Essex CHAMBERS

Paul Darling KC Construction Conference 2025

Wednesday, 8 October 2025 • 11:00 - 17:15


Edwin Glasgow KC


Marion Smith KC


Kate Grange KC


Adam Robb KC


Swee Im Tan


Jess Connors


Juan Lopez


Camilla ter Haar


Kelly Stricklin-Coutinho


Rebecca Drake


Vivek Kapoor


Melissa Shipley


David Hopkins


Alexander Burrell


Ruth Keating


Nicholas Higgs


Santosh Carvalho


Anna Moody


Jose Torero Cullen


Gerry Brannigan

39 Essex CHAMBERS

Slides, LinkedIn and Latest Intelligence

Wednesday, 8 October 2025 • 11:00 - 17:15

Paul Darling KC Construction Conference 2025

39 Essex Chambers
#39Events

39 Essex Chambers
#39Events

Kate Grange KC
39 Essex Chambers

Camilla ter Haar
39 Essex Chambers

Alexander Burrell
39 Essex Chambers

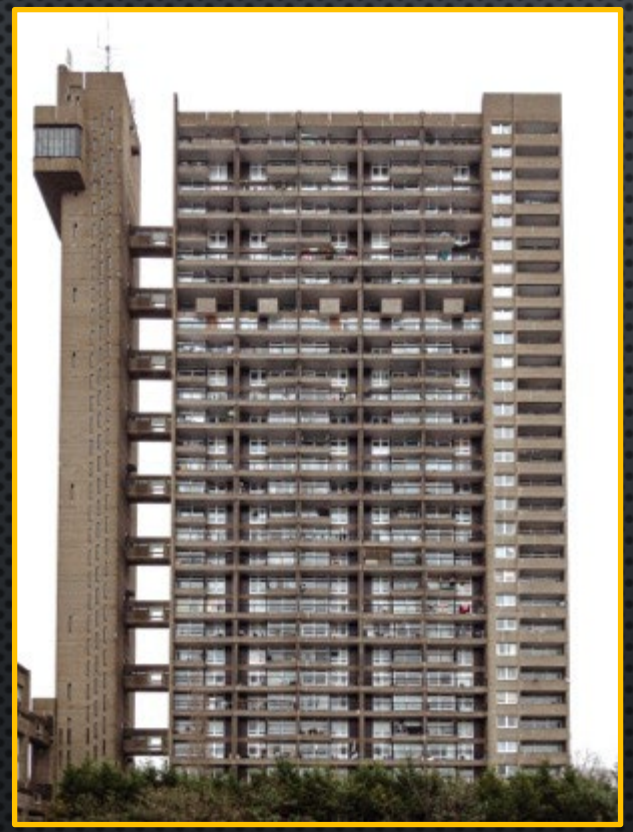
Jose Torero Cullen
UCL

Panel 1: The Latest on Building Safety

NAVIGATING THE TENSIONS BETWEEN TECHNICAL AND LEGAL CONSIDERATIONS IN BUILDING SAFETY CASES

José L. Torero
University College London

"LEGAL" LAW VS. "TECHNICAL" LAW



Status: This is the original version (as it was originally enacted).

Building Act 1984

1984 CHAPTER 55

An Act to consolidate certain enactments concerning building and buildings and related matters. [31st October 1984]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

DOES "LEGAL" LAW EVOLVE AT THE SAME RATE AS "TECHNICAL" LAW?

SOME PRINCIPLES NEVER AGE!

LIMITATION ON REQUIREMENTS

In accordance with Regulation 8, the requirements in Part A of Schedule 1 to the Building Regulations do not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about the buildings.

THE BUILDING REGULATIONS: A FUNCTIONAL REQUIREMENTS SYSTEM

1985

PART B FIRE.

Means of escape

B1. – (1) There shall be means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times.

(2) This requirement may be met only by complying with the relevant requirements of the publication entitled "The Building Regulations 1985 — Mandatory rules for means of escape in case of fire" published by HMSO (1985 edition).

Internal fire spread (surfaces)

B2. In order to inhibit the spread of fire within the building, surfaces of materials used on walls and ceilings—

(a) shall offer adequate resistance to the spread of flame over their surfaces; and

(b) shall have, if ignited, a rate of heat release which is reasonable in the circumstances.

Internal fire spread (structure)

B3. – (1) The building shall be so constructed that, in the event of fire, its stability will be maintained for a reasonable period.

(2) The building, or the building as extended, shall be sub-divided into compartments where this is necessary to inhibit the spread of fire within the building.

(3) Concealed spaces in the structure or fabric of the building, or the building as extended, shall be sealed and sub-divided where this is necessary to inhibit the unseen spread of fire and smoke.

(4) A wall common to two or more buildings shall offer adequate resistance to the spread of fire and smoke.

(5) For the purposes of sub-paragraph (4) a house in a terrace and a semi-detached house are each to be treated as being a separate building.

