailing and seductive narrative has been that cost and time are best saved by engaging the contractor in works in conjunction with the development of design. It is an old fashioned, but hard to knock view that getting started before being ready saves neither time nor money and so a proper evaluation of the context in which ECI should be adopted is essential. It will be fascinating to see whether the Nation Infrastructure and Service Transformation Authority ("**NISTA**"), in its new role at the helm of UK infrastructure delivery, adopts James Stewart's recommendations in relation to ECI and is willing to put the Think Slow, Act Fast mantra back in vogue.

Our thanks again to James Stewart for sparing us time for dinner in October and to Keltbray, Kilnbridge, Heathrow

Industry update continued

Airport Limited, Keir, Burns & McDonnell, Aureos, Thames Tideway, Deloitte, Global Interconnection Group and KBR for their lively contributions to the evening's discussion.

Major Transport Projects Governance and Assurance Review: The HS2 Experience

Consultation on a single construction regulator

I tend to take the view that the time of year at which a consultation is launched speaks volumes about how seriously Government is seeking responses. Make what you will, then, of the consultation on the creation of the single construction regulator being launched in the days running up to Christmas 2025. Although the consultation itself has little detail of the powers that the regulator will have, the intention is that functions which currently sit with the Office for Products Safety and Standards, local authorities and the Building Safety Regulator should be collapsed into one single body.

Grenfell brought an unwelcome but much needed focus on the shortcomings of the construction industry. Perhaps more damning than the occurrences of negligence were the examples of systematic dishonesty. James Stewart's review of the problems with the delivery of HS2 (see pg. 33) concludes that the sector is just not "match fit" when it comes to providing support to UK PLC's growth plans. It is Government's intention that an improved culture across the construction sector will contribute to a more robust and profitable industry which can then help to deliver the economic growth pledged by Government.

One of the clear recommendations from the Grenfell Inquiry was that a single regulator should take responsibility for the regulation of construction products. We await a White Paper later this year which will bring forward more detail on this front. Further, the Inquiry highlighted the need for more robust accountability and confidence in the competence of those performing professional roles in the context of safety critical activities. Proposals for the design of a new framework to reduce the disparate nature of professional regulation on this front are underway. In the Spring of 2025 Government established the Fire Engineer's Advisory Panel with the purpose of providing support and advice to Government on the burgeoning fire engineering profession. Again, in Spring of 2026, a call for evidence will be published with a view to collating insights in relation to Government's proposals for this reform.

It is difficult to criticise any of the aspirations contained within the consultation. The outcomes sought are:

1. that buildings and the built environment should be safe and high performing;
2. that companies and individuals should be able to thrive when they operate in the interests of current and future building users;
3. that construction projects should be fit for their purpose and users provided with accurate project information; and
4. the building system should be trusted and users should have confidence that the system will act to prioritise their safety.

This is motherhood and apple pie. Who could challenge any of these aspirations? But how will the regulator make these aspirations achievements? The consultation advises us that the intention is that the regulator will have a hierarchy of objectives divided between primary and secondary. Primary objectives are those which the regulator must exercise in a way best calculated to secure the safety of people in buildings and improve safety standards. Secondary objectives are those which the regulator should aim to advance including but not limited to achieving sustainable economic growth and allowing companies to thrive when they operate in the interests of current and future building users. Strangely, given the prominence given to policing construction products, the consultation states that construction projects being fit for purpose and the return of trust in the building system are placed in the secondary objective category. We should want more from our regulator than this.

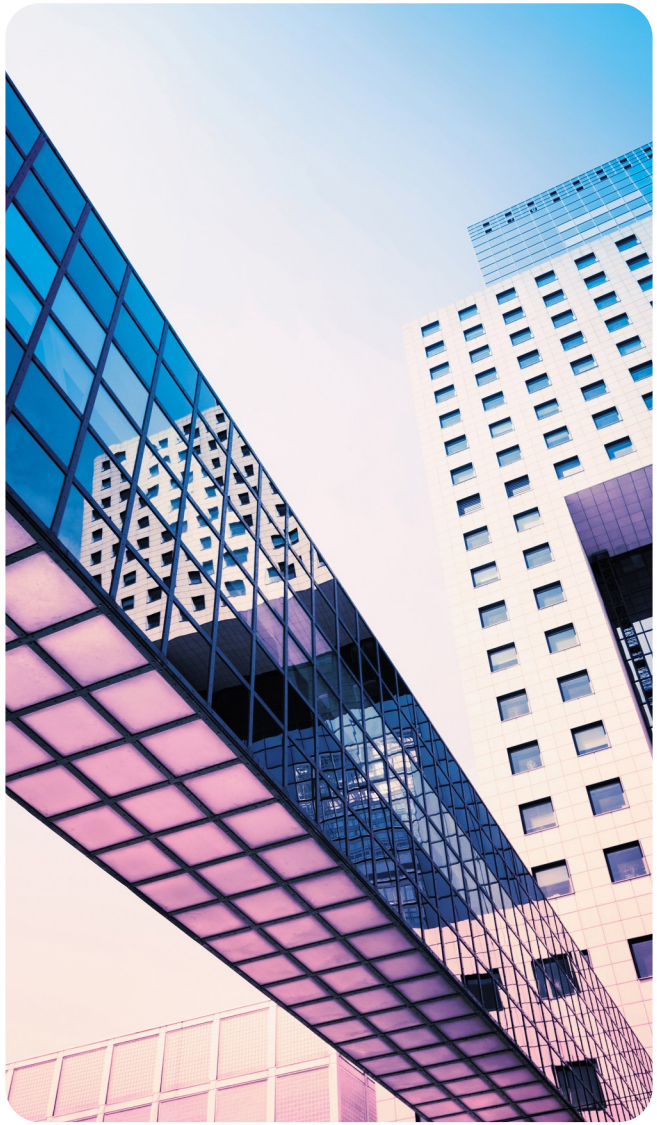
Watch out for concrete proposals for the regulator's powers and what balance there will be between "carrot and stick". Few UK regulatory bodies appear to have or make proper use of the powers given to them. The well documented shortcomings in the UK water industry have brought into question the role of its regulator. If we are going to have one, let the single construction regulator have teeth and bite.

