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Construction and Engineering Matters

UK – Summer 2024

Welcome to the summer edition of Construction and Engineering Matters, where we provide you with bite-sized updates on UK construction and engineering issues.

This summer edition includes:

- Biodiversity Net Gain and the Construction Industry
- The Amended Building Regulations
- Adjudication – Clash of the Decisions
- More Challenges to Adjudication Award Enforcement: Beware of Default Payment Schedules and Set offs (Again!)
- Getting Termination Right
- All Change for Collateral Warranties? Abbey Healthcare (Mill Hill) Ltd v. Augusta 2008 LLP (formerly Simply Construct (UK) LLP)
- JCT 2024 Is Here (Some of It Anyway!)
- Preparing for an Adjudication – Join Us!

Please feel free to share with your contacts – we welcome feedback and suggestions for other topics that you would like to see covered in future editions.

Biodiversity Net Gain and the Construction Industry

Many people in the construction industry likely have never heard of biodiversity net gain. It has become a significant consideration in the planning process, but perhaps has not fed through to construction professionals. This article is intended to give a brief overview of the topic and, in turn, highlight certain considerations from a construction perspective.

Biodiversity net gain is a mandatory requirement that will apply to the majority of planning applications submitted on or after 12 February 2024 (or 2 April 2024 for small scale development) whereby a developer must provide at least a 10% net gain on the level of habitat that exists on the development site.

Essentially, one calculates the amount of habitat (e.g. plant life and watercourses) that exists on the site prior to any development being carried out. One must then provide at least a 10% increase on this baseline value after the actual development is completed.

The priority is to avoid impacts on existing habitat or mitigate and enhance the said habitat on site. Where this cannot be achieved, the developer can make up the loss in habitat through the acquisition of "biodiversity units" that are created off-site by private entities through purpose-built habitat sites (habitat banks). The price of these biodiversity units will be determined by the market (i.e. supply and demand) and indeed, a number of providers are now creating habitat banks to meet demand. Where biodiversity units are not available on the open market, there is also the last resort of acquiring biodiversity credits from the government, which are intentionally expensive.

The habitat provided has to be retained and maintained for a period of at least 30 years (with differing timescales associated with on-site and off-site delivery).

So, how will this impact the construction industry?

First of all, we do anticipate that there will be far greater care required as part of any programme of works to avoid any damage to existing habitat to be retained on-site. Indeed, developments may be intentionally designed around mitigating any impact on habitat. Losses that arise from damage to habitat during the course of the works will likely then fall on the contractor, subject to how the building contract is drafted.

There will also be more inventive use of living roofs and living walls in order to provide greater levels of habitat on site.

The role of the ecologist during the planning process has been significantly elevated. Equally, their role during the course of works on-site will also be important to ensure habitat is protected and to correctly guide the contractor in the methods of work.

We do expect more elaborate approaches to ecological consultant appointments where there is an expectation of providing a service for the ongoing 30-year period of maintenance.

Ultimately, this remains a relatively new area of law and approaches and practices will develop and evolve over the course of the next few years.

- David Myers
- Robert Norris

The Amended Building Regulations

Some changes brought about by the Building Safety Act 2022 apply to all buildings, not only "higher-risk buildings" (certain high-rise residential buildings). One such change is the introduction of a "dutyholders and competence" regime under the amended Building Regulations 2010 (BR).

Dutyholders

The new dutyholders may appear familiar, as they are the same (in name but not in duties) as those under the Construction (Design and Management) Regulations 2015, namely the client (or domestic client), principal designer (PD), designer, principal contractor (PC), and contractor. At a high level, the key differences are that the duties under BR have a focus on the quality of design and build rather than the safety of the construction site, and, where there is only one designer or contractor working on a project, they are automatically treated as appointed as the PD or PC.

These dutyholders have numerous new duties that seek to ensure each dutyholder carries out their role in such a way that the design and construction will be carried out such that the building(s) will comply with "all relevant requirements", which includes various individual regulations under BR as well as the technical requirements of Schedule 1 of BR and any condition(s) specified in the planning permission as being required to comply with BR.

Competence

In addition, the dutyholders have duties relating to competence and due diligence with regard to the competence of others when appointing them.

Individuals must have the necessary skills, knowledge, experience and behaviours, and organisations must have the organisational capability, to fulfil their duties and to carry out the design/building work in accordance with all relevant requirements. Organisations appointed as PD/PC must also appoint what is commonly known as a "designated individual" – who has the task of managing its functions as the PD/PC – and take all reasonable steps to satisfy itself as to that individual's competence.

In terms of due diligence, before appointing any dutyholder, a person must take all reasonable steps to satisfy themselves that the individual/organisation fulfils these competence requirements (subject to certain rules relating to supervision of individuals in training).

Penalties

Failure to comply with these duties is a breach of BR, which is punishable by a potentially unlimited fine and/or a maximum of two years' imprisonment (where an individual is convicted), and a £200 fine per day for each day after the breach continues after conviction. The enforcing authority is the building control body.

