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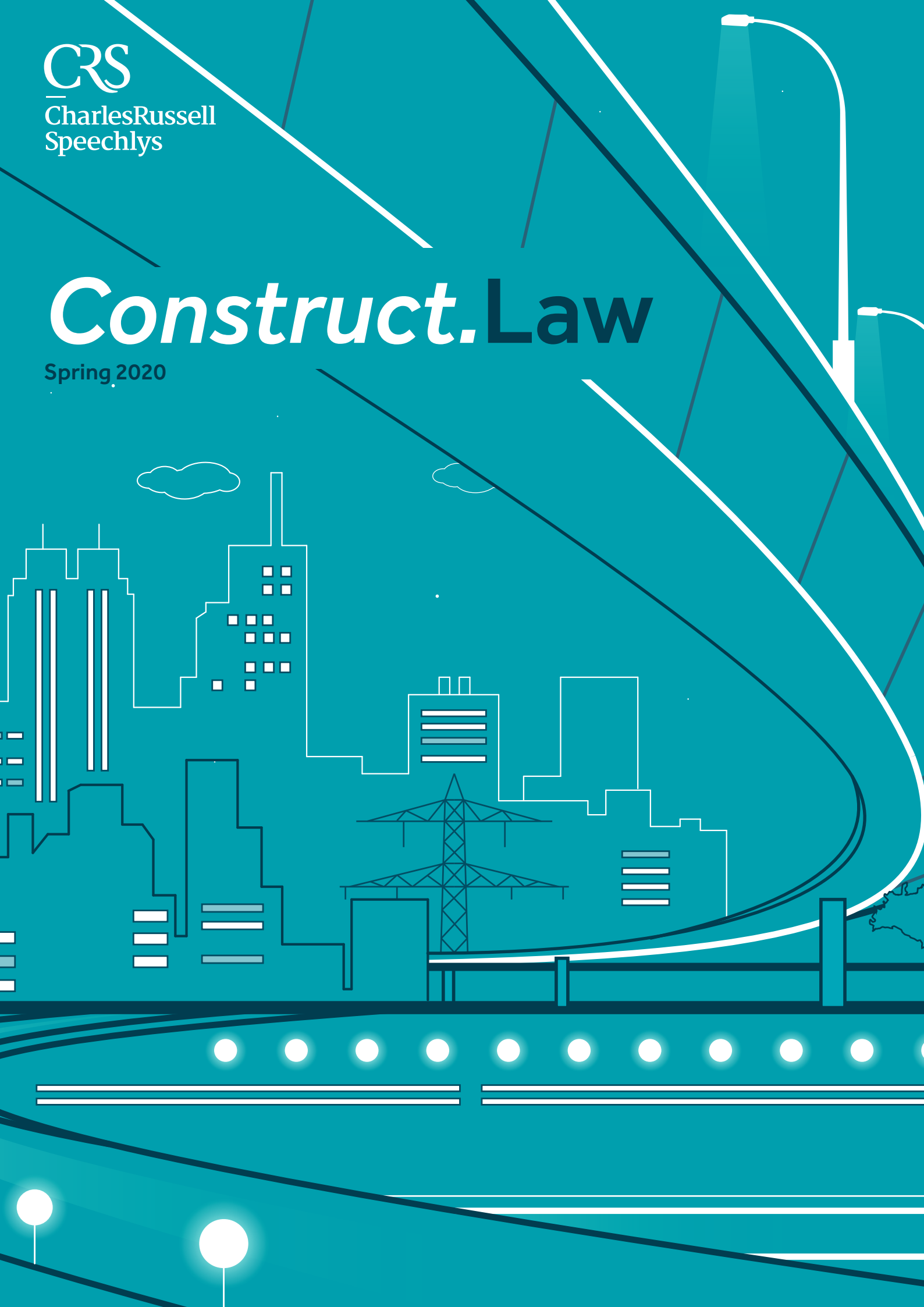

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Introduction

Welcome to the latest edition of our construction, engineering and projects publication, **Construct.Law.** Our spring edition focuses on topical legal issues affecting the construction, engineering and projects sector as we enter the new decade.

With recent statistics showing an increase in construction insolvencies (the highest number of insolvencies of all industry groupings), we look at some recent adjudication decisions involving insolvent parties. We also discuss ongoing developments relating to the tragic Grenfell Tower fire in 2017 and what these could mean for the future of the construction industry. Cladding has now become a national concern, with recent media coverage focusing on the unfortunate plight of apartment owners who cannot sell or remortgage their properties.

On a more positive note, we look at innovation in the construction industry, considering the legal implications of modular construction, smart contracts and blockchain technologies.

We hope you enjoy reading this edition of **Construct.Law**. Please get in touch directly if you would like to discuss any of the issues detailed within. You may also be interested in our sister publication **Infra.Law**, which focuses on the UK Infrastructure Sector, or our **'Building Up'** series, which explores the challenges of delivering taller developments in London and how property experts are seeking innovative ways to deliver high quality developments at increased densities.

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Thoughts for the new decade: smart contracts, blockchain and construction dispute resolution

At the start of a new decade where automated, self-executing smart contracts are likely to become more commonplace, perhaps also in the construction sector, it is interesting to consider how such a development might impact construction dispute resolution processes. A smart contract is simply a computer protocol intended to facilitate, verify and enforce performance of a contract. In short, it is about contract law and related business practices being facilitated through the design of electronic commerce protocols. Understanding the role blockchain technologies can play in this context is key.

By David Savage, Partner, Construction

Notwithstanding the general success of construction adjudication as an interim form of construction dispute resolution, almost all final determination forms of construction dispute resolution remain lengthy and costly processes for all those involved. Marginal net economic wins even for the "successful" party regularly lead to both parties feeling dissatisfaction by the time the dispute is resolved. Even in the case of adjudication – and alternative dispute resolution processes – sunk costs can often feel disproportionate to the sums disputed, and there is an appetite for cheaper, swifter solutions – especially to resolving more straightforward and lower value claims.

Reducing the scope for disputes

The use of smart contracts in the construction sector could help resolve many issues at contract inception, prior to any dispute crystallising, by reducing the scope for disputes through the use of smoother, objective contract administration and automated payment processes, facilitated in whole or in part by the use of *distributed ledger technology (for example, blockchain)*. The source of numerous construction disputes can be traced back to parties' basic misunderstanding of the contract they have entered into, compounded by a range of contract administration failures or errors. Smart contracts have the capability to function as unbiased, trustworthy and consistent contract administrators, resulting in a reduced margin for error and increased transparency. But new technologies are also poised to impact dispute resolution much more broadly through developments in online dispute resolution, crowd-sourced justice platforms and AI-powered dispute resolution solutions.