Carry over

2010

PART B FIRE SAFETY

Means of warning and escape

B1. The building shall be designed and constructed so that there are appropriate provisions for the early warning of fire, and appropriate means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times.

Requirement B1 does not apply to any prison provided under section 33 of the Prison Act 1952(a) (power to provide prisons etc.).

Internal fire spread (linings)

B2.—(1) To inhibit the spread of fire within the building, the internal linings shall—

(a) adequately resist the spread of flame over their surfaces; and

(b) have, if ignited, either a rate of heat release or a rate of fire growth, which is reasonable in the circumstances.

(2) In this paragraph "internal linings" means the materials or products used in lining any partition, wall, ceiling or other internal structure.

Internal fire spread (structure)

B3.—(1) The building shall be designed and constructed so that, in the event of fire, its stability will be maintained for a reasonable period.

(2) A wall common to two or more buildings shall be designed and constructed so that it adequately resists the spread of fire between those buildings. For the purposes of this sub-paragraph a house in a terrace and a semi-detached house are each to be treated as a separate building.

(3) Where reasonably necessary to inhibit the spread of fire within the building, measures shall be taken, to an extent appropriate to the size and intended use of the building, comprising either or both of the following—

(a) sub-division of the building with fire-resisting construction;

(b) installation of suitable automatic fire suppression systems.

(4) The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited.

Requirement B3(3) does not apply to material alterations to any prison provided under section 33 of the Prison Act 1952.

2010

External Fire Spread

B4.—(1) The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building.

(2) The roof of the building shall adequately resist the spread of fire over the roof and from one building to another, having regard to the use and position of the building.

Access and facilities for the fire service

B5.—(1) The building shall be designed and constructed so as to provide reasonable facilities to assist fire fighters in the protection of life.

(2) Reasonable provision shall be made within the site of the building to enable fire appliances to gain access to the building.

Omission

1985

External fire spread

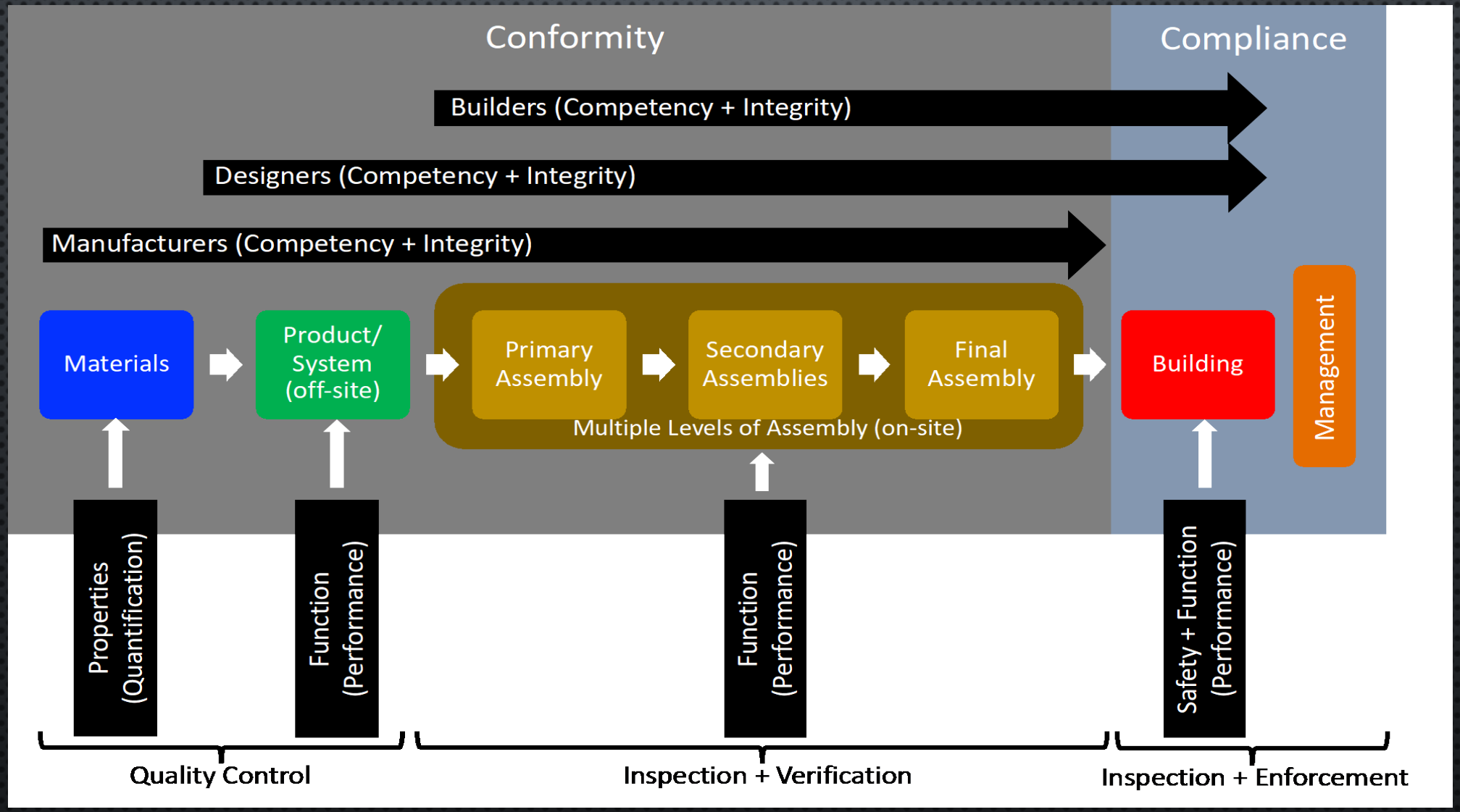
B4. – (1) The external walls of the building shall offer adequate resistance to the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building.