How We Can Help

Our environmental, safety and health (ESH) colleagues have advised on duties, competence requirements (including how to demonstrate competence), due diligence of other dutyholders and more.

For further information, please contact:

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Adjudication – Clash of the Decisions

Dutyholders

In *Wordsworth Construction Management Ltd (WCM) v. Inivos Ltd*, trading as Health Spaces (HS) (TCC, 13 February 2024), the Technology and Construction Court (TCC) dealt with cross-applications to enforce two adjudication decisions, one in favour of each of the parties. Ultimately, the two adjudication decisions were enforced and set off against each other, as contractually agreed between the parties. The case is interesting because set off of adjudication decisions does not happen often. Also, there are various arguments that are routinely used in enforcement proceedings and therefore the judgment has wider application.

HS, the employer, entered into a construction management contract with the contractor, WCM, as the construction manager, for a turnkey modular facility at Newham University Hospital in London. In May 2023, HS terminated the contract. After an initial adjudication between the parties (which is not relevant to this decision), on 28 July 2023, WCM initiated an adjudication, claiming that HS had unlawfully terminated the contract (having committed an unreasonable and vexatious act of bad faith contrary to the express wording of the contract in summarily terminating the contract as it did, and which repudiatory breach was subsequently accepted by WCM); WCM sought £961,245 in damages. In the alternative, WCM argued that HS had invalidly terminated WCM's engagement for convenience.

HS countered, asserting it was entitled to £798,050 due to WCM's alleged default (being WCM's failure to exercise the standard of care required by the contract), which justified the termination. HS's claim included extra over costs in completing the works covered by the contract. HS further claimed that, even if it was wrong about the termination (either for repudiatory breach or for convenience), WCM still owed it £437,097.

The first adjudicator ruled that HS had been in repudiatory breach of contract by wrongfully terminating WCM's appointment and awarded £170,562.69 to WCM (First Decision). Consequently, the first adjudicator dismissed HS's counterclaims in a single paragraph, stating that HS's claims failed on the basis that HS had repudiated the contract: "On the basis that I have decided HS repudiated WCM's contract, I decide that HS's claim for WCM's breaches prior to termination … fail". This brief dismissal formed the basis of HS's resistance to the enforcement of the First Decision.

HS commenced a second adjudication, citing a potential conflict of interest with the first adjudicator on the basis that a natural justice argument could possibly be raised regarding the first adjudication and, as such, it was not appropriate for the first adjudicator to be appointed again. Despite WCM's submissions to the Royal Institution of Chartered Surveyors (RICS) – the adjudicator nominating body – that HS's comments were inappropriate, and that the first adjudicator had been appointed as the adjudicator in previous disputes between the parties, a new (second) adjudicator was appointed.

HS's claim in the second adjudication focused on substantial contracharge claims, which had not been individually addressed in the first adjudication. The second adjudicator upheld HS's claims, awarding HS £192,772 plus £4,978.54 interest from WCM (Second Decision).

Both parties sought to enforce their respective adjudication decisions.

- HS argued against the First Decision (in WCM's favour), claiming a breach of natural justice due to the first adjudicator's failure to decide its counterclaims or failure to justify his decision.
- WCM contested the Second Decision (in HS's favour), arguing that the second adjudicator's appointment was invalid (as a result of WCM's comments in the RICS nomination form); and that the dispute was the same or substantially the same as previously adjudicated by the first adjudicator.

The parties agreed that if both decisions were enforced, contrary to their respective primary positions, they should be set off against each other.

Issues for the Court

- **Material breach of natural justice in the First Decision** – The primary issue was whether there was a material breach of natural justice regarding how the first adjudicator either decided or failed to decide the counterclaims at B(1)(a) to B(20) and D(1) to D(6) of HS's counterclaim. The specific manner in which these counterclaims were addressed formed the basis for HS's resistance to payment of the sums awarded by the first adjudicator. Specifically, HS argued that the first adjudicator (a) failed to decide the counterclaims at all; (b) failed to give reasons for his decision on those counterclaims and (c) dismissed the counterclaims on a basis that neither party had argued, without giving the parties the opportunity to comment.
- **Enforceability of the Second Decision** – If the first adjudicator's decision was deemed enforceable, the court needed to determine if the dispute referred to the second adjudicator was the same or substantially the same as the matters already decided by the first adjudicator. Alternatively, the court had to consider if the second adjudicator's appointment was invalidated by HS's assertion of a potential conflict in the RICS nomination form.
- **VAT and interest** – In the event that both decisions were enforced, the court needed to decide what sums, if any, were due, in respect of VAT and interest on (1) the amounts awarded to WCM by the first adjudicator and (2) the amounts awarded to HS by the second adjudicator.