Industry update continued

CMA developments in 2025:
Key considerations for the construction sector

Nick Pimlott and Holly Johnson

2025 was a significant year for the UK Competition and Markets Authority ("**CMA**"). A combination of accelerated enforcement timetables, technology-enhanced investigative capability and a forward-looking market study signals a more assertive regulatory stance - one with direct implications for contractors, developers and suppliers engaged in public procurement.



Housebuilders information sharing investigation

In October 2025, the CMA announced its decision to accept binding commitments from a number of major housebuilders[1], bringing its information-sharing investigation to a close without making infringement findings. The decision marks a significant intervention in the UK residential development sector, while also illustrating the CMA's increasing willingness to use commitments to address perceived systemic issues more swiftly than traditional enforcement routes.

CMA's assessment of the conduct

The investigation centred on concerns that several national housebuilders had been exchanging commercially sensitive information ("**CSI**"), including forward-looking data on sales prices, demand levels, development pipelines and incentives. Although the CMA did not reach a view on whether the parties had infringed competition law, it concluded that the nature, frequency and granularity of the information being shared gave rise to a realistic prospect of restricting competitive decision-making.

1. Barratt Redrow plc; Bellway plc; The Berkeley Group plc; Bloor Homes Limited; Persimmon plc; Taylor Wimpey plc; and Vistry Group plc

Industry update continued

The CMA noted in its analysis that:

- → The information circulated between firms was capable of reducing uncertainty regarding competitors' pricing strategies and sales expectations.
- → The exchanges risked weakening competitive pressure in local housing markets, where a small number of large developers may operate in close proximity.
- → Some information exchanges appeared to occur routinely, rather than being confined to exceptional or project-specific circumstances.

While stopping short of establishing a breach, the CMA characterised the practices observed as creating material competition risks, particularly where the information that was shared extended beyond publicly available datasets or market-wide indices.

Nature and scope of the commitments

The binding commitments accepted by the CMA require housebuilders to implement measures designed to prevent or substantially reduce the risk of future unlawful information-sharing. The commitments will remain in force for period of five years from 30 October 2025, including:

1. **The Information Exchange Commitment**

   Housebuilders must not share commercially sensitive or forward-looking information with competing developers, whether directly, indirectly or via third party data providers. This obligation expressly prohibits[2]:

   a. The price at which the sale of a property was agreed (**Pricing Information**);

   b. Information relating to any proposed or actual incentives (including, but not limited to, any payment of stamp duty, or inclusion or upgrade or appliances or other features) offered to or provided to any buyer of a property (**Buyer Incentives Information**);

   c. The number of properties that had been reserved, sold, cancelled, exchanged and/ or legally completed at housing developments (**Sales Volume Information**);

   d. The fact that a particular property had been reserved, sold, cancelled, exchanged and/ or legally completed (**Sold, Reserved or Unsold Information**); and/ or

   e. Information relating to the number, type, characteristics or interest of visitors to their developments (**Visitor Information**).

   This commitment is broad in scope and reflects the CMA's concern that the exchange of seemingly routine operational data can, in aggregate, "soften" competition by reducing market uncertainty.

2. **Affordable Homes Payment Commitment**

   The housebuilders must make a collective £100 million ex gratia payment to the UK Government by 30 January 2026. The Government will allocate the funds to affordable homes programmes across England, Scotland, Wales and Northern Ireland, supporting the capital costs of delivering housing for those whose needs are not met by the private market.

   The commitments also make clear that none of the companies in question may claim its share of the payment as a tax-deductible expense, ensuring that it operates as a genuine financial contribution rather than a deductible cost.

3. **The Industry-Wide Guidance Commitment**

   The housebuilders concerned must support the development and publication of industry-wide UK competition law guidance on Information Exchange. This includes:

   a. Using their best efforts to work with the Home Builders Federation ("**HBF**") and Homes for Scotland ("**HfS**") to produce guidance consistent with the Information Exchange Commitment, to be published within three months of 30 October 2025.

2. Except in circumstances where the information is (i) publicly available, (ii) required to comply with the housebuilder's legal obligations, including requests from statutory bodies or information needed to support the effective operation of the planning and land delivery process; or (iii) necessary for the furtherance of legitimate contractual arrangements, including joint bids, joint ventures, consortiums, and conveyancing, development or other land transactions.