(2) The roof of the building shall offer adequate resistance to the spread of fire over the roof and from one building to another, having regard to the use and position of the building.

Mistake

PRINCIPLES REMAIN THE SAME: **EVOLUTION NOT REVOLUTION**

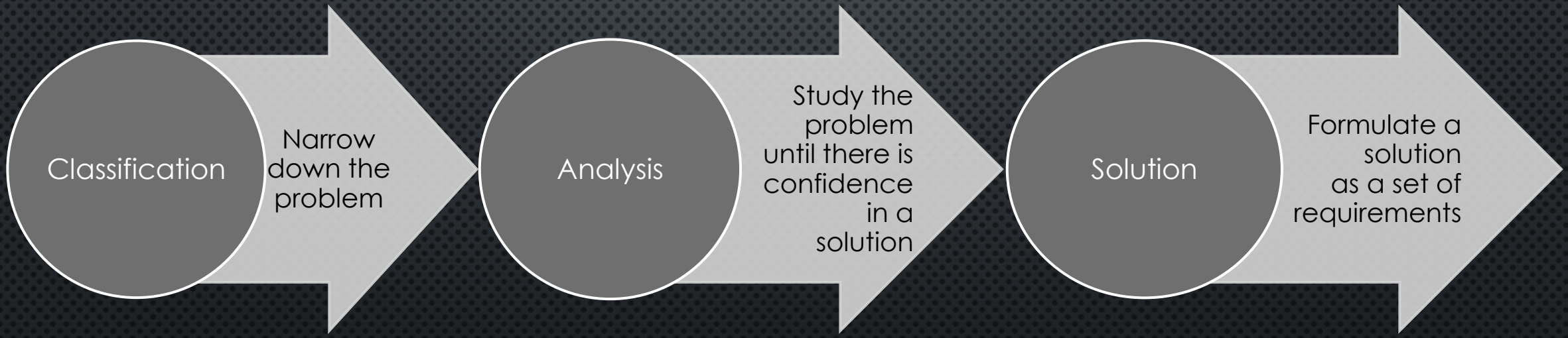
CONSTANT OBJECTIVE: **THE BUILDING**



It is the Building – and only the Building – that is compliant with Building regulations