The Court's Decision

First Decision

The judge found that although the First Decision on the counterclaims was expressed extremely briefly, the first adjudicator did not fail to provide a reason. The first adjudicator had considered the merits of the counterclaims but made an error of law, which is not a breach of natural justice. The judge noted that the "error, therefore, on the part of [the first adjudicator] is that he failed to consider the merits of items B and D counterclaims, irrespective of the termination issues, which in my judgment is an error of law, not a breach of natural justice … he decided wrongly in law, that once the termination issues went in WCM's favour, that in itself disposed of the B and D counterclaim items". A refusal to consider a defence at all in a money claim constitutes a breach of natural justice, but a decision not to award sums on an erroneous legal basis does not. Any breach of natural justice must be material and sufficiently serious. Here, at worst, the failure was inadvertent rather than deliberate. What matters is whether the adjudicator attempted to answer the broad question that he had been asked.

Second Decision

Regarding the second decision, the judge found that the claim before the second adjudicator was not the same or substantially the same as the claim before the first adjudicator. The first adjudicator did not decide the merits or quantum of the counterclaims as individual breaches of contract. Since the claim before the second adjudicator was not previously decided, it was compatible with the first adjudication. The comments in the RICS nomination form were accurate and not fraudulent. Therefore, the Second Decision would also be enforced.

Both Decisions Were Enforced

The court confirmed that the first adjudicator's brief dismissal of counterclaims was an error of law rather than a breach of natural justice. Additionally, the Second Decision was upheld as it addressed claims not previously adjudicated by the first adjudicator. The parties' agreement to set off any enforceable sums against each other was acknowledged, with VAT and interest to be determined accordingly.

Commentary

This decision offers several key takeaways. Firstly, the case reaffirms the court's robust approach to enforcing adjudicators' decisions. It emphasises that when both parties have enforceable adjudication decisions, they can agree that the sums awarded can be set off against each other, ensuring a balanced resolution without unnecessary delay.

The judgment provides clarity on important principles, such as breaches of natural justice and the evaluation of claims being the same or substantially the same. The court emphasised that a decision based on an erroneous legal basis does not necessarily constitute a breach of natural justice. This distinction is crucial as it delineates between a failure to consider a counterclaim at all, which would be a breach of natural justice, and an adjudicator's legal error, which would not.

Moreover, the court reiterated that an adjudicator does not need to provide extensive reasoning for every counterclaim. What is essential is that the adjudicator has made an attempt to address the broad issues presented. This aligns with previous case law, such as in *Primus Build Ltd v. Pompey Centre Ltd* [2009], reaffirming that breaches of natural justice must be material and of sufficient seriousness to invalidate an adjudication decision.

Another significant point from the judgment involves the "same or substantially the same" principle. The case illustrates the importance of carefully considering whether issues previously adjudicated are being redecided under a different legal basis. The court noted that a different legal basis for the same factual matters could still be considered separately if they had not been adjudicated as standalone breaches in the initial adjudication.

The court's handling of jurisdictional challenges and potential conflicts of interest are also noteworthy. The case demonstrated that assertions of potential conflicts in nomination forms must be scrutinised, but do not automatically invalidate subsequent adjudicator appointments unless the conflict materially impacts the adjudication process. In summary, this case underlines the need for clear and comprehensive submissions in adjudications, awareness of the nuances in claims of natural justice breaches, and careful consideration of whether subsequent disputes are indeed distinct from previously adjudicated matters. The decision provides a framework for navigating complex adjudication scenarios, reinforcing the importance of procedural fairness and the enforceability of adjudicators' decisions in maintaining the integrity of the adjudication process.

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More Challenges to Adjudication Award Enforcement – Beware of Default Payment Schedules and Set offs (Again!)

Background

The decision in *Morganstone Limited v. Birkemp Limited* [2024] EWHC 933 (TCC) (25 April 2024) arose from an adjudication award dated 23 February 2024 in which the adjudicator determined that Morganstone owed Birkemp £207,076, following Birkemp's interim payment application made on 31 August 2023 ("August Application"). This adjudication decision is central to two linked claims: Morganstone's Part 8 claim and Birkemp's Part 7 claim, which had significant implications for the enforceability of the adjudication award and the interpretation of the parties' contractual rights.

Part 8 Claim

On 4 March 2024, Morganstone issued a Part 8 claim seeking declarations that Birkemp had no contractual right to make the August Application or any interim payment applications after March 2023 and that the adjudicator's decision, which upheld Birkemp's right to make the August Application and receive payment, was legally incorrect and unenforceable.

Morganstone's primary argument was that the contract between the parties did not permit any interim payment applications beyond March 2023. Therefore, they asserted that any such applications, including the one made in August 2023, were invalid, and Birkemp was not entitled to payment. Birkemp defended the Part 8 claim by arguing that on the correct interpretation of the contract, it retained the right to submit interim payment applications beyond March 2023 and therefore the August Application was legitimate and enforceable.

Part 7 Claim

Following the Part 8 claim, on 5 March 2024, Birkemp issued a Part 7 claim seeking to enforce the adjudicator's award of £207,076.