Industry update continued

b. Providing monthly written updates to the CMA on progress, beginning on 30 November 2025 and continuing until the guidance is published on 30 January 2026.

Taken together, these commitments represent a significant behavioural shift for the sector and impose ongoing compliance obligations that will require active monitoring. They are binding and enforceable, and any failure to comply may result in further intervention by the CMA. Importantly, the CMA has made clear that the commitments do not create a safe harbour for information-sharing more broadly; firms must continue to assess competition risks on a case-by-case basis in light of their own practices and market conditions.

More broadly, the CMA's findings demonstrate a continuing concern that long-standing industry norms - particularly those involving data flows and market intelligence - may, even unintentionally, soften competitive dynamics. The acceptance of commitments should therefore not be understood as signalling a shift to a new norm, or reduced appetite for enforcement. On the contrary, the CMA has indicated that it will maintain close scrutiny of information-sharing practices across the housebuilding sector throughout the five-year duration of the commitments. Moreover, where – as is the case here – the CMA has investigated an issue (i.e. suspected anti-competitive information-sharing), it may be more likely to treat future instances of the same conduct more harshly.

Follow-on litigation risk

The CMA's findings have already triggered private enforcement activity. In January 2026, a proposed opt-out collective action was announced on behalf of UK homebuyers, alleging that years of information-sharing between major housebuilders enabled inflated prices for new-build homes. According to the proposed claim, the same categories of CSI identified by the CMA - achieved selling prices, incentives offered to buyers, and sales and reservation activity - distorted market conditions and resulted in purchasers paying more than they otherwise would have in a competitive market.

Although the claim remains at a preliminary stage and has not yet been certified by the Competition Appeal Tribunal, it illustrates how CMA investigations, even when closed by commitments rather than infringement findings, can give rise to subsequent private damages actions. It also reinforces the need for firms operating in concentrated markets to ensure that information-sharing practices are carefully controlled and competition-law risks actively managed.

Civil Engineering Interim Report

The CMA launched a market study on civil engineering market on 19 June 2025, encompassing the project life cycle of railway and public road infrastructure. In an interim report on 17 December 2025 the CMA set out a number of concerns regarding the functioning of the road and rail infrastructure markets (excluding HS2). The CMA is increasingly sceptical about whether current market structures and procurement practices are capable of delivering competitive outcomes or value for public money.

Emerging concerns

The CMA has highlighted several systemic issues that appear to be contributing to elevated costs, recurrent delays, and sub-optimal competitive dynamics:

- → Weak competitive pressure in certain segments of the supply chain, with limited bidder participation resulting in low contestability for major works.
- → Barriers to entry for SMEs, including resource-intensive procurement processes, high bidding costs, and contractual structures that tend to favour large incumbents.
- → Ineffective risk allocation, with risk transfer mechanisms that may discourage innovation and inflate delivery costs rather than driving efficiency.
- → Fragmented information flows and insufficient transparency, limiting contracting authorities' ability to benchmark performance, assess market capacity, or challenge cost escalation effectively.
- → Persistent delivery inefficiencies, including significant cost overruns and delays, which the CMA notes are long-standing rather than isolated occurrences.

These concerns extend beyond supplier conduct and include the capability and incentives of procuring authorities, the design of procurement policy and approaches, and regulatory barriers - indicating system-wide issues rather than problems confined to particular firms.

Industry update continued

Proposed options and potential regulatory direction

The CMA has indicated a series of possible options - both within and beyond its direct powers - which may be pursued depending on the conclusions reached in its final report, expected in Spring 2026. These include:

1. **Addressing pipeline uncertainty:** Proposed recommendations to extend multi-year capital funding settlements to procuring authorities, and encourage longer-term contracts beyond the political cycle. Calls for the publication of a consolidated UK-wide project pipeline.
2. **Alleviating public procurement authority capacity constraints:** Encouraging more cross-authority pooling of capacity and expertise, as well as joint procurement initiatives.
3. **Improving procurement policy:** Doing more to explicitly incentivise and reward innovation, investment, and long -term cost reduction.
4. **Reducing regulatory burden:** Expediting regulatory approvals for new products/technologies; eliminating over-compliance; and streamlining, supplier accreditations.
5. **Market fragmentation:** Some concern that more layers within the supply chain increases potential risk misallocation. Smaller fragmented firms may have more constrained capital reserves, restricting ability to innovate and take on risk.

Possible implications for construction and infrastructure businesses

The tone of the CMA's update suggests a regulator that is increasingly concerned about entrenched delivery problems and is willing to push for meaningful structural change, spurred on no doubt by the Government's push for growth. For market participants, several implications follow:

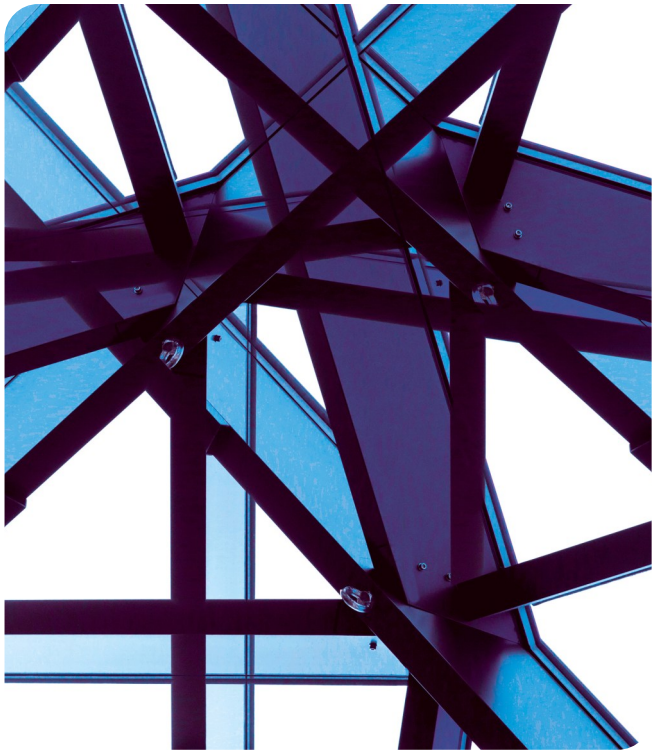
- → Firms involved in road and rail delivery should anticipate greater scrutiny of pricing, performance data, and risk-allocation models, with a likely expectation of clearer justification for cost and programme forecasts.
- → Procurement processes may be revised to incorporate stronger data requirements, enhanced reporting obligations, or revised evaluation structures.
- → Larger incumbents may face increased expectations around competitive performance, while reforms designed to reduce procurement barriers could create new opportunities for smaller or specialist contractors.
- → Businesses operating within long-term frameworks should assess whether their current commercial models and supply-chain arrangements remain aligned with evolving expectations around transparency and demonstrable value.

While the CMA has stopped short of initiating a full market investigation at this stage, the breadth and depth of its concerns suggest that regulatory pressure on the civil engineering sector will remain high throughout 2026, with a material possibility of policy or procurement reform following its final report.

Industry update continued

Procurement Act Nick Pimlott and Holly Johnson

The long-awaited Procurement Act 2023 ("PA23" or "Act") - together with the new Government's updated National Procurement Policy Statement – came into force on 24 February 2025 with a promise to modernise and simplify the legal framework governing how public bodies and utilities purchase goods, works and services.



Although described as a major reform to the public procurement rules, the first year of the PA23 has been a slow burn. Transitional provisions mean that frameworks, dynamic purchasing systems and utility qualification systems that were set up before the Act came into force continue to operate under the previous rules. Similarly, pre-PA23 contracts continue to be subject to the previous rules with regard to, for example, contract modifications.

However, as frameworks and contracts come up for retendering the PA23 will come increasingly into play.

Some key emerging themes for suppliers to the public and utility sectors are set out below.

Frameworks

Call off mechanisms under frameworks are likely to come under greater scrutiny under the PA23. Whilst the rules in the Act on frameworks appear largely similar to those under the previous regime, subtle differences in wording point to a need for framework authorities to define more precisely than has historically been the case the circumstances in which direct award without further competition is permitted under a framework.

The Act requires that for direct award to be available the framework itself must set out the "core terms" of each call-off contract. These could include: deliverables, standards, pricing mechanism, warranties, indemnities, termination and variation mechanisms specified with enough certainty to be considered the terms of a contract. Core terms cannot be changed later unless the modification falls within the Act's limited permitted-modification rules.

This implies that direct award mechanisms PA23 frameworks will have to be drafted with more precision than many legacy models.

Direct award under a PA23 framework also requires an "*objective mechanism for supplier selection*". Again, although this wording is not dissimilar to the previous regime, guidance issued by the Cabinet Office indicates that this should be more precise and specific than has commonly be the case under many frameworks. Examples include rotational allocation ("taxi-rank") or capped-award models that ensure transparent sequencing. What PA23 does not do is permit a fresh re-application of award criteria at call-off stage for direct awards, nor does it suggest that a desk-based reassessment of Most Advantageous Tender would satisfy the statutory test. This is likely to introduce a higher degree of specificity into direct award structures.

The flip-side of this is that, as direct award becomes more specific and limited in PA23 frameworks, competitive selection (mini-competitions) will become more prevalent.

Industry Update continued

As the PA23 may encourage framework authorities to think more precisely about direct award mechanisms, the National Procurement Policy Statement actively discourages another common practice in the use (and abuse) of frameworks, namely the widespread availability of multiple overlapping frameworks. These are said to add to costs for suppliers and cause confusion for contracting authorities. The Statement also cautions against the use of frameworks that have been set up by private entities that may not comply with legal requirements.

Naming, Shaming and the Exclusion of Suppliers

One the key areas of interest to suppliers under the PA23 has been the new and expanded rules concerning the exclusion and debarment of suppliers.

Headline changes include:

- → New and expanded lists of mandatory and discretionary grounds for exclusion
- → Much stronger powers for authorities to exclude suppliers for:
  - Competition law infringements (or potential competition law infringements)
  - Poor performance on prior public contracts
  - National security reasons
- → A publicly available debarment list of suppliers that either can or must be excluded from procurements. As at the end of 2025, no suppliers have yet been included on the debarment list. A number of suppliers implicated in the Grenfell tragedy were placed under investigation for possible debarment but the investigations were paused pending criminal investigations.

To participate in procurements under the PA23, suppliers need to register with the UK Government's central digital platform (Find a Tender) and upload and keep up to date "core supplier information" ("**CSI**") to be made available to contracting authorities in specific procurements.