PERFORMANCE SOLUTIONS – FUNCTIONAL REQUIREMENTS
VS.
PRESCRIPTIVE SOLUTIONS

PRESCRIPTIVE SOLUTIONS



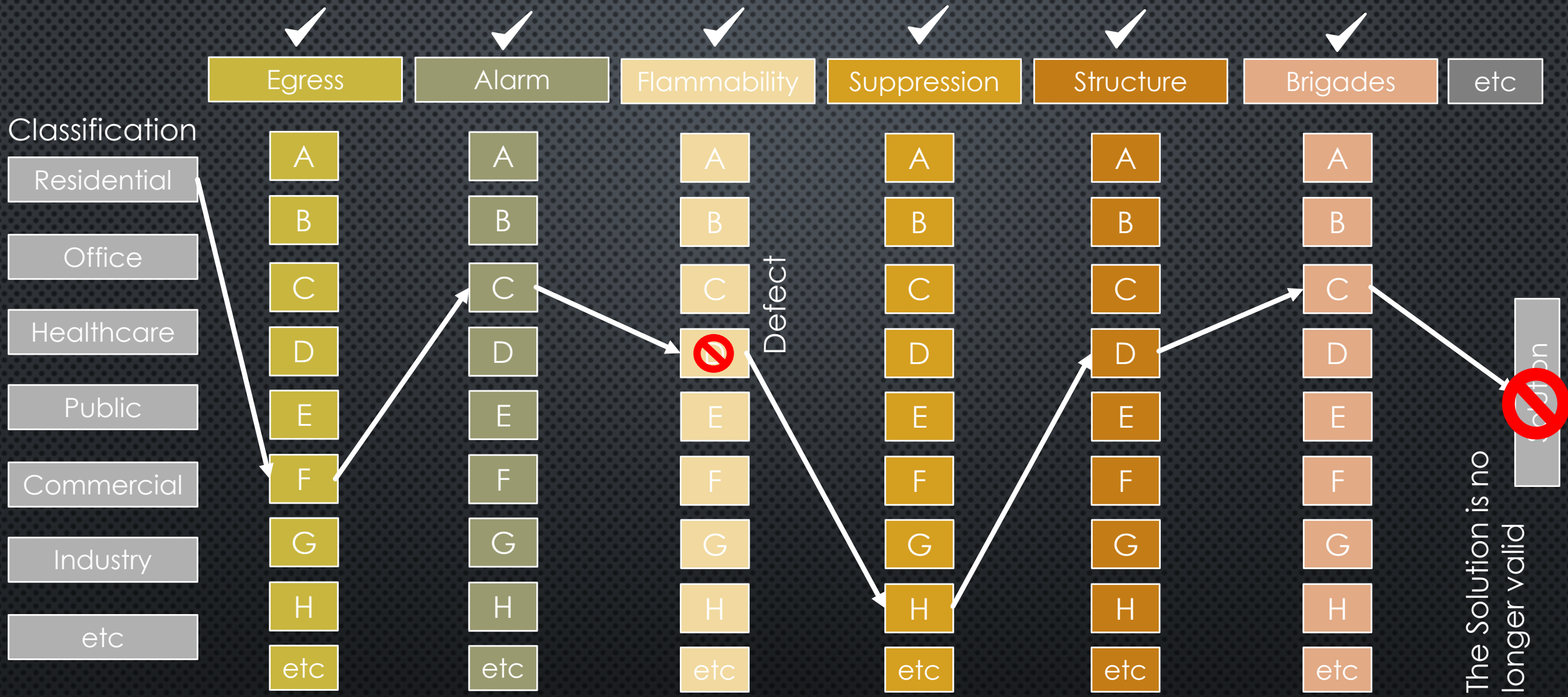
- A RIGID FRAMEWORK THAT DELIVERS PRE-DEFINED SOLUTIONS FOR A SPECIFIC CLASSIFICATION
- MAY BE CLASSIFIED … BUT NO CLASSIFICATION WAS EVER CONSTRUCTED!

34 Classification of buildings

For the purposes of building regulations and of a direction given or instrument made with reference to building regulations, buildings may be classified by reference to size, description, design, purpose, location or any other characteristic whatsoever.