The relationship between the two claims was crucial – if Morganstone succeeded in its Part 8 claim, Birkemp's Part 7 claim for enforcement of the adjudication decision would be unnecessary and dismissed. Conversely, if Morganstone's Part 8 claim failed, Morganstone intended to defend the Part 7 claim by arguing that the adjudication process had breached natural justice on the basis that the adjudicator had not properly considered its defences, rendering the award unenforceable.

The Decision of the Court

The central issue in the Court's decision was the discrepancy between the monthly payment schedules and Clause 10 of the subcontract. The original payment schedule ran until March 2022, and was subsequently extended until March 2023. However, there was no agreed schedule for the period after March 2023. Relevantly, Birkemp argued that, in the absence of an agreed payment schedule, the default payment provisions in Clause 10 of the subcontract should apply.

The court found that the manuscript note appended to Clause 10, stating that the "payment schedule takes precedence", meant that the dates and procedures outlined in the payment schedules would override those in Clause 10 as long as a schedule was agreed upon. However, once the agreed payment schedules ended, Clause 10's provisions would take effect by default.

Judge Keyser KC determined that the parties' failure to agree on a new payment schedule for the period after March 2023 did not negate Birkemp's entitlement to interim payments. Instead, the default provisions of Clause 10 would apply.

Both Morganstone's Part 8 claim and Birkemp's Part 7 claim were dismissed.

In regard to the Part 8 claim, the court found in favour of Birkemp and concluded that Birkemp had the contractual right to make interim payment applications beyond March 2023 based on interpretation of the contract as a whole. As a result, the August Application was valid, and the adjudication award was, in principle, enforceable.

However, in respect of the Part 7 claim, the court held that the adjudicator had breached principles of natural justice on the basis that it had taken a deliberate and erroneously restrictive view of his jurisdiction in excluding Morganstone's cross claims related to set off and deductions for defective works, which could have had a significant effect on the overall result of the adjudication. This exclusion constituted a breach of natural justice, rendering the adjudication decision unenforceable.

Commentary

The court's decision to uphold the enforceability of Clause 10 of the subcontract, despite the absence of an agreed extended payment schedule, highlights the importance of having a robust default mechanism within a contract. This ensures that the subcontractor's right to interim payments is preserved even when parties fail to agree on a new schedule, and provides additional certainty. Notably, Birkemp was not even relying on Clause 10 when making its applications. There was also significant reliance by Morganstone on *Balfour Beatty Regional Construction Ltd v. Grove Developments Ltd*, but the court decided that although both cases concerned payment schedules and failure to agree extensions to payment schedule dates (and readers will remember that the Balfour Beatty case resulted in no further interim applications being permissible), the Balfour Beatty case "turned on the precise terms of the parties' agreement" and that the judge could not "see that the case establishes any significant wider proposition of law".

Morganstone's failure in the Part 8 claim demonstrates the challenges in overturning adjudication decisions based on contractual interpretation.

However, Morganstone's success in the Part 7 claim illustrates the courts' commitment to upholding the principles of natural justice. By identifying that the adjudicator had taken an erroneously restrictive view of his jurisdiction, the court reinforced the need for adjudicators to consider all relevant defences, including set offs and cross claims, to ensure fair and just outcomes for the parties. We also note that the judge commented that "the adjudicator's error was brought about by Birkemp's deliberate attempt to achieve a tactical advantage by confining the scope of adjudication in such as a manner as to exclude potentially relevant defences to the claim for payment."

There are, however, other nuances to this decision (noting the cross claims and set off relied on by Morganstone were not actually part of the relevant pay less notice) and we imagine that this decision will give adjudicators and referring and responding parties serious pause for thought going forwards. For contractors and subcontractors, this case serves as a reminder to ensure that their contracts contain clear provisions for payment applications or payment schedules, and reliable default mechanisms to ensure payment. Even though Morganstone was successful ultimately (at least in the Part 7 proceedings), it obtained only a very limited costs award because it effectively lost the Part 8 proceedings it initiated. All in all, an expensive process, given the uncertainty when the contract was initially pulled together.

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Getting Termination Right

In this article, we examine the TCC judgment in Providence Building Services Limited v. Hexagon Housing Association Limited [2023] EWHC 2965 (TCC). The decision has far-reaching relevance, as it deals with termination rights under a Joint Contracts Tribunal (JCT) form of contract and how contractors need to consider very carefully whether termination rights have accrued.

Background

Providence Building Services Limited (Providence) was contracted by the employer, Hexagon Housing Association Limited (Hexagon), to carry out and complete works in relation to the erection of new structures under a standard JCT Design and Build (DB) Contract (2016) (Contract) as amended by a schedule of amendments.

While works progressed, Payment Notice 27 was issued by the employer's agent, Baily Garner, on 25 November 2022. Pursuant to this notice, Hexagon was obliged to pay £260,000 on or before 15 December 2022 (Final Date for Payment). However, they failed to do so. Consequently, Providence issued an initial notice of specified default under cause 8.9.1 of the Contract on 16 December 2022. However, Hexagon remedied the default by paying the sum payable, within 28 days of the notice of specified default.