Where rules are embedded into smart contracts, lawyers will no longer need to draw clients' attention to circumstances of legal significance – decisions will be made autonomously in line with agreed rules. Self-executing contracts will initiate actions and automatically execute processes and provisions, limiting the need for human input. This could mean automating the transfer of title to a buyer on receipt of payment or automating the occurrence of digital actions in the event of a breach or failed performance. Such enhanced efficiency and increased transparency should help reduce the scope for dispute between parties.

Information within the smart contract will be captured and registered on a distributed ledger between the relevant parties, producing a robust and reliable audit trail of past events that will reduce scope for disagreement if and when a dispute does arise, as the ledger will provide a clear record of contract events from an unbiased perspective. Such contracts would further avoid many of the current snags and disagreements that result from contract non-compliance and misinterpretation throughout the life-cycle of the project.

Parties will need to ensure that such contracts are correctly programmed but, once in place, they clearly have the potential to materially reduce human error and contract non-compliance. However developing the smart construction contract in the first place will be no small undertaking – standard construction contracts need to provide for risk allocation and administration of a wide range of physical, economic and legal issues. I do not see a JCT "smart contract" being in place this decade, albeit I would love to be proven wrong…

Ultimately, the digitisation of contracts and increased reliance on data may also breed new types of disputes arising out of smart contracts. Parties may challenge the legitimacy of the algorithmic decision making, or sue the programmers responsible for its development.

Why blockchain technology is key

A blockchain is a continuously growing list of records (known as "blocks") that are secured together using strong cryptography. Each individual "block" contains a link to a previous block, a timestamp and other transaction-related data. Blockchains are, by design, extremely secure and highly resistant to any modification of the data they contain. The key thing is that they are managed by peer-to-peer networks, and any attempt to retrospectively alter data in any one block requires changes to be made to all the subsequently generated blocks. This is something that would require collusion of the majority of the network and is therefore almost impossible to achieve. As such, blockchain technology can be used to create open, distributed ledgers recording transactions between parties in a highly efficient, auditable and permanent way.

Blockchain technology can therefore help enable trust in environments where it might otherwise be lacking. It is not hard to see potential uses for an undisputed record of actions and facts, captured in real time, and not capable of revisionist/subjective reinterpretation in a sector such as construction.

UK construction is a highly regulated and data generating environment, with numerous compliance verification steps to be recorded across multiple data paths. Payment records, regulatory certifications, delay and disruption events, and programme critical path impacts immediately spring to mind. In that context, it is hard to imagine a future for our sector which does not involve embracing blockchain technology and processes once they are adapted to the data needs of our sector. The potential for tie-in with *BIM technologies* is also clear.

Beyond recording value exchange, and certifying proof of existence of different types of data, blockchain technology will assist in enabling the administration of "smart contracts" and the creation of decentralised autonomous organisations – created by combining smart contracts.

Blockchain technology has the potential to contribute seriously to how we restructure design, procurement, occupation and management of the whole built environment. The verifiable decentralised and permissionless manner in which data is captured ought to support the adoption and operation of a circular economy. As we progress to an "internet of things", we will find ourselves increasingly needing a "ledger of things" – and it is hard to imagine that role not being played by blockchain technology at some point in that future.

Transforming existing court and tribunal systems

From a lay perspective, court systems can appear time-consuming, unjustifiably combative and inexplicably steeped in opaque procedure and language. Revolutionising the courts with the use of technology could ensure inexpensive, swift, proportionate and inclusive dispute resolution.

But many of the technological advances applicable to courts are "sustaining" rather than "disruptive" technologies. Giving judges laptops, improving AV in courts, and using iPads rather than traditional paper court bundles for document referencing simply makes existing court processes more efficient. The critical exception may be online dispute resolution **(ODR)**. ODR has the potential to challenge the conventional court based judicial role. ODR goes a step beyond a virtual courtroom, to a dispute resolution process where the formulation of the solution is entirely or largely enabled by technology, with a "court" becoming a service rather than a place. Examples of technological reform within the courts can already be seen in a variety of different jurisdictions:

- In the UAE, the Dubai International Financial Centre's Small Claims Tribunal hears claims of up to £104,000. Parties are required to file electronically (via CaseLines) and may appear from anywhere in the world. The courts have developed their own case management system. Future plans include the use of blockchain to authenticate judgments for enforcement in other jurisdictions and to enable the court to rule on disputes involving smart contracts. Abu Dhabi offers a similar, rival set-up – the Abu Dhabi Global Market Courts.
- In British Columbia, Canada, the Civil Resolution Tribunal offers an ODR process for certain claims of low value and low complexity, involving companies established in BC. Its jurisdiction includes traffic accident claims, cooperative association claims and company disputes. Hong Kong has also indicated support for funding the development of an online arbitration and mediation platform ("eBRAM"), and a budget has been allocated. The proposed electronic platform would provide ODR services in relation to international disputes.
- There are also examples of failed attempts at state-sponsored ODR, such as the Netherlands' Rechtwijzer, which was set up in 2014 to deal with landlord and tenant disputes, debt and divorce. The latter was shut down in March 2017 as it proved financially unsustainable. A second attempt (Justice42), focusing primarily on the divorce market, is in the works. In a

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2017 lecture following Rechtwijzer's decline, Sir Terence Etheron cautioned fundamental differences between the Rechtwijzer and the UK's proposed Online Solutions Court – whereas the Dutch system attempted to set up an online alternative to the court systems, the UK solution proposes an integrated approach incorporating ODR into existing processes.

Ultimately, online courts could result in substantial costs savings both for litigants and the court system itself, leading to an increasingly accessible, user-friendly system, especially appropriate for lower value claims.

Other alternatives to traditional dispute resolution

Technology-powered alternatives to traditional dispute resolution are also increasingly making an appearance. These mostly take the shape of private-sector funded dispute resolution platforms which rely on blockchain technology and varying levels of human input. Some utilise *"crowd-sourced justice"* whilst others apply AI-based diagnostic tools and predictive forecasting, mostly based on statistical analysis of past court behaviour:

- Kleros, a decentralised adjudication system, is an example of such a platform. It proposes *"fast, open and affordable justice for all"* in the form of a quasi-judicial online court system. The peer to peer platform uses crowdsourcing and blockchain to put the dispute resolution process in the hands of the community. Members of the public can sign up as jurors and are then selected by the system and appointed to jury panels.
- Mattereum's decentralised dispute resolution and enforcement platform was developed to assist clients in the design and implementation of dispute resolution and enforcement systems in the context of self-executing smart contracts, and natural-language contracts incorporating smart contract code.
- CodeLegit is an auditing tool designed to verify compliance by carrying out technological compliance audits in conjunction with leading law firms. It purports to ensure technological compliance and bridge the gap between technology and law by auditing compliance of software code. It also offers ready-made smart contracts fitted with its own arbitration certificate, and has even drafted a set of Blockchain Arbitration Rules.
- Oath Protocol, another newcomer, is a crowd-sourced dispute platform relying on a large, diverse juror pool and incentive systems, modeled on the common law jury system. The platform will rely on community decision-making and engagement from blockchain users. Most of these systems remain in beta testing mode and/or development, and a number of technical and legal obstacles remain to be overcome. Some of these tools are already enhancing judicial processes today while other applications of such technology are set to disrupt the dispute resolution sector more fundamentally. As we have already seen in relation to transactional drafting and due diligence, AI can assist parties to craft dispute provisions which are fit for purpose and tailored to the parties' needs, using machine learning tools to collate all the relevant factors. These include aggregating drafting and drafting analysis from vast quantities of similar contracts, and the advice given around them when being negotiated. Whether, or when, we will see AI enhanced dispute resolution platforms start to aggregate data from past arbitrations and judgments and apply a level of "reasoning" to the facts of the instant dispute in front them is an interesting question to ponder. This may sound completely far-fetched to some – or frankly dystopian to today's senior lawyers. But for younger lawyers, it is worth remembering that if Moore's Law was to hold for another 40 years (an admittedly big assumption, albeit it has done so for the past 45 years – since 1975 when Gordon Moore revised his forecast to a doubling of processor speeds every two years) the processing power available to support such advanced AI based systems then will be approximately one million times more powerful than that available today.

This article was first published as a blog by Practical Law Construction on 14 January 2020.

Don't touch those defects

It is often a vexed question whether a contractor should be entitled to rectify defects in its works when an employer has lost confidence in its abilities. There is often a clash between the desire for contractors to seek to minimise their losses by rectifying their own defects and the desire of employers (in some circumstances) for the defaulting party not to darken their door again.

By Steven Carey, Partner, Head of Construction, Engineering & Projects group

Restraining a replacement contractor from rectifying defects

The recent case of *Flexidig Ltd* vs *A Coupland (Surfacing) Ltd* concerned a novel question in this context: could the original subcontractor (Flexidig) obtain an injunction preventing a replacement subcontractor (Coupland) from repairing defects in Flexidig's works?

The court acknowledged it was arguable M&M could have been acting in breach of contract by engaging a third party without giving Flexidig the opportunity to rectify its defects.

The main contractor, M&M, and Flexidig had entered into a subcontract for civil engineering works connected with the installation of fibre optic cable in Louth for the employer, Virgin Media Ltd, and Lincolnshire county council.

Under the subcontract, Flexidig was required to make good any defects during the progress of the works and the defects liability period. If Flexidig failed to do this, M&M could engage another party to do so, or complete the works itself, and recover the costs from Flexidig. M&M was also entitled to terminate the contract for breach, or for convenience on one week's notice.

M&M and Flexidig fell out. Both obtained adjudication awards against the other. Flexidig was awarded £185,000 for works undertaken and M&M was awarded £462,000 as an on-account sum for defects. Enforcement proceedings were commenced for both sums but were subsequently adjourned to allow Flexidig an opportunity to return to site and correct the defects.

Flexidig returned to site but M&M was unhappy with the remedial works and stopped the work on two separate occasions. M&M then contracted with Coupland as a new subcontractor to complete the rectification works on a call-off basis.

Claims by the parties

Somewhat unusually, Flexidig then applied for an injunction against Coupland to stop it carrying out these rectification works. Surprisingly, it did not claim against M&M.

Flexidig argued M&M had engaged Coupland in breach of contract to remedy the defects, when Flexidig had the right to perform those works under its subcontract. Flexidig claimed that in continuing to comply with call-off instructions from M&M to undertake work while aware of this alleged breach, Coupland's actions constituted the tort of procuring a breach of contract.

The court's decision

The court rejected the application on the basis that:

(i) there was no inducement of a breach of contract by Coupland;
(ii) while it was possible M&M could have breached the contract by appointing Coupland to complete the remedial works, the court was unconvinced by this argument; and
(iii) injunctive relief was not an appropriate remedy in these circumstances. If it were granted, M&M could simply terminate its contract with Flexidig under the termination-at-will clause and then engage another subcontractor.

Procuring a breach of contract

A key part of the tort of procuring a breach of contract is an intention by the defendant to induce the third party to breach its contract with the claimant. The court found that while Coupland may have facilitated a breach by accepting the works, this was not the same as procuring a breach. Facilitating and inducing did not mean the same thing. The defendant would only be liable if the claimant could demonstrate the requisite mental ingredient to a claim for inducing breach of contract – namely an intention by Coupland to induce a third party (M&M) to breach its contract with Flexidig. All Coupland knew was that Flexidig alleged M&M was acting in breach of contract, to which M&M told it otherwise. The court rejected the suggestion that Coupland should have assessed the correctness of such competing arguments before accepting its engagement.

The court acknowledged it was arguable M&M could have been acting in breach of contract by engaging a third party without giving Flexidig the opportunity to rectify its defects. However, it was not persuaded that this was a breach of contract in this case, as Flexidig's subcontract did not necessarily require M&M to allow it to return to remedy defects in all circumstances. It did not expressly provide that M&M could not engage a third party to remedy defects should it so desire. However, the court did suggest that it was implicit in the subcontract that M&M should request Flexidig remedy defects if it wished to subsequently claim the costs of engaging another.

Requirements of an injunction

Anyone seeking injunctive relief needs to satisfy the *American Cyanamid* test, that:

(i) there is a serious issue to be tried,
(ii) damages would not be an adequate remedy, and
(iii) the balance of convenience favours granting an injunction. The court's finding that there was no inducement meant there was no serious question to be tried. In any event, damages would have been an adequate remedy, especially as granting an injunction would not necessarily result in Flexidig resuming and completing the works. As such, the balance of convenience was against granting an injunction.

Engaging a replacement contractor to rectify?

While unusual, this case is an interesting illustration of the issues that may arise in the rectification of defects. The more interesting question is: in what circumstances could an employer, despite there being a provision in the contract entitling the defaulting party to come back to rectify its own defective works, be entitled to deny that party that opportunity?

This may depend upon the nature and extent of the defects found or if that party had already gone back to rectify defects and the employer still remained unsatisfied with the quality of the remedial works.

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Modular construction – making payment terms work

Modular construction has many advantages over more traditional construction methods, including accelerated build times, reduced build costs and improved quality. One topical example is the new hospital planned in Wuhan, China to deal with the outbreak of the Coronavirus. According to media reports, the 1,000 bed hospital is to be constructed using pre-fabricated buildings in just six days.

However, modular construction does require employers and contractors to consider some additional risks, particularly in relation to payment for off-site materials.

By Jane Robertson, Associate, Construction

Minimising payment risk

In order to manage these payment risks the terms of a modular construction contract should be carefully considered and clearly drafted. The recent decision in *Bennett (Construction) Ltd V CIMC MBS Ltd (formerly Verbus Systems) Ltd [2019] EWCA Civ 1515* highlighted issues that can arise in relation to milestone payment provisions. Milestone payments are often incorporated into modular construction contracts to balance the modular supplier's cash flow requirements with the insolvency risk associated with paying for works which have not been installed on site.