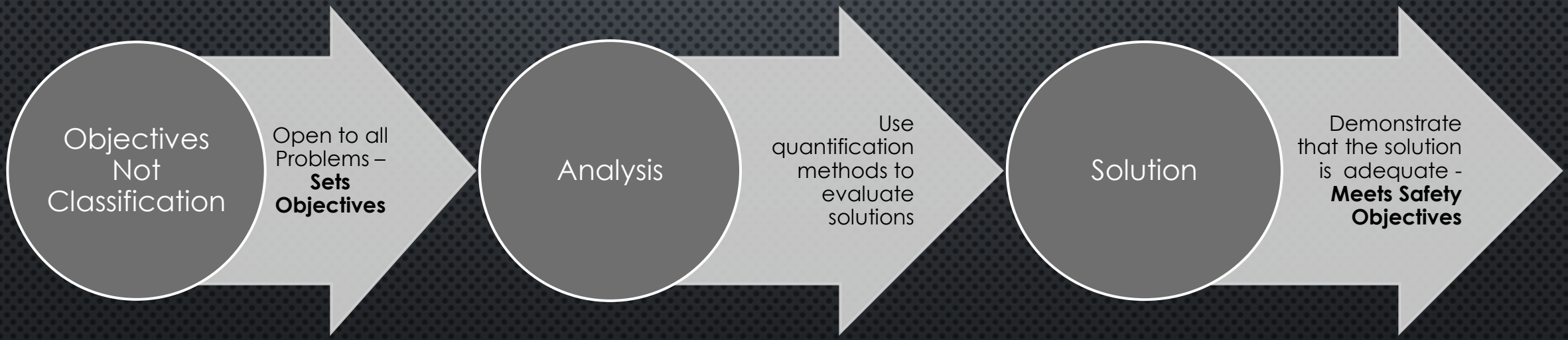
Building Act 1984

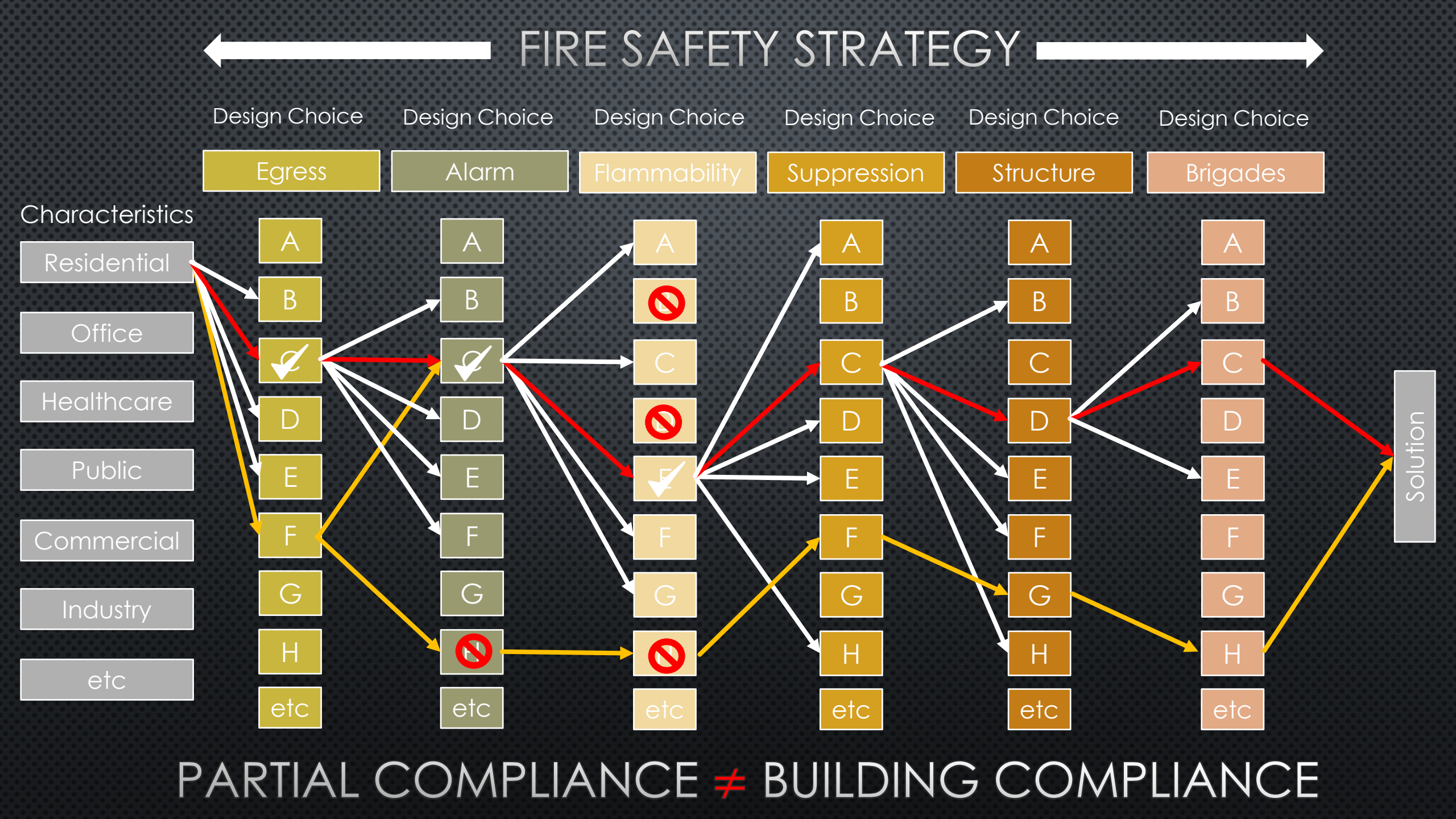
1984 CHAPTER 55



COMPLETE PARTIAL COMPLIANCE = BUILDING COMPLIANCE

PERFORMANCE BASED SOLUTIONS – FUNCTIONAL REQUIREMENTS




FIRE SAFETY STRATEGY
Design Choice
Design Choice
Design Choice
Design Choice
Design Choice
Design Choice
Egress
Alarm
Flammability
Suppression
Structure
Brigades
Characteristics
Residential
Office
Healthcare
Public
Commercial
Industry
etc
A
B
C
D
E
F
G
H
etc
Solution
PARTIAL COMPLIANCE ≠ BUILDING COMPLIANCE

Fire Safety Strategy and Responsibility in a Functional Requirements System

- In a Functional requirements System Everything is a Choice
  - All Choices Need to Support the Fire Safety Strategy
  - Therefore, for Building Compliance, the impact of All Choices on the Fire Safety Strategy Needs to Be Demonstrated

- A Defect is a Choice that Prevents the Fire Safety Strategy to Deliver the Objectives of the Building Regulations
  - Choice of Design
  - Choice of Implementation
  - Choice of Maintenance, etc.

- Misleading Information is Incorrect Information, that upon Request, is Provided by a Party and that Disables Another Party from Properly Discharging their Duties

- To Understand Responsibility:
  - You need a Fire Safety Strategy
  - You need to Understand Decision Making
  - You need to Understand Communications Between all Parties Involved in Decision Making

IN A FUNCTIONAL REQUIREMENTS SYSTEM: A DEFECT IS A BAD CHOICE, A BAD IMPLEMENTATION OR BAD MANAGEMENT AND MAINTENANCE

SOME TECHNICAL CONCEPTS EVOLVE: CLASS "0"

13 The highest national product performance classification for lining materials is Class 0. This is achieved if a material or the surface of a composite product is either:

a. composed throughout of materials of limited combustibility; or

b. a Class 1 material which has a fire propagation index (I) of not more than 12 and sub-index (i_1) of not more than 6.