CSI includes information about whether any mandatory or discretionary exclusion grounds apply and, where they do, "self-cleaning" measures to ensure that the circumstances giving rise to the ground do not occur again.

There is a significant onus on suppliers to ensure their CSI is complete, accurate and up-to-date, at the risk of facing exclusion if it is not. This presents particular challenges in the case of exclusion grounds which involve a degree of judgement as to whether a ground has arisen, for example: potential competition infringements, poor performance on prior public contracts, professional misconduct, environmental misconduct, labour market misconduct and national security. The extension of exclusion grounds to other members of a corporate group, subcontractors and to non-UK conduct/activities also presents risks for suppliers in ensuring accurate CSI.

To minimise the risks, suppliers would be well advised to:

1. Ensure that their CSI on Find a Tender is complete and up to date for each procurement.
2. Proactively monitor events that might require disclosure in the CSI and make decisions in good time about what does and does not need to be included.
3. Ensure good communication around their corporate group (including outside the UK) about potential exclusion grounds.

Industry Update continued

4. Involve their legal teams in assuring and verifying exclusion ground information.
5. Conduct early and thorough due diligence on proposed sub-contractors' exclusion ground information.

SMEs and VCSEs

The PA23 requires contracting authorities to have regard to reducing barriers to small and medium enterprises ("**SMEs**") when engaging in procurement under the Act.

The National Procurement Policy Statement reinforces this by emphasising the importance of SMEs and voluntary, community and social enterprises ("**VCSEs**") in delivering value for money and driving economic growth. Contracting authorities are encouraged to give SMEs a 'fair chance' at winning public contract and increase spend with SMEs and VCSEs.

In pursuit of this objective, central government departments along with their executive agencies and NDPBs are required to set a three-year target for direct spend with SMEs and a two-year target for direct spend with VCSEs, and to publish the results annually.

The government has also published updated guidance on the definition of SMEs for procurement purposes setting out additional considerations to be taken into account to help ensure that SMEs are properly identified. SMEs will have the opportunity to self-declare their status when registering on the central digital platform and submitting supplier information to contracting authorities.

Whilst contracting authorities cannot directly favour SMEs in above-threshold procurements, they can introduce requirements into tenders that a certain percentage of a larger requirement must be sub-contracted to SMEs and use lotting strategies to create more attractive opportunities for SMEs. Larger supplier and Tier 1 or prime contractors will likely need to focus on partnering opportunities with smaller businesses.

Authorities may also, where appropriate, reserve below threshold contracts to SME and VCSEs in a particular geographic location.

What to expect in 2026

2026 is expected to the year when the PA23 starts to bed in, in particular as key government frameworks are re-tendered under the PA23 (for example: Construction Works and Associated Services 3 (including ProCure 24) - Construction Works and Associated Services 3 including ProCure 24 - CCS – the formal procurement for which is expected to kick off in late January 2026).

The first cases are also hoped to come through the Courts which will provide important insight into the attitude of the Court to the new Act: will the procurement judges see the PA23 as essentially a rolling-forward of the previous regime or will they start afresh? The answer to that question could have important implications for how strictly or otherwise authorities' duties under the Act will be enforced and consequently for how much the Act will truly represent a step-change in the practice of public procurement.

Should your organisation wish to discuss any of the issues raised in this blog, or any other matters concerning public procurement, please contact Nick Pimlott or Holly Johnson, who specialise in procurement law.

Industry update continued

Update on standard form contracts Christina Cheriyan

The past year saw the following developments within industry bodies who publish standard form contracts:

- → JCT published its Target Cost Contract suite in June 2025;
- → in the same month JCT updated its practice note "Deciding on the most appropriate JCT contract";
- → in October 2025 NEC published guidance on how to follow "The Construction Playbook"; and
- → NEC launched NEC Digital in November 2025.

JCT Target Cost Contract 2024 ("**JCT TCC 2024**")

JCT users will be familiar with a lot of the terminology within the new JCT TCC 2024 because it is based on the JCT Design and Build Contract. The key difference is that the new standard form offers an alternative pricing mechanism through which the risk of any overrun and the benefit of any cost savings against the agreed Target Cost are shared between the Parties.

The key features of the new contract are as follows:

1. **Allowable Cost** – Schedule 2 sets out the "*reasonably and properly incurred*" cost ("**Allowable Cost**") that the Contractor is entitled to recover for carrying out its obligations under the contract. The Parties can make changes to this Schedule by referencing a list of modifications in the Contract Particulars.
2. **Contract Fee** – in addition to Allowable Cost the Contractor is entitled to recover a Contract Fee which is either by a fixed sum or a percentage of the Allowable Cost. Where it is a fixed sum, Schedule 3 sets out the formula for increasing that sum where the Target Cost is adjusted under the contract by more than the pre-agreed percentage threshold set out in the Contract Particulars.
3. **Difference Share** – this refers to the pain-gain difference between the Target Cost and the Adjusted Target Cost. Where there is a cost overrun or a cost saving, this is shared between the Parties according to the pre-agreed percentages set out in the Contract Particulars. The Contract Particulars also give the Parties the option for the Difference Share to be calculated and applied to interim payments rather than just being assessed at final payment.
4. **Open book verification** – in order to enable the Employer or Employer's Agent to verify or calculate the Allowable Cost the Contractor must keep records, permit audits and provide further information where requested.