A subsequent Payment Notice 32 was issued on 28 April 2023. Pursuant to this notice, Hexagon was obliged to pay £360,000 on or before 17 May 2023. Again, Hexagon failed to make payment by the Final Date for Payment of this sum.

Providence then promptly issued a notice of termination under Clause 8.9.4 of the Contract.

Hexagon challenged Providence's entitlement to issue the notice of termination.

The crux of the dispute therefore lay in the meaning of clauses 8.9.1, 8.9.3 and 8.9.4 of the JCT and whether Providence had a right to terminate.

JCT Clauses

The court considered clauses 8.9.1.1, 8.9.3 and 8.9.4. which state as follows:

"8.9.1 If the Employer:

.1 does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on that amount… the Contractor may give to the Employer a notice specifying the default or defaults…

.3 If a specified default or a specified suspension event continues for 28 days from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 28-day period by a further notice to the Employer, terminate the Contractor's employment under this Contract.

.4 If the Contractor for any reason does not give the further notice referred to in clause 8.9.3 but (whether previously repeated or not):

.1 the Employer repeats a specified default; or

.2 a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby, then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

Providence's Claim

Providence argued that the late payment by Hexagon of Payment 27, even if remedied within the prescribed timeframe of 28 days from the date of notice of specified default, created a permanent trigger for termination for the repeated specified default, which ultimately allowed them to terminate upon any future late payment.

They contended that the drafting of Clause 8.9.4 would produce a "harsh and uncommercial result", as an Employer could withhold payment until the 27th day and thus avoid the possibility of termination, given that the right to terminate pursuant to Clause 8.9.3 had not arisen.

Hexagon's Defence

Hexagon's position was that Clause 8.9.4 only granted termination rights for subsequent late payments if a prior "specified default" remained unaddressed within the designated timeframe (28 days). In other words, the "trigger" to terminate was not permanent, but instead required a persistent breach for termination.

With regard to whether the wording would produce a "harsh and uncommercial result", Hexagon noted that a contractor has a wide range of options available to protect its cash flow position, e.g. suspension, etc. If the wording was interpreted as per Providence's position, this could potentially lead to a "trigger-happy contractor", who attempts to terminate and be released from contracts over very small underpayments and/or minor delays in making a payment.

TCC Outcome

In determining whether termination was applicable, the court held that the starting position was to determine the "natural and ordinary meaning of clauses 8.9.3 and 8.9.4 of the contract". In doing so, the court decided in favour of Hexagon, stating the following reasons:

- If a specified default continues for 28 days after a Clause 8.9.1 notice, the contractor may give the employer notice to terminate the contractor's employment under the Contract.
- The contractor has a choice of whether or not to serve such a notice to terminate, but, if electing to do so, the contractor needs to take an active step, i.e. serve a notice of termination.
- If the contractor does not exercise the accrued right to terminate and if there is a repeated specified default, the contractor may then serve a notice of termination under Clause 8.9.4.
- In this case however, Hexagon did remedy the original specified default within the 28-day period, so that no right to terminate had accrued to Providence.
- This meant that Providence did not have an automatic right to terminate upon a subsequent specified default pursuant to Clause 8.9.4.

Commentary

This is an important decision for parties considering matters of termination on construction projects. The TCC's judgment clarifies the interpretation of clauses 8.9.3 and 8.9.4 and emphasises the importance of addressing any payment delays promptly. It also emphasises the importance of contractors considering the specific conditions prior to exercising termination and, in particular, whether a specified default has actually occurred and been sustained for 28 days following the Specified Default Notice and rights to terminate have accrued.

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All Change for Collateral Warranties? *Abbey Healthcare (Mill Hill) Ltd v. Augusta 2008 LLP* (formerly Simply Construct (UK) LLP)

This is the Supreme Court decision that we have all been waiting for – the final say on whether the parties' collateral warranty (CW) was a "construction contract" under the Housing Grants, Regeneration and Construction Act 1996 (Construction Act). If it was, the CW would be deemed to include statutory adjudication provisions entitling the parties to adjudicate their dispute. This is relevant where a construction contract does not include express adjudication provisions, which was the case in Abbey, hence the importance of deciding whether or not the CW was a construction contract.

Background

Simply Construct (Simply) was engaged to carry out the construction of a care home, a long lease of which was granted to Abbey Healthcare (Abbey). CWs were provided by Simply. The freeholder of the care home and Abbey both sought to enforce adjudication awards in their favour. Simply argued that Abbey's CW was not a construction contract under Section 104(1) of the Construction Act and that, accordingly, the adjudicator had no jurisdiction. There then began a long but very interesting series of court judgments and appeals.

First Instance Decision – Is a CW a Construction Contract? – In Favour of Simply

The TCC judge agreed with the adjudicator that the parties' CW was not a construction contract. Section 104(1) provides that "a 'construction contract' means an agreement with a person for ... (a) the carrying out of construction operations…". "Construction operations" include "construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form part of the land (whether permanent or not)" [Section 105].