Note: Class 0 is not a classification identified in any British Standard test.

The national classifications used are based on tests in BS 476 Fire tests on building materials and structures, namely Part 6 Method of test for fire propagation for products and Part 7: Method of test to determine the classification of the surface spread of flame of products. However, Part 4 Non-combustibility test for materials and Part 11 Method for assessing the heat emission from building products are also used as one method of meeting Class 0. Other tests are available for classification of thermoplastic materials if they do not have the appropriate rating under BS 476-7 and three ratings, referred to as TP(a) rigid and TP(a) flexible and TP(b), are used.

Flammability

BS476 – Part 6

BS476 – Part 7

Polyurethane

BS476 – Part 6 X

BS476 – Part 7 X

Retardancy

Polyisocyanurate

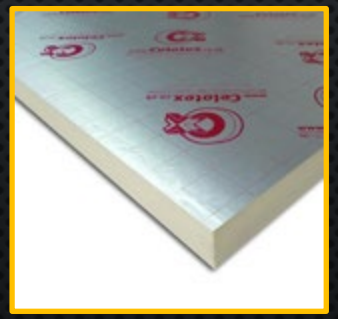
BS476 – Part 6 X

BS476 – Part 7 X

Phenolic

Flammability

Encapsulation



BS476 – Part 6 X

BS476 – Part 7 ✓

Class "0"

Mechanical Failure

USING CLASS “0” IS A BAD CHOICE: WHO IS REQUIRED TO BE UP TO DATE WITH THESE CHANGES?

BUILDING SAFETY ACT 2022: **PRODUCT OR BUILDING?**

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk.

"building safety risk", in relation to a building, means a risk to the safety of people in or about the building arising from the spread of fire or structural failure;

Section 130

The Building Regulations 2000

Fire safety

APPROVED DOCUMENT

B

VOLUME 2 – BUILDINGS OTHER THAN DWELLINGHOUSES

B1 Means of warning and escape
B2 Internal fire spread (linings)
B3 Internal fire spread (structure)
B4 External fire spread
B5 Access and facilities for the fire service

Coming into effect April 2007

LOADING AND GROUND MOVEMENT A1/2

The Requirements

This Approved Document deals with the following Requirements which are contained in the Building Regulations 2010.

Requirement *Limits on application*

Loading

A1. (1) The building shall be constructed so that the combined dead, imposed and wind loads are sustained and transmitted by it to the ground:

(a) safely; and

(b) without causing such deflection or deformation of any part of the building, or such movement of the ground, as will impair the stability of any part of another building.

WHAT IS INHERENTLY DEFECTIVE IN A FUNCTIONAL REQUIREMENTS SYSTEM?

Section 149

149 Liability for past defaults relating to cladding products

(1) This section applies where Conditions A to D are met.

(2) Condition A is that, at any time before the coming into force of this section— **Bad Choice**

(a) a person fails to comply with a cladding product requirement in relation to a cladding product,

(b) a person who markets or supplies a cladding product makes a misleading statement in relation to it, or

(c) a person manufactures a cladding product that is inherently defective. **Bad Choice**

(3) Condition B is that, after Condition A has been met, the cladding product is attached to, or included in, the external wall of a relevant building in the course of works carried out in the construction of, or otherwise in relation to, the building.

(4) Condition C is that, when those works are completed—

(a) in a case where the relevant building consists of a dwelling, the building is unfit for habitation, or

(b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.

(5) Condition D is that the facts referred to in subsection (2)(a), (b) or (c) were the cause, or one of the causes, of the building or dwelling being unfit for habitation.

(6) The person referred to in subsection (2)(a), (b) or (c) is liable to pay damages to a person with a relevant interest in

Section 148

148 Liability relating to construction products

(1) This section applies where Conditions A to D are met.

(2) Condition A is that, at any time after the coming into force of this section—

(a) a person fails to comply with a construction product requirement in relation to a construction product,

(b) a person who markets or supplies a construction product makes a misleading statement in relation to it, or

(c) a person manufactures a construction product that is inherently defective.

(3) Condition B is that, after Condition A is met, the construction product referred to in subsection (2)(a), (b) or (c) is installed in, or applied or attached to, a relevant building in the course of works carried out in the construction of, or otherwise in relation to, the building.