Milestone payments

In this case, Key Homes was the developer of a new Park Inn Hotel in Woolwich, London. Bennett was employed as the main contractor and sub-contracted with CIMC to design, supply and install 78 modular bedroom units, to be manufactured in China.

The contract for the modular units was based on an amended form of JCT Design and Build Subcontract 2011 **(Subcontract)**. The interim payment provisions were deleted in their entirety and the following payment milestones were inserted instead:

- **Milestone 1:** 20% deposit payable on execution of the contract.
- **Milestone 2:** 30% on sign-off of prototype room by Park Inn/Key Homes/Bennett in China.
- **Milestone 3:** 30% on sign-off of all snagging items by Park Inn/Key Homes/Bennett in China.
- **Milestone 4:** 10% on sign-off of units in Southampton.
- **Milestone 5:** 10% on completion of installation and any snagging.

Key Homes went into liquidation and following this the Subcontract came to an end. CIMC then commenced adjudication proceedings against Bennett for non-payment. The dispute between the parties centred on what was meant by "sign-off" in milestones 2-4, as there were no timings prescribed for the sign-off process.

Adequate payment mechanism required

Under the *Housing Grants, Construction and Regeneration Act 1996* **(Act)**, a construction contract must contain an 'adequate mechanism' for determining what payments become due and when, as well as the final date for payment. If the payment provisions of a construction contract do not provide for these minimum requirements, the relevant provisions set out in the *Scheme for Construction Contracts (England and Wales) Regulations 1998*, as amended, **(Scheme)** will be implied into the contract to effectively 'rectify' the offending provisions and ensure that an adequate payment mechanism exists.

The Subcontract here was a construction contract for the purposes of the Act. The two key issues were:

(i) did the payment regime in the Subcontract comply with the Act and
(ii) if not, which payment mechanism should replace it?

The adjudicator decided that the milestone provisions were compliant with the Act and therefore enforceable. CIMC then commenced proceedings in the Technology and Construction Court disputing this and contending that the milestone payment regime was non-compliant.

The Courts' decisions

The Technology and Construction Court held that milestones 2 and 3 were non-compliant and that milestones 2 -5 should be replaced by the payment regime contained in the Scheme. This decision was further appealed by CIMC.

On appeal it was held that the milestones provided an adequate payment mechanism and were therefore compliant with the Act. The Court of Appeal concluded that "sign off", which was not defined in the Subcontract, was to be interpreted objectively. The works were "signed off" when they were complete and in a position where they could be signed off, otherwise Bennett could have refused to formally sign off the works and no payment would ever become due. Actual "sign-off" was not required.

The Court also said, in passing, that if the milestone payments had been found to be non-compliant with the Act and therefore there was no adequate payment mechanism in the Subcontract, paragraph 7 of Part II of the Scheme would have applied.

The Court of Appeal confirmed that the Scheme can be implied on a "piecemeal" basis insofar as non-compliant payment terms are concerned; only those parts of the payment mechanism in the Scheme are implied into the non-compliant contract as are required to achieve compliance with the Act. If provisions from the Scheme had been implied in this case, payment would have fallen due seven days after the completion of the works to which the payment related.

Preserving agreed payment mechanisms

This case provides a stark reminder of the importance of clear drafting in order to avoid disputes. It also shows that, where possible, the courts seek to preserve payment mechanisms agreed by the parties and will only imply provisions from the Scheme where absolutely necessary. Coulson LJ emphasised that the Act was

"not designed to delete a workable payment regime which the parties had agreed, and replace it with an entirely different payment regime based on a radically changed set of parameters".

The Court also referred to incorporating provisions from the Scheme *"in order to 'save' the bargain which the parties made."*

Location, location, location

Most UK or 'local' construction contracts with modular or off-site elements are likely to be construction contracts for the purposes of the Act. In this case the Subcontract was taken to be a construction contract to which the Act applied. However, it is worthwhile considering the extent to which the Act applies where the project is located, or part of the works are carried out, abroad. In this case, the pre-fabrication of the bedroom units was in China and the project location was England. The Act applies to construction operations carried out in England, Wales and Scotland, not abroad, although where pre-fabrication work is overseas and the project location is 'local', as in this case, the Act may apply to the pre-fabrication contract if it also provides for installation on site.

Contract provisions for modular construction

As well as the payment mechanism, other contractual provisions should be considered in order to manage the risks of modular construction. These might include:

- Rights to inspect and test the works during the design, construction and transport phases, to assist with the early identification of problems.
- An efficient delivery schedule to avoid the units being prematurely stored on site.
- The transfer of title, following payment of the units (which have not yet been delivered to site). Additional insurance should also be considered if the ownership and risk of the units is to be passed at a time when there is no control over these items, their place of storage or their transport to site.
- A cap on payment for the off-site materials.
- Liquidated damages for the failure to provide the modular units within a specified time.
- Suitable retention - withholding a percentage of the value of the works until completion or the making good of defects.
- Performance bond, as additional security against insolvency.

Where the Act applies, all the requirements of the legislation, such as provisions in respect of adjudication and payment must be complied with. Milestone or similar payment arrangements can easily be accommodated, but they should be drafted with care and precision. Ensure there is no room for doubt as to when the payment falls due and take care not to breach the prohibition in the Act in respect of conditional payment terms, for example pay-when-certified clauses. Among other things, the Act prohibits making payment conditional on certification under another contract.

As Coulson LJ said in this case, the

"precise trigger for payment will depend upon the terms of the contract."

The payment 'trigger' is likely to need more careful consideration where modular or off-site works are involved and other requirements, such as inspection and testing, must be accommodated.

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Considering crystallisation – when can a dispute be referred to adjudication?

It's a scenario we see all too often. Employer meets Contractor. Employer and Contractor enter into a contract, and for a while, everything seems rosy. Then as the project progresses, unresolved claims start escalating and the relationship deteriorates. Inevitably, the parties' minds turn to adjudication, and the potential recourse that they may find there.

By Carolyn Davies, Associate(New Zealand Qualified), Construction

The recent decisions in *Dickie v McLeish* arose from such a scenario, and considered when a dispute can be referred to adjudication and whether the adjudicator's decision can be successfully enforced. The decisions provide helpful guidance to contractors and employers alike in relation to:

1. The courts' approach as to whether a dispute has 'crystallised' (and can be pursued) or not; and
2. What, if any, part of the adjudicator's decision can still be enforced where an adjudicator lacks jurisdiction in respect of a dispute.

Crystallisation of a dispute

Under s.108 of the *Housing Grants, Construction and Regeneration Act 1996*, the parties to a construction contract are entitled to refer a dispute arising under the contract to adjudication at any time. However, the dispute must first have crystallised. If a dispute has not crystallised before the Notice of Adjudication is served, the adjudicator (without the consent of the other party) will lack jurisdiction to determine the dispute and the decision could be challenged on enforcement.