To put the decision in context, the status quo for many years, since the pivotal, novel, and somewhat surprising judgment of Akenhead J in *Parkwood Leisure Ltd v. Laing O'Rourke Wales and West Ltd* [2013] (Parkwood) was that a CW could be deemed to be a construction contract and the Parkwood CW was indeed held to be a construction contract.

Although both the Parkwood and Abbey CWs referred to a past state of affairs and future performance, the judge noted, "I cannot see how, applying commercial common sense, a collateral warranty executed four years after practical completion and months after the disputed remedial works had been remedied by another contractor can be construed as an agreement for carrying out of construction operations."

Backtrack by the Court of Appeal – In Favour of Abbey

The Court of Appeal, by a majority of two (Coulson LJ and Jackson LJ) to one, allowed Abbey's appeal. The issue before the court was not whether a CW could ever be a construction contract, but whether the Abbey CW was a construction contract. In his dissenting judgment, Stuart-Smith LJ disagreed with Coulson LJ's interpretation of Section 104(1).

Coulson LJ's main focus was that the "broad approach" should be adopted – the words "an agreement ... for ... the carrying out of construction operations" in Section 104(1) was a broad expression "and has regularly been construed as such: see in particular Parkwood." He noted that this was supported by one of the purposes of the Construction Act, i.e. to provide an effective dispute resolution system where one adjudicator can deal with disputes arising out of the same construction operations in relation to different contracts.

Further, where a warranty related to a promise or guarantee, it might be more akin to a product guarantee rather than a contract for the carrying out of construction operations. The terms of the Abbey CW made it a construction contract with reliance on the wording in Clause 4.1(a) that Simply "has performed and will continue to perform" its obligations under the building contract. Coulson LJ considered this to be "a warranty of both past and future performance of the construction operations". This mirrored the position in Parkwood, which Coulson LJ said was correctly decided.

Importantly, Jackson LJ's interpretation of 104(1) was that "not every agreement that is related to construction operations will be a construction contract. The word 'for' requires that the purpose or object of the agreement must be the carrying out of construction operations. It is concerned with the performance of construction operations and not with their consequences."

Stuart-Smith LJ – Dissenting – In Favour of Simply

- Observed that the word "for" in the context of Section 104(1) ("a 'construction contract' means an agreement with a person for … (a) the carrying out of construction operations") indicates and is followed by the purpose of the agreement and carries with it the implication that a party to a contract "for" the carrying out of construction operations undertakes a direct contractual obligation; it is not sufficient if the contractor is merely warranting its performance of obligations owed to someone else – here, Simply was not undertaking direct obligations to Abbey and therefore the CW was not a construction contract
- Agreed with Coulson LJ and Jackson LJ that a CW could be a construction contract and distinguished Parkwood on the grounds that it concerned different wording in a different context

Back to Square One in the Supreme Court

On appeal by Simply, the Supreme Court agreed with the TCC. The two key issues to be decided were:

Issue 1 – Statutory interpretation: what is the meaning of an agreement "for … the carrying out of construction operations" in Section 104(1) of the Construction Act?

Simply argued Coulson LJ had erred by treating the word "for" as meaning "in respect of" in his conclusion that "What may be critical is whether the warranty is in respect of the ongoing carrying out of construction operations, on the one hand, or is in respect of a past and static state of affairs, on the other." The key question was "whether the object or purpose of the agreement is the carrying out of construction operations". Lord Hamblen concluded that a CW would not be an agreement "for" the carrying out of construction operations for the purposes of Section 104(1) if it merely promised to perform obligations owed to someone else under the building contract. There needed to be a separate or distinct obligation to carry out construction operations for the beneficiary under the CW; not one which was merely derivative and reflective of obligations owed under the building contract – in short, this encompassed the "direct obligation" requirement referred to by the dissenting judge in the Court of Appeal (Stuart-Smith LJ).

Issue 2 – Contractual interpretation: how should the Abbey CW be construed and, so construed, was it an agreement "for … the carrying out of construction operations"?

Lord Hamblen agreed with Abbey that the word "warrants" simply meant "promises". He agreed that Simply's promise to Abbey that it "has performed and will continue to perform" its obligations under the building contract, was potentially, at least, a "warranty as to future performance". However, it was an entirely derivative promise not giving rise, in itself, to any construction operation. The whole purpose of the warranty was to provide Abbey with a right of action in relation to Simply's performance under the building contract covering all obligations, whenever they arose and whenever the warranty was executed. Lord Hamblen concluded that "a far more principled and workable approach is for the dividing line to be between collateral warranties, which merely replicate undertakings given in the building contract, and those which give rise to separate or distinct undertakings for the carrying out of construction operations. That is a distinction which can be easily understood and applied." Accordingly, most CWs would likely not be construction contracts, and the judge's view was that they were not intended to be, citing the fact that nominal consideration was normal in CWs (as opposed to detailed payment provisions), and CWs would not affect cash flow (unless the beneficiary had step-in rights).