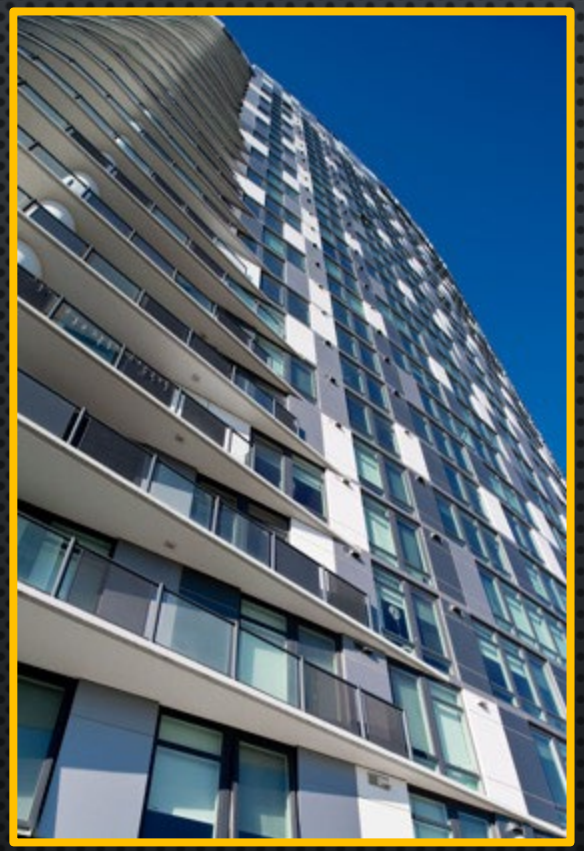
(4) Condition C is that, when those works are completed—

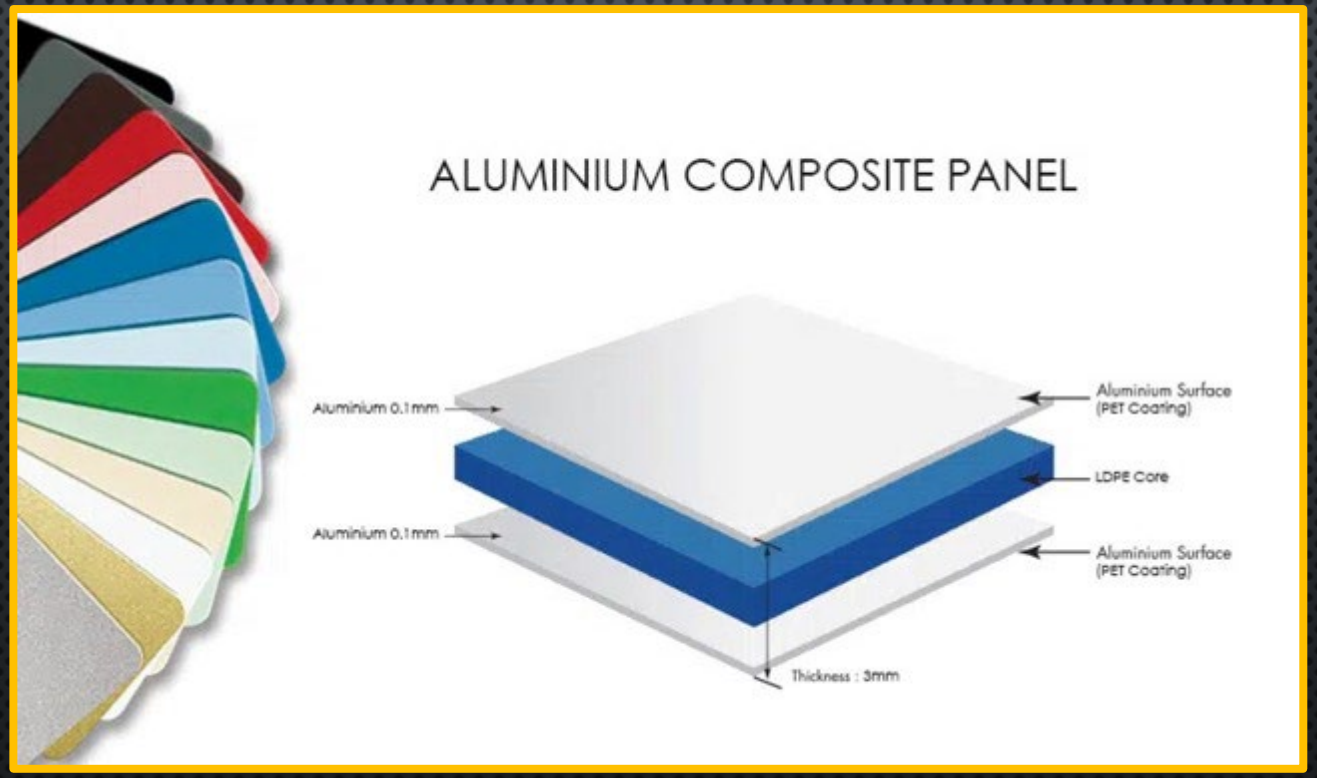
(a) in a case where the relevant building consists of a dwelling, the building is unfit for habitation, or

(b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.

(5) Condition D is that the facts referred to in subsection (2)(a), (b) or (c) were the cause, or one of the causes, of the building or dwelling being unfit for habitation.

WHAT IS INHERENTLY DEFECTIVE?





WHAT IS A BAD CHOICE?

THE USE OF GUIDANCE AND PROFESSIONAL RESPONSIBILITY

What is an approved document?