The courts' approach to crystallisation is noted in *Coulson on Construction Adjudication* (4th edition):

"...the court will adopt a pragmatic approach to the crystallization issue, analysing the material that passed between the parties before the notice 'with a commercial eye'."

In the context of final account disputes, parties may disagree about the employer's valuation of the works and, due to the time limits imposed for challenges and potential impacts on cashflow, contractors are often keen to crystallise the dispute and urgently proceed to adjudication.

Background and claims

The contractor, Dickie & Moore Ltd **(Dickie)**, entered into a JCT Standard Building Contract with Quantities for use in Scotland (2011 Edition) with the employer who comprised trustees for the Lauren McLeish Discretionary Trust **(the Trust)**. The works related to the construction of a large house in Westfield, Scotland.

Dickie submitted a claim for payment in respect of an interim valuation. The Trust later produced a Final Adjustment Statement that assessed the value of Dickie's claim for loss and expense, made a number of deductions for works not completed and gave its valuation of the final account.

Dickie challenged the Final Adjustment Statement on a number of grounds. The Trust nevertheless issued the Final Certificate in similar terms to the Final Adjustment Statement and without taking into account Dickie's objections. As is usual under JCT contracts, the contract stated that the Final Certificate would be conclusive evidence of certain matters unless proceedings (including adjudication) were commenced within 60 days of the issue of the Final Certificate.

Dickie twice wrote to the Trust claiming that the Final Certificate was incorrect, and that the Trust had made wrongful deductions. Dickie then issued a Notice of Adjudication (the Notice) stating that its rejection of the Final Certificate was sufficient to crystallise a dispute between the parties.

Challenges to enforcement

The adjudication proceeded under a reservation of the Trust's jurisdictional objections and the enforcement action was challenged by the Trust on a number of grounds. All of these failed, save for its argument concerning crystallisation of the dispute.

The Trust noted that some items included within the Notice were of a considerably different flavour than those originally put forward by Dickie in its challenge to the Final Adjustment Statement and included (amongst other matters) a claim that Dickie was entitled to further extensions of time (an additional 46.5 weeks), together with increased associated loss and expense claims.

Dickie argued:

- as it was challenging the Final Certificate, and had to commence adjudication within 60 days in order to prevent the Final Certificate becoming conclusive evidence of certain matters, it was not necessary for the dispute to have crystallised;
- the fundamental dispute related to the fact that the value of the Final Certificate was lower than payments made to Dickie as part of the interim valuations, and that this in itself amounted to a claim by the Trust against Dickie;
- it was entitled to raise any defence it had (i.e. its claim for time and loss and expense) in response to the Trust's claim against Dickie in the Final Certificate; and
- in any event, a dispute had existed before the Trust's claim in the Final Certificate as was evident from Dickie's correspondence at that time.

However, Dickie accepted that the initial dispute had not been as extensive as the dispute in the Notice. In particular, claims for extensions of time and loss and expense contained in the Notice had not previously been advanced.

The first decision - a *"robust, practical"* approach

In reaching its decision, the Court of Session referred to the approach outlined in *Coulson on Construction Adjudication* and noted that:

"An over-legalistic analysis should be avoided. The court should seek to determine in broad terms whether a claim or assertion was made and whether or not it was rejected... It should discourage nit-picking comparison between the dispute described in the notice and the controversy which pre-dated the notice."

Even adopting this broad approach, the court found that the claims in the Notice were of *"a different nature and order of magnitude"* to the previous disagreements between the parties. There was a *"very marked discrepancy"* when a comparison was made of Dickie's initial objections and the claims made in the Notice. On that basis, the court found that "a very material part of the dispute" described in the Notice had not crystallised before the Notice was served.

This decision demonstrates that while courts will not adopt *"an over-legalistic analysis"* when considering issues of crystallisation, there are limits. In the rush to adjudicate or comply with contractual time limits, care must be taken to ensure that the Notice of Adjudication does not overstep the boundaries of the existing dispute between the parties. If there are valid claims to extensions of time and / or loss and expense, these should be made at the appropriate time.

The second decision - severance of the adjudicator's decision

Following its findings on crystallisation, the court's second decision in *Dickie* considered what part, if any, of the adjudicator's original decision could be enforced.

The Trust argued that the adjudicator's decision on the final account dispute was a 'unity' and if the adjudicator lacked jurisdiction in respect of some part of the

dispute, no part of the decision could be enforced. Dickie argued that, because the adjudicator had jurisdiction in respect of the remainder of the claim (for example findings on the valuation of the Bill of Quantities, variations, and architect's instructions), that part of the decision could be enforced. It could be severed from the other erroneous parts of the adjudicator's decision.

The court conducted a thorough review of existing severance decisions in both Scotland, and England and Wales, finding that the legislation applied similarly in both jurisdictions. This second decision in *Dickie v McLeish* is a useful point of reference and guide to practitioners and parties in dispute when considering the issue of severance.

In this particular case, the court declined to answer the Trust's question of whether there was a single dispute or not. Rather, the court said that the critical question is:

"whether it is clear that there is a core nucleus of the decision that can safely be enforced;"

The above point was made with reference to the recent case of *Willow Corp Sarl v MTD Contractors Ltd [2019]* EWHC 1591 (TCC), where Pepperall J, in severing part of an adjudicator's decision, suggested that the focus may be shifting from whether there was a single identifiable dispute, to *"whether it is clear that there is anything left that can be safely enforced"* once the erroneous part of the decision is severed.

The *"core nucleus"*

Here, the court said that the adjudicator's findings in respect of the valuation of Bill of Quantity works, variations, and architect's instructions *"were made separately and independently from his extension of time and loss and expense decisions"*. The decisions and calculations made within the adjudicator's jurisdiction were not in any way dependent upon or influenced by the time and loss and expense findings which fell outside his jurisdiction.

On that basis, the court found that the unenforceable, 'uncrystallised' aspects of the adjudicator's decision could be pruned away, leaving the *"core nucleus of the decision"* that could be safely enforced.

The Dickie decisions helpfully reiterate the court's approach to crystallisation and their preference to enforce adjudicator's decisions wherever possible. Contracting parties can have confidence that the courts will encourage an adjudication process that seeks to achieve tangible enforceable results when used effectively.

A version of this article was first published as a blog by Practical Law Construction on 21 October 2019.

Clarity in party wall awards

Party wall awards are common place in construction projects. Neighbours cannot prevent lawful works to party walls, but they can affect how and when the works are carried out.

Late last year, the Royal Institution of Chartered Surveyors (RICS) released the 7th edition of its *Party Wall Legislation and Procedure Guidance Note*. The provisions of the updated Guidance Note are effective from 1 December 2019 and it applies to RICS members and firms regulated by RICS. This 7th edition of the Guidance Note is the first update for over eight years and contains a number of important changes, including a more concise draft precedent award.