Industry update continued

5. **Adjusted Target Cost** – Schedule 1 sets out the circumstances in which the Target Cost can be adjusted. This is primarily for Changes and for loss and/or expense resulting from Relevant Matters. Where possible, the value of work by which the Target Cost should be adjusted is determined by reference to the rates and prices set out in the Target Cost Analysis.
6. **Disallowed cost** – unlike most standard form target cost contracts there is no definition of disallowed costs, i.e. costs which are not recoverable by the Contractor. However Schedule 2 does detail costs which are excluded from the calculation of Allowable Costs.

In addition to the JCT TCC 2024, the JCT published a target cost sub-contract and a guide for each of the main and sub-contract precedents.

For those unfamiliar with target cost contracts, the JCT Target Cost Contract Hub provides an introduction to the JCT TCC 2024 and how it works, along with worked examples of various calculations for the Target Cost, Allowable Cost, Contract Fee and Difference Share.

Updated JCT practice note

The JCT has published a "2024" version of their practice note "Deciding on the appropriate JCT contract", the previous version of which was published in 2016.

The key change is that the practice note now includes consideration of the recently published JCT TCC 2024.

Interestingly the note now states *"JCT Contracts are intended to be read as a whole, and amendments can produce unintended results when construed at law. Amendments should be avoided as far as practicable, particularly on points on substance. Where an amendment is considered necessary it should only be done with appropriate professional advice."*

NEC articles on The Construction Playbook

The NEC published a series of short articles on how their standard form contracts can be used to deliver key policies within "The Construction Playbook". The Playbook is a government published document that sets out key policies and guidance for how public works projects and programmes are assessed, procured and delivered.

1. **Delivery model assessments** – this key policy is the focus of Article 1. The article explains how the wide range of contracting options and flexibility built into each NEC contract type allow for different approaches to be adopted. It also gives examples of points that should considered when assessing what the best delivery model is, such as the Client's role and capability, the extent to which the Client wants to specify design etc.
2. **Effective contracting** – this key policy is the focus of Article 2. This article explains the features NEC contracts contain which drive better outcomes, such as collaboration, early warnings, incentives, innovation, risk allocation, climate change and conflict avoidance.
3. **Early supply chain involvement** – Article 3 explains how the NEC suite and the use of Option X22 (early contractor involvement) can be used to support this key policy.
4. **Risk allocation, payment mechanism and pricing** – Article 4 sets out the inherent flexibility of NEC contracts and how they can be used to allocate risk between the parties, providing the freedom to alter risk allocation to suit the nature of the project and capabilities of the parties. There are a range of main and secondary options available and also a wide range of contracts including the NEC4 Alliance Contract.

NEC Digital

The NEC has launched a digital platform which allows NEC contracts to be digitally drafted.

According to the NEC the benefits of subscribing to this platform are that:

1. it will reduce manual drafting errors and inefficiencies due to the automation of key processes;
2. it removes the risk of incompatible clause selection;
3. it allows for real time collaboration by multiple stakeholders on one interface but with robust permission controls ensuring only authorised personnel can view and edit documents;
4. it gives access to guidance throughout drafting with links to comprehensive learning resources; and
5. it can feature a comprehensive personalised Z clause library built from users' previously drafted clauses.

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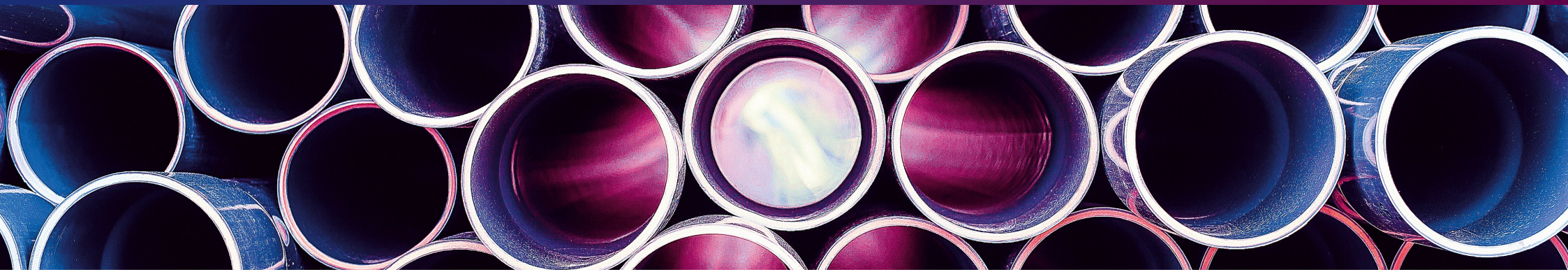
Look ahead to 2026 Sarah Shafiq and Natasha Leo



Look ahead to 2026 Sarah Shafiq and Natasha Leo

The construction industry heads into 2026 with a sense of both momentum and caution. After years of regulatory reform, shifting economic pressures, and rapid technological change, the sector is now entering a phase where those changes start to affect day-to-day practice. New safety regimes are here, planning reform is beginning to reshape how projects move from concept to site, and expectations around sustainability and digital coordination continue to rise.