Commentary

There is relief that this vexing and challenging legal question has been settled. The different legal interpretations across first-instance courts (including in relation to *Parkwood*), the Court of Appeal (with a dissenting judgment) and the Supreme Court show that this was not a straightforward issue. As Lord Hamblen concluded, "It is also in the interests of certainty that there is a dividing line which means that [CWs] are generally outside the 1996 [Construction] Act rather than everything being dependent on the wording of the particular [CW] in issue." However, time will tell as to how the market will react and whether beneficiaries of CWs will look to include wording to, essentially, add construction obligations within a CW or, more simply, seek the inclusion of an adjudication provision. Until then, the Supreme Court's decision has brought the *Abbey v. Simply* legal saga to a welcome end.

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JCT 2024 Is Here (Some of it Anyway!)

The long-awaited new 2024 suite has started to flow through – so far, published suites include the DB, Intermediate and Minor Works families. Further contract families will follow with dates to be confirmed.

In this article, we focus on the DB Contract as a commonly used form of contract in the industry. In future articles, we will look at other forms.

So, what is new (in a nutshell) for the DB Contract?

Overview

First to note is that the changes as a whole are quite light touch, so, for example, changes made as a result of the Building Safety Act 2022 are minimal, focusing predominantly on the new PD and PC appointments (new Article 7) pursuant to the Building Regulations 2010; plus a new Employer obligation to provide "building information" under Regulation 11A(4) of the Building Regulations and Clause 3.16 expanding the Construction (Design and Management) Regulations (CDM) approach for Part 2A (new dutyholder roles) under the Building Regulations (see article above on The Amended Building Regulations). The 2024 version has modernised, adopting gender-neutral language and recognising (but not specifically endorsing) electronic execution.

Supplemental Provisions

The new suite focuses on greater cooperation and collaboration reflected by three previously optional supplemental provisions (SPs) becoming mandatory. They are:

1. **SP5** – Provides for collaborative working and is promoted to Article 3. The wording is unchanged and, importantly, by way of recap, obliges the parties to "work with each other and with other project team members in a cooperative and collaborative manner, in good faith and in a spirit of trust and respect. To that end, each shall support collaborative behaviour and address behaviour which is not collaborative."

2. **SP8** – Sustainable development/environmental SP8 is now in Clause 2, with the contractor being encouraged to suggest environmentally beneficial changes to the works (Clause 2.1.5) and to provide information on the environmental impact of goods and materials it selects (Clause 2.2.2).

3. **SP10** – Notification and negotiation of disputes with no change in wording – is now elevated to new Clause 9.1, with senior executives being identified in the contract particulars (CPs).

Quick Preliminary Points

In addition to the changes to the SPs, there are some succinct changes worthy of note:

- A new Building Regulations (2010) definition.
- A new ""Statutory Provider" definition replaces the ""Statutory Undertaker" definition – "local authority or statutory undertaker" is now replaced with "person".
- Clause 1.7 should be reviewed carefully, as it provides for certain notices to be provided by email to potentially different individuals and addresses, dependent on how the CPs are completed.
- Fluctuation provisions have been removed (only Option A was in the 2016 version) but all can be accessed via JCT online.
- There is a new regime for "Termination Payments", including cross-referencing in pay less notices.
- There is now provision for sublimits and exclusions, in addition to pollution and contamination with regard to professional indemnity insurance (PII).

Some of these points are picked up below.

Design Liability

New Clause 2.17.1 specifically clarifies that there is no fitness for purpose for design, but this is expressed as being to "the extent permitted by Statutory Requirements"; therefore, there is not a complete release from a fitness for purpose obligation. Further liability under the Defective Premises Act 1972 (DPA) encompasses "work in relation to a dwelling" rather than solely the "provision" of a dwelling, which mirrors new Clause 2A in the DPA.

Time

The employer has 14 days to request further information in response to a contractor delay notice (there was no time limit previously) (Clause 2.24.4). The employer is to notify any extension of time decision within eight weeks of receiving the relevant information from the contractor (this was previously 12 weeks) (Clause 2.25.2).

New Relevant Events:

- Dealing with asbestos or contaminated material (unless in the Contract Documents or brought on-site by the contractor) or dealing with unexploded ordnance and related employer instructions (Clause 2.26.4)
- Epidemic impacting labour, services, goods or materials, first occurring after the base date, or where its effects change after the base date (Clause 2.26.7)
- The change-in-law Relevant Event is replaced and is now wider, and includes "the publication of any guidance" by the UK government, local authorities and the Construction Leadership Council (Clause 2.26.8)

Note that epidemics and the exercise of statutory powers now constitute grounds for triggering the right for either party to terminate after prolonged suspension (Clause 8.11).