By Joe Edwards, Senior Associate, Real Estate

The recent decision in *R on the application of Subramanian v City of London Magistrates Court [2019] EWHC 1240* (Admin) highlights just how important clarity is when drafting any award. Uncertainty can lead to time consuming – and expensive – satellite litigation.

Background

The case involved a dispute between neighbours about a party wall.

In 2013, the Subramanians served notice on the Stewarts in accordance with the Party Wall etc. Act 1996 **(Act)** setting out that excavation works were to take place. The Stewarts did not consent so a 'dispute' was deemed to have arisen. In accordance with Section 10 of the Act, each party appointed their own surveyor and those surveyors also appointed a third surveyor. The surveyors made an award which resolved the 2013 dispute.

Even though the Subramanians' works were carried out in accordance with the surveyors' plans, damage was caused to the Stewarts' propertay. Both parties appointed surveyors in accordance with the Act to make an award in respect of the damage. They had reached agreement on all principal matters apart from a disagreement in relation to the Stewarts' kitchen. As a consequence of the works, it was believed that the Stewarts' kitchen floor had become tilted. Removing the cabinetwork to rectify this issue would mean removal of the various units. The cost of replacement cabinetwork was estimated at £104,600. The Subramanians objected as they argued, via their surveyor, there should be a discount because the Stewarts' would effectively gain brand new cabinets for their kitchen (which were not new when they were damaged).

Third surveyor's conclusions: 2017 Award

The third surveyor was asked to make a determination in respect of the replacement cabinetry. The referral included three related considerations:

1. whether the cabinetry needed to be replaced or could be repaired;
2. if replacement was required, whether a discount should be made to reflect the gain of brand new cabinets; and
3. liability for various costs.

The third surveyor determined that the cabinetry did need replacing, but a discount of 25% should be made to take account of the gain of brand new cabinets. The amount to be paid by the Subramanians to the Stewarts was a total of £85,950 inclusive of VAT (with costs and fees split between the parties). This was known as the "2017 Award".

The Subramanians then appointed a replacement surveyor. In his view the issue with the floor of the Stewarts' property was not caused by the works. At the time of judgment, that dispute remained to be determined.

Had the 2017 Award by the third surveyor made it clear exactly what was covered, the dispute could have been avoided.

Often surveyors make awards in evolving situations. When a referral is made to a third surveyor, the scope needs to be made clear. Any uncertainty on the part of the third surveyor or the parties must be clarified before the award is finalised. As the judgment also stated:

"A surveyor's award has to say what it means…Legal certainty is the whole point of surveyor awards".

Effect of the 2017 Award

The parties did not agree on the interpretation of the 2017 Award, which consequently led to court proceedings.

- The Subramanians argued that the 2017 Award was only an interim determination and restricted to the issues in dispute at the time. They contended the 2017 Award only dealt with valuing the loss – liability still needed to be proved.
- On the other hand, the Stewarts argued the 2017 Award was binding and that it was a final determination of the only outstanding matters in dispute at the time. The 2017 Award was said to have effectively settled the whole issue of liability.

The wording of the 2017 Award was argued to support both interpretations. The Court held that the 2017 Award was to be a binding determination only on the value of the replacement cabinetwork.

Clarity is key

The issue here was the lack of clarity. The court judgment stated that *"Precision is required in resolving party wall disputes"*.

Post-Grenfell – where are we now?

By Chi Mount, Associate, Construction

In our autumn edition of Construct.Law we reported on the government's June 2019 consultation on building and fire safety issues, our response to that consultation and its key proposals for the construction industry:

- the establishment of five "dutyholders" with clear responsibilities throughout a building's design, construction and occupation; and
- the principle of the three gateways and the golden thread: the regulatory requirements to be discharged at the planning, design and construction phases of a building and the requirement for a "golden thread" of information and key data relating to the building to be stored digitally, which must be updated and remain accurate throughout a building's life-cycle.

This new regime is likely to result in increased and longer term liability for designers, engineers and contractors responsible for fire safety and the structural integrity of a building. The government also proposes to introduce legislative penalties and criminal sanctions.

We noted the hardening of the insurance market in response to these proposals. We have seen insurance premiums dramatically increase, alongside a marked reduction in the availability of the certain insurance. There is also an expectation that the types of 'at risk' buildings will increase over time, perhaps to ultimately capture commercial high rise as well, but initially to extend to buildings such as hospitals and prisons. At the time of writing, the government has not yet provided a response to the consultation, but there have been numerous other developments affecting the construction industry since the Grenfell tragedy.

Fund for replacement of ACM Cladding

On 9 May 2019 the government announced that it would allocate £200 million to replace unsafe Aluminium Composite Material cladding **(ACM)** from around 176 privately owned high-rise buildings. Applications for the fund closed on 31 December 2019. However, if there are mitigating circumstances for failure to meet the deadline, responsible entities should inform the Ministry of Housing, Communities and Local Government (MHCLG). It will be at the application board's discretion whether to grant an extension.

There have been recent media reports referring to the 'naming and shaming' of building owners who fail to replace non-compliant cladding. In a statement to the press in September 2019, the Housing Secretary, Rt Hon Robert Jenrick MP, said that *"inaction will have consequences and I will name and shame those who do not act during the course of the autumn"*.

It is worth noting that there may be cladding and other exterior materials, such as balconies, that are non-compliant and fall foul of the Building Regulations, but which are not covered by the fund.

Building Safety Standards and BSR

On 14 October 2019, the implementation of a new building safety standard was announced in the Queen's Speech. It was stated that the government *"will bring forward laws to implement new building safety standards"*, thus progressing the implementation of a new independent Building Safety Regulator **(BSR)**. In January 2020, the government announced the BSR will be set up immediately, as part of the Health and Safety Executive.

According to the government, the BSR will oversee the design and management of buildings, with a strong focus on ensuring the new regime for higher risk buildings is enforced effectively and robustly, as well as overseeing compliance with safety regulations by contractors, designers and building owners. The BSR will have the power to apply criminal sanctions to building owners who do not obey the new regime. The Bill also promises legislation requiring developers of new homes to belong to a New Homes Ombudsman. An MHCLG spokesperson said the Ombudsman would be a *"watchdog that champions homebuyers, protects their interests and holds developers to account"*.

Building Regulations

On 30 August 2019, the new edition of Approved Document B (Fire Safety) came into force. This was published in response to the recommendations made by Dame Judith Hackitt's independent review into Building Regulations and fire safety. The new Approved Documents do not reflect any new policies, but take account of amendments to the Building Regulations made following the Grenfell tower fire, namely:

- The ban on the installation of combustible materials in external walls on buildings with a height of 18 metres or more introduced in October 2019. The Building Regulations now require that, in any building with a storey 18 meters or more in height containing:
  - one or more dwellings;
  - an institution, or
  - a room for residential purposes (excluding hostels, hotels or boarding houses);

  any installation product, filler material (such as the core materials of metal composite pans, sandwich panels and window spandrel panels but not including gaskets, sealant and similar) etc. used in the construction of an external wall should be European Class A2-s1, d0 or A1 or better..." (i.e. be of limited combustibility); and
- Restrictions on the use of desktop fire safety assessments rather than testing introduced in April 2019.