For businesses across the supply chain, 2026 will not be defined by a single new law or policy. Instead, it will be shaped by how well the industry adapts to a more demanding, more transparent, and more accountable operating environment.

Building safety

The Building Safety Levy is one of the most significant changes taking effect in 2026. It is designed to raise funds for the remediation of historical building safety defects while protecting leaseholders and taxpayers from further costs. The levy is part of the government's wider remediation funding package and is expected to raise £3.4 billion over 10 years to support building-safety expenditure. This, together with further developments following the implementation of the Building Safety Act 2022, are explored in more detail in our article above.

Further changes in effect this year include:

1. Dutyholder and accountable person obligations under the Building Safety Act are now fully operational.
2. The Building Safety Regulator will be established as new body to take over the Health and Safety Executive's functions from 27 January 2026 and will expand oversight of higher-risk buildings.

Look ahead to 2026 continued

3. Fire-safety reforms, including updates to Approved Document B, meaning that from 30 September 2026, all new residential buildings in England over 18 metres in height will require a second staircase to ensure adequate means of escape, together with Scottish regulatory reforms.

The Supreme Court is also set to hear the appeals in ***Triathlon Homes LLP v Stratford Village Development Partnership [2025] EWCA Civ 846*** and ***Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856***, which together raise an important question for the post-Grenfell regime: can recovery of remediation-related costs extend to expenditure incurred before section 124 of the Building Safety Act 2022 came into force on 28 June 2022? The Court's decision will provide long-awaited clarity on the retrospective reach of the cost-recovery provisions and is expected to have significant implications for landlords, developers, and leaseholders alike.

Finally, the Remediation Acceleration Plan, published in December 2024 and updated through 2025, sets out how the UK Government intends to speed up the remediation of residential buildings with unsafe cladding in England. The intention is by the end of 2029, every 18m+ residential building in a government funded scheme will be remediated and every 11m+ building with unsafe cladding will either have been remediated, have a date for completion, or its landlords will be liable for penalties. The UK Government intends to introduce a Remediation Bill to Parliament when Parliamentary time allows, which we expect to be later this year.

Planning

The Planning and Infrastructure Act 2025 introduces significant reforms that directly affect how construction, development, and major infrastructure projects are planned, approved, and delivered in England. It received Royal Assent on 18 December 2025. The Act aims to speed delivery by accelerating planning and infrastructure approvals, but it also imposes new compliance duties, including the need for robust legal due diligence, early design certainty, and proactive environmental compliance.

Sustainability

In 2026, ESG has become a compliance and commercial priority for the construction industry, driven by tightening sustainability regulations and rising client expectations. New mandatory disclosure rules under the UK Sustainability Reporting Standards, coming into force from January 2026, require large companies to report climate-related financial risks, with obligations cascading through supply chains and affecting contractors and SMEs

For contractors, there is increased pressure to adopt sustainable practices, driven by stricter environmental expectations, rising energy costs, and the need to meet net -zero targets. Clients, investors, and public-sector procurers increasingly expect contractors to demonstrate low-carbon construction methods, responsible sourcing, and transparent reporting. Leading contractors are already shifting to low-emission materials and digital tools to reduce waste, reflecting a sector-wide move toward greener, more efficient delivery models. This is also reflected in FIDIC's launch of its Carbon Management Guide in December 2025 which sets a new climate conscious standard and introduces adaptable drafting that may see more widespread industry use.

Legislation

Several bills are scheduled for their second readings in Parliament:

→ **Building Regulations (Minimum Standards) Bill 2024–25** – proposes the introduction of minimum quality and energy-efficiency standards for new homes.

Look ahead to 2026 continued

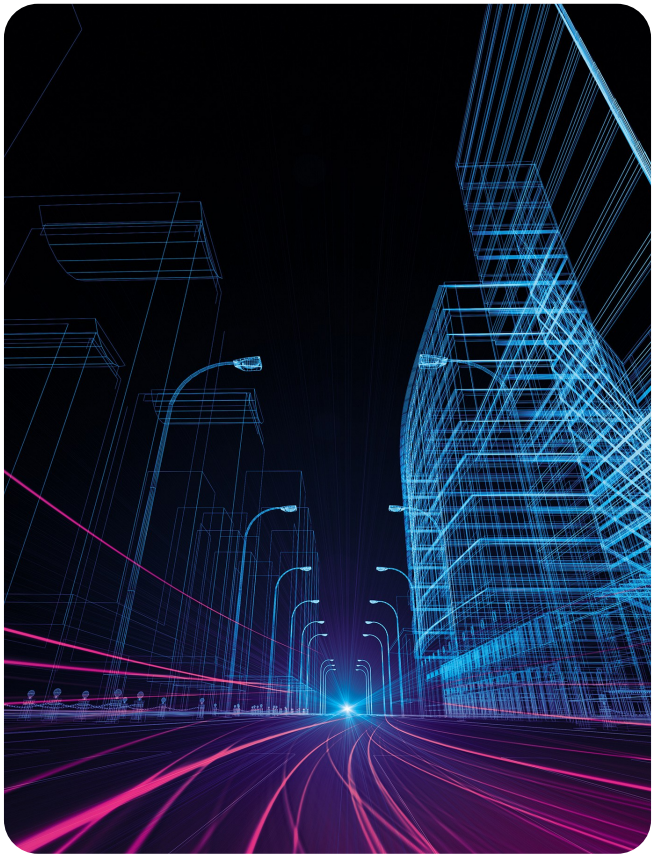
- → **Domestic Building Works (Consumer Protection) Bill 2024–25** – seeks to establish a mandatory licensing scheme for builders carrying out domestic building work in England.
- → **Letter Boxes (Positioning) Bill 2024–25** – requires letter boxes in new buildings and new front doors to comply with positioning requirements set out in BS EN 13724:2013.