Money

- The list of "Relevant Matters" now includes discovery of, plus employer's instructions relating to, asbestos, contaminated material (unless identified in the Contract Documents or brought to site by the contractor) or unexploded ordnance (Clause 4.21.3) – Clause 3.15 (Antiquities) has now been extended to include asbestos, contaminated material and unexploded ordnance.
- There is now provision for optional new Relevant Matters via selection in the contract particulars (i.e. via opt-in – does/does not apply – if not completed they do not apply) for:
  - Epidemics, mirroring the wording in Clause 2.26.4 (Clause 4.21.6)
  - Change in law or guidance, again, mirroring the wording in Clause 2.26.8 (clause 4.21.7) so notably here also includes "the publication of any guidance … by the Construction Leadership Council or its successor"

Liquidated Damages and Termination

New Clause 2.29.5 deals with liquidated damages and termination, and, following the Triple Point[1] case, it allows for liquidated damages up to the date of termination with general damages applicable thereafter. The clause specifies that the reference to practical completion of the works or section in Clause 2.29.2 (noncompletion notice) is deemed to be a reference to the date of termination.

1. *Triple Point Technology Inc v. PTT Public Company Ltd* [2021] UKSC 29

Section 3 – Control of the Works

There are various points to note here. Firstly, pursuant to new Clause 3.4.1, automatic termination of subcontracts has now been changed to allow for step-in rights by the employer or a funder (which are common on projects) in those subcontracts plus the right to suspend by the subcontractor if the main contract is terminated pending exercise of those step-in rights.

Further, Section 3 includes:

- A flow down of Part 2A of the Building Regulations (new dutyholder roles) to the subcontractor (clause 3.4.2.3).
- Expansion of the discovery of antiquities has been widened out to include the discovery of asbestos, contaminated material or any unexploded ordnance (contractor to notify employer followed by relevant employer instruction (Clause 3.15.3).
- The widening out of CDM provisions to Building Regulations (Clause 3.16).

Note that the JCT 2024 does not deal with Higher-risk Buildings (HRBs), which include "golden thread" and gateway regime requirements.

Section 6 – Insurance

In relation to Option A insurance (new buildings where the Contractor is required to take out a joint names policy for all-risks insurance for the works), there is now clarification that reinstatement work is to be treated as a change under Clause 2.26.1 (but not otherwise) with the consequent entitlement to an extension of time (Clause 6.13.5.4).

The Contract Particulars relating to PII (Clause 6.15) now provide for the noting of any agreed sublimits within the overall level of cover and specific exclusions to the relevant policy. PII also now depends on commercially reasonable terms as well as rates (clauses 6.15 and 6.16).

Section 8 – Termination

There are a significant number of changes in this section. Firstly, the definition of "insolvency" has been amended to include two new triggers: a moratorium under Part A1 of the Insolvency Act 1986 and an order sanctioning a compromise or arrangement under Part 26A of the Companies Act 2006 (clauses 8.1.4.3 and 8.1.4.4).

Secondly, in Clause 8.7.4 and later clauses, there are additional provisions that deal with the "termination payment" and relevant due dates linked to termination. Where the employer decides not to complete the works, it is required to serve a notice within six months of the date of termination but is deemed not to want to complete the works if no notice is served within such six-month period, and the employer does not commence to make arrangements for carrying out and completing the works. Here, the due date for the termination payment is two months after the last day of the six-month period (Clause 8.8).

As noted above, there is now default termination for epidemics and change in law effecting prolonged suspension (i.e. as with *force majeure* but note the concern above in relation to guidance) (Clause 8.11).

Further, where the contractor's employment is terminated by the contractor or the other usual provisions in Clause 8.12, Clause 8.12 now provides for a mechanism for the contractor to provide information (two months from the date of termination) and for the employer to issue an account (up to three months) with the provisions then establishing the due date.

There is significant new drafting provided in Clause 8.13, which ties together due dates, final dates for payment, payment notices and pay less regime in respect of the termination payment. The default payment notice regime is baked into the process.

Closing Comments

A number of these changes will be welcomed, but, in respect of those that alter the risk profile yet further, it will be interesting to see how the market reacts as some will no doubt be subject to more scrutiny in practice (e.g. the new change in law and guidance approach). As with all projects, the forms of contract and any amendments should be tailored to the project.

For further information, please contact:

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Preparing for Adjudication – Join Us!

We are very much looking forward to taking part in a CIOB panel discussion on **25 September at 5:30 p.m.** – "Preparing for Adjudication", with our own Graeme Bradley and Ray O'Connor. We are hosting this popular event at our Birmingham office together with the well-known adjudicator Matt Molloy, alongside Andrew White and Dominic Keene of the DGA Group (Part of TSA Riley) and Alison Coutinho of Mace. This event is not to be missed, and we look forward to seeing as many of you as possible! Tickets are free for our guests, book your place here – Preparing for Adjudication | CIOB.

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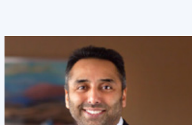

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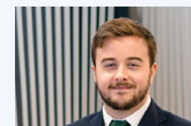

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