In November 2019 the Administrative Court quashed the introduction of new regulation 2(6)(b)(ii) which would have prohibited the use of *"a device for reducing heat gain within a building by deflecting sunlight which is attracted to an external wall"* (i.e. external shutters, awnings and blinds), unless certified as complying with certain European classifications and British Standards. In response, the government issued a circular letter on 11 December 2019 confirming the Administrative Court judgment did not otherwise affect the cladding ban and reiterating that its policy remained that combustible material should not be used in or attached to external walls. It also reiterated Building Control's overarching requirement to consider the risk of fire spreading over buildings' walls. It is likely the government will take further steps during the course of 2020 to implement Dame Judith Hackitt's wider recommendations, including:

- Setting up new regulatory framework for multi occupancy higher risk residential buildings that are ten storeys or more in height (HRRBs) involving a new Joint Competent Authority (JCA) to oversee management of safety risks in such buildings. The JCA would hold a database of all high-risk residential buildings and oversee the sign-off of HRRBs with duty holders required to demonstrate that their plans are detailed and robust.
- A strict regime for overseeing the construction of HRRBs, clarifying the role of Local Authority Building Control (to be renamed Local Authority Building Standards **(LABS))** who should have additional powers to issue improvement and prohibition notices.
- An increased focus on safety during a building's occupation, including a means for tenants to raise concerns. This issue has also been raised in the government's June 2019 consultation, *Building a safer future: proposals for reform of the building safety regulatory system*.

Grenfell Inquiry Phase 1

Phase 1 of the inquiry focused on establishing the facts of what happened on the night of 14 June 2017. Of particular interest to the construction industry is the inquiry's conclusion that the cladding did not comply with Building Regulations. Sir Martin Moore-Bick, chair of the Grenfell Inquiry, stated that there was "no good reason" to omit certain conclusions in relation to the buildings external facade and that it would be an "affront to common sense" to suggest that the external building was compliant with the requirements of the Building Regulations. He concludes, in this regard, that instead of resisting the spread of fire, the external walls "promoted it" and therefore did not comply with the Building Regulations.

Public hearings for Phase 2 of the Inquiry, which began on 27 January 2020, will consider wider questions about the refurbishment of the tower and the adequacy of applicable Building Regulations at the time along with more technical elements such as choice of materials and material testing.

New valuation process for high risk buildings

There have been growing concerns by home owners and lenders regarding the valuation of properties in high risk residential buildings over 18 metres and with some valuations coming back at £0 where the external wall cladding material was unknown or untested, transactions across the market have been affected. In an effort to overcome these issues RICS, the Building Societies Association (BSA) and UK Finance announced on 16 December 2019

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a new industry-wide valuation process for buying, selling and re-mortgaging homes in buildings above 18 metres (six storeys). The process involves a new External Wall Fire Review, whereby all buildings will be checked by fire safety experts who will then advise valuers, lenders, purchasers and sellers.

Updated advice for building owners issued

The Independent Expert Advisory Panel set up by the government shortly after the Grenfell tower fire issued updated advice in January 2020. It advises building owners, irrespective of the height of the building, to consider the risk of fire spread and the risks of external wall systems and fire doors. In summary, the guidance:

- Demands remediation of wall systems with ACM, HPL or similar cladding/ panels in high rise and HRRBs;
- Requires external fire spread to be part of fire risk assessment for all residential buildings; and
- Updates advice on fire doors for all residential buildings, as well as for balconies, external wall insulation and smoke control systems.

Consultation on cladding ban

2020 will inevitably see further measures aimed at implementing the recommendations of Dame Judith Hackitt. Indeed, in January 2020 the government launched a consultation on expanding certain aspects of the ban on the use of combustible materials in external walls suggesting amongst other things:

- The inclusion of hotels, hostels and boarding houses;
- Lowering the height threshold of the ban from 18 meters to 11 meters;
- Banning the use of metal composite materials with a polyethylene core in and on external walls and in specified attachments in all buildings, regardless of height; and
- Extending the ban to include solar shading products, including but not limited to blinds and shutters.

This consultation concludes on 13 April 2020.

Conclusion

Considerable progress has been made through the government's various consultations and new regulations in relation to building and fire safety. The £200 million government fund will offer assistance with improvements in safety for existing high-rise buildings and the government has confirmed that the ban on combustible cladding is not affected by the Administrative Court's quashing of the new regulation 2(6)(b)(ii).

It remains to be seen to what extent the government will implement the recommendations made by Dame Judith Hackitt, but all indications are that legislation imposing more stringent building safety requirements will be enacted in the foreseeable future.

Insolvency and adjudication – a compatible mix?

Construction litigation is no stranger to insolvency, including insolvent claimants. This is also the case for adjudication, a fast and commercially driven form of dispute resolution for the construction industry. However, there has been considerable uncertainty as to the enforceability of adjudicators' awards where a claimant is insolvent and receives a favourable decision. Recent cases have shed some light on this issue and have started to untangle the statutory difficulties when insolvency meets adjudication.

By James Scott, Trainee Trainee Solicitor, Construction
Eveline Strecker, Knowledge Development Lawyer, Construction

Bresco - Incompatibility of adjudication and insolvency

The Court of Appeal decision in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* (January 2019) highlighted the apparent incompatibility between adjudication and the insolvency regime. The Court gave guidance as to the extent (if at all) to which an adjudicator can decide claims made by an insolvent claimant which can then be immediately enforced.

Background

Lonsdale entered into a subcontract for the provision of electrical works by Bresco. Bresco went into insolvent liquidation six months later. There were cross-allegations made by both parties concerning monies owed and termination of the subcontract. Three years after the liquidation, Bresco's liquidator commenced an adjudication against Lonsdale claiming damages and payment for work completed.

First Instance

Fraser J in the TCC granted an injunction (preventing the continuation of the adjudication) citing two key points:

I. a lack of jurisdiction – the adjudicator did not have the necessary jurisdiction to deal with claims advanced by an insolvent company because the dispute arises in the liquidation, rather than under the construction contract; and
II. the basic incompatibility of adjudication and the insolvency regime (the 'utility argument') – they are different processes, with different outcomes. Adjudication claims by contractors in insolvent liquidation, for example, are highly likely to be futile and incapable of enforcement where there is a cross-claim.

Bresco appealed to set aside the injunction and the matter came before Coulson LJ in the Court of Appeal.

Appeal

Coulson LJ disagreed with the jurisdictional issue, noting that *"Bresco's right to refer a dispute to adjudication was not automatically lost when they went into liquidation"*. Insolvent parties are able to pursue claims in litigation or arbitration, and adjudication should be no different. However, this was only the first step in the analysis. It was also necessary to consider the *"utility"* of the adjudication proceedings.