In 2025, the Government conducted a consultation on late payments and poor payment practices. The outcome of that consultation is expected shortly and is anticipated to result in amendments to the Late Payment of Commercial Debts (Interest) Act 1998, including the introduction of a mandatory statutory interest rate of 8% on all qualifying contracts, the imposition of maximum payment terms and limitations around retentions.

Technology and AI

Automation and traditional AI are not new to construction – industry reports show that AI is now embedded across design, planning, scheduling, safety, and project control. However, like most other industries, adopting generative AI to help solve challenges such as labour, materials and supply chain shortages more efficiently, is in the early stages. Embedding AI tools into processes and projects is expected to continue to develop into 2026.

Dispute resolution is also seeing use of AI tools to aid complex discovery and disclosure, and is now being seen in decision making following the introduction of an AI arbitrator by the American Arbitration Association – International Centre for Dispute Resolution. However, notwithstanding these developments, we remain unconvinced that AI will be able to replicate the nuanced, unbiased judgment of a human decision-maker in the resolution of disputes.



Predictions

Finally, in the spirit of embracing technology, we asked our in-house AI assistant to predict the single event or change most likely to impact the construction industry in 2026. Maxton says:

> *"One major event likely to impact the construction industry in 2026 is the widespread adoption of advanced building automation technologies, including robotics and artificial intelligence (AI). These technologies have the potential to revolutionize how construction projects are planned and executed, improving efficiency, reducing human error, and lowering labour costs.*
>
> *Robotic systems can handle repetitive tasks such as bricklaying and welding with precision and speed, while AI systems can optimize project management by predicting workflows and identifying potential delays. This technological shift is driven by the need for increased productivity amid growing demand for construction in urban areas, coupled with a persistent labour shortage in many regions.*
>
> *Adopting such innovations could lead to faster project completion times, reduced costs, and improved safety. However, it may also require significant upskilling of the workforce to manage and maintain these systems, creating both opportunities and challenges within the industry."*

There may be a little AI bias there...?

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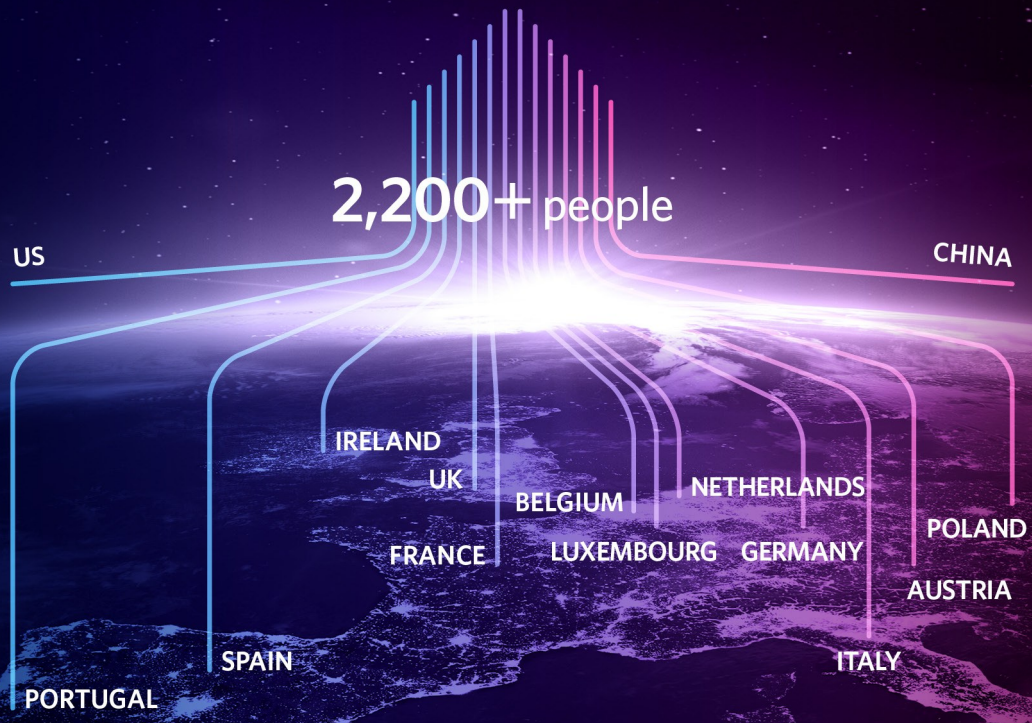
- Real Estate
- Regulatory
- Tax
- Tech & Data



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We advise clients throughout the life sciences industry on a range of complex legal matters, as this important sector grows and innovates to meet the changing medical and healthcare needs of the global society.

Technology

We operate at the forefront of international tech law with a deep understanding of how it impacts business from a regulatory, legal or commercial standpoint.