The judge agreed with the 'utility argument'. There would be a significant risk that Bresco would be unable to repay the adjudication judgment sum should any Lonsdale cross-claims be successful. As such, there was almost no prospect of an adjudicator's decision being enforced and therefore pursuing the adjudication, and incurring wasted costs in doing so, would be futile.

Coulson LJ did note that there may be *"exceptional circumstances"* in which such an adjudication would have practical utility. Step forward the case of Meadowside.

Meadowside – "Exceptional circumstances"

The recent decision in *Meadowside Building Development Ltd v 12-18 Hill Street Management Company Ltd* (October 2019) saw the court expand on the "exceptional circumstances" referred to in Bresco.

Background

Meadowside was appointed by HSMC to carry out repair works under a JCT Minor Works Building Contract. Soon after completion of the works, Meadowside was placed in voluntary winding-up and a liquidator was appointed. Under the building contract, in the event of insolvency there was a requirement to prepare a final account taking into account monies owed to and from each party. This is in line with the Insolvency Rules, which require calculation of a net balance figure. Simple enough in theory. In practice, the final account was disputed with both parties claiming that they were owed money from the other.

By 2017 Meadowside's liquidator had failed to collect monies from HSMC and appointed Pythagoras Capital Limited **(Pythagoras)**, a third party agent, to assist. This type of appointment is common for liquidators, as was Pythagoras's remuneration mechanism - based on a percentage of the sum recovered.

Pythagoras commenced an adjudication against HSMC and HSMC refused to participate (although it reserved its right to challenge the outcome). HSMC alleged that adjudication was fundamentally incompatible with liquidation proceedings and the adjudicator lacked jurisdiction. The adjudicator nevertheless decided that a net balance of monies was owed to Meadowside.

In seeking summary judgment to enforce this award, and no doubt appreciating the points raised in **Bresco**, Pythagoras took the unusual step of proposing a form of security by which Pythagoras themselves would guarantee the:

I. payment of any adverse costs order against Meadowside, in the event that the application for enforcement was unsuccessful; and
II. repayment of any sums paid and costs orders should HSMC successfully overturn the adjudication award.

Pythagoras also raised the possibility of either 'ring-fencing' the award or providing After the Event **(ATE)** insurance – though no formal proposal or policy was submitted to the court.

The Court's decision

While conceding that the adjudication process and the insolvency regime are *"fundamentally incompatible"*, liquidators have a statutory obligation to collect debts and adjudication should not be excluded as an option to achieve this. The Court expanded on the *"exceptional circumstances"* raised in *Bresco* - a case is likely to be an exception to the ordinary position where the following factors are satisfied:

I. The adjudication determines the final net position between the parties;
II. Satisfactory security is provided in respect of both (a) any sum awarded in the adjudication (in case it needs to be repaid if the award is overturned); and (b) any adverse costs order made against the insolvent company in any enforcement or other future proceedings;
III. What constitutes such "satisfactory security" is a question of fact in each case. It may mean that the liquidator must agree not to disburse the adjudication sum, or that security such as a third party bond or guarantee or ATE insurance is put in place; and
IV. Any funding agreement or security put in place is not an abuse of process.

On the facts in this case, the Court found that the final *"abuse of process"* ground had not been satisfied. The funding agreement between the liquidator and Pythagoras was found not to comply with the *Damages-Based Agreement Regulations 2013*. Notably and despite numerous requests, Pythagoras repeatedly failed to disclose the specific terms of the funding agreement. Accordingly, the abuse of process point could not be satisfied.

The Court was also concerned about the sufficiency of security provided by Pythagoras. 'Ring-fencing' the adjudication award or purchasing sufficient ATE insurance cover were acknowledged to be satisfactory security options, as was a guarantee or bond provided by a reputable *"bank or equivalent"* that could provide a *"high degree of certainty that the guarantee will be called successfully"*. However, having assessed Pythagoras's accounts, the Court considered that the financial position of Pythagoras did not provide the Court with sufficient certainty that should the guarantee be called 12 or 18 months down the line, Pythagoras would be in a position to cover an adverse order for costs.

The Court refused to give summary judgment to enforce the adjudicator's award.

Granada – Insolvent from the outset

The decision in *Granada Architectural Glazing v RGB P&C Ltd (November 2019)* provides further hope for insolvent claimants.

Background

Granada, who were employed by RGB to design, supply and install curtain walling, commenced adjudication proceedings against RGB despite being balance sheet insolvent.

Having been awarded £102,089 by the adjudicator, Granada applied for summary judgment to enforce the award. RGB responded by applying for a stay of execution and unsurprisingly pointed directly to Granada's insolvency.

The Court's decision

Granada's debts clearly exceeded their liabilities. However, this financial status was commonplace for Granada who relied on intra-group loans from its parent company to assist with the repaying of debts. This arrangement had allowed Granada to pay its debts as they fell due and trade successfully. Notably, RGB were aware of this situation when they entered into the contract with Granada.

The judge referred to previous cases which have established that where a claimant's position *"is the same or similar to its financial position at the time the relevant contract was made"* it is unlikely that a stay of execution of the adjudicator's award will be granted, even if it is probable that the claimant would be unable to repay the judgment sum. Here, Granada's current financial status was *"materially similar"* to its position when the contract was entered into.

Although the judge envisioned a *"reasonable likelihood"* that Granada would not be able to repay sums should the decision be overturned, they were deemed more likely to do so than not. The stay of execution was refused.

Importantly, RGB's alternative application for the sum due to be paid into the court was also dismissed on the basis that this "halfway house"/ pseudo-escrow solution undermined a key purpose of adjudication, which was to mitigate cash flow difficulties

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Conclusions

So where does this case law leave us?

Following *Bresco* and *Meadowside* it is clear that a liquidator's obligations to take all steps to recover outstanding debts will often be at odds with the adjudication procedure. Yet the judgment in *Meadowside* provides some welcome clarity in understanding when an insolvent company may be able to both bring an adjudication claim and successfully enforce a favourable award. There are specified exceptional circumstances which must be met.

The court recognises that, though funding agreements are market standard and acceptable, they must be regulation compliant. They should also be drafted with the expectation that they will be disclosed to, and scrutinised by, the court. Ensuring that this is the case will help prevent claims falling foul of the 'abuse of process' exception.

In terms of security, 'certainty' is the name of the game. Insolvent claimants should aim to provide a guarantor that the court will have full confidence in, both at the time of the award and in the future. Reputable banks are preferable, but the courts have left the door open for other third party guarantors if they can provide the necessary comfort in respect of their financials. If security is to be offered via insurance, such insurance should be in place prior to the award and any relevant policies disclosable, on-demand, to the court.

Despite the conflict with insolvency and liquidation, *Granada* demonstrates the court's commitment to adjudication and its fundamental purpose: a fast, commercial form of dispute resolution. It shows a desire to take a factual approach to each individual case and on that basis make a judgement as to whether adjudication awards are enforceable.

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