Approved documents are approved by the Secretary of State and give practical guidance on common building situations about how to meet the requirements of the Building Regulations 2010 for England. Different approved documents give guidance on each of the technical parts of the regulations. These are all listed in the back of the approved documents. In addition to guidance, some approved documents include provisions that must be followed exactly, as required by regulations or where methods of test or calculation are approved by the Secretary of State.

Each approved document covers the requirements of the Building Regulations 2010 relating to a different aspect of *building work*. *Building work* must also comply with all other applicable requirements of the Building Regulations 2010 and all other applicable legislation.

How is construction regulated in England?

Most *building work* being carried out in England must comply with the Building Regulations 2010. The Building Regulations are made under powers in the Building Act 1984.

Building Regulations protect the health and safety of people in and around buildings; they also provide for energy and water conservation and access to and use of buildings.

The *Manual to the Building Regulations* (references to this in the introduction are taken from the first edition) gives an overview of the building regulatory system in England. You can access the most recent version of the manual at: www.gov.uk/guidance/building-regulations-and-approved-documents-index.

Building Regulations

How do you comply with the Building Regulations?

Demonstration

Building work must meet all relevant requirements of the Building Regulations. To comply with the Building Regulations, it is necessary both to follow the correct procedures and meet technical performance requirements.

The approved documents set out what, in ordinary circumstances, may be accepted as one way to comply with the Building Regulations. Note, however, that:

Applicability

- Complying with the guidance in the approved documents does not guarantee that *building work* complies with the requirements of the regulations – the approved documents cannot cover all circumstances. Those responsible for *building work* must consider whether following the guidance in the approved documents is likely to meet the requirements in the particular circumstances of their case.
- There may be other ways to comply with the requirements than those described in an approved document. If those responsible for meeting the requirements prefer to meet a requirement in some other way than described in an approved document, they should seek to agree this with the relevant building control body at an early stage.

Responsibility: Designers, builders, installers, owners

Those responsible for *building work* include agents, designers, builders, installers and the building owner. For further information, see Chapter 7 in Volume 1 and paragraphs A26, B2 and F2 in Volume 2 of the *Manual to the Building Regulations*.

The Building Regulations can be contravened by not following the correct procedures or not meeting the technical performance requirements. If the building owner or those responsible for the works contravene the Building Regulations, the local authority may prosecute them in the magistrates' court. For further information on enforcement and sanctions in the existing system, see Chapter B in Volume 2 of the *Manual to the Building Regulations*.

What do the Building Regulations cover?

Applicability

'*Building work*' is a legal term for work covered by the Building Regulations. Where a building is not exempt, the Building Regulations apply to all types of *building work* as defined in regulation 3 of the Building Regulations. For further information, what constitutes *building work* is covered in Chapter A, Volume 2 of the *Manual to the Building Regulations*.

The Building Regulations contain sections dealing with definitions, procedures and the expected technical performance of *building work*. For example, the Building Regulations:

a. define what types of building, plumbing and heating work are classed as *building work* in regulation 3 (for further information see paragraphs A14 to A16 in Volume 2 of the *Manual to the Building Regulations*).

b. specify types of building that are exempt from the Building Regulations (for further information see Table A1 and paragraph A11 in Volume 2 of the *Manual to the Building Regulations*).

c. set out the notification procedures to follow when undertaking *building work* (for further information see Figure 2.1 in Volume 1 of the *Manual to the Building Regulations*).

d. set out the technical requirements (see Table 7.1 in Volume 1 of the *Manual to the Building Regulations*) with which the individual aspects of building design and construction must comply in the interests of the health and safety of building users, of energy efficiency (for further information see paragraphs A12(d)–(f), A14(f)–(h), A22, A23, B2(c) and F24 in Volume 2 of the *Manual to the Building Regulations*), and of access to and use of buildings.

e. set out the standards for building materials and workmanship in carrying out *building work* (for further information see Chapter 7 in Volume 1, and paragraphs F8 to F11 in Volume 2 of the *Manual to the Building Regulations*).

When must a building control body be notified?

It is often necessary to notify a building control body of planned *building work*. To help ensure that work complies with the Building Regulations, those responsible for *building work* may need to use one of the two types of building control body listed below:

a. a local authority building control body (for further information see Chapter B in Volume 2 of the *Manual to the Building Regulations*)

b. an approved inspector (for further information see Chapter E in Volume 2 of the *Manual to the Building Regulations*).

building work consists only of installing certain types of services or fittings (e.g. fuel-burning appliances or replacement windows) and the building owner employs an installer that is registered with a relevant competent person scheme designated in the regulations, a building control body does not need to be notified.

Third party schemes of certification and accreditation of installers can provide confidence that the required level of performance for a system, product, component or structure can be achieved. Building control bodies may accept certification under such schemes as evidence of compliance with a relevant standard. However, a building control body should establish before the start of the building work that a scheme is adequate for the purposes of the Building Regulations.

For further information about third party certification schemes and competent person schemes, see Chapter 5 in Volume 1 and Chapter C in Volume 2 of the *Manual to the Building Regulations*.

How to use this approved document

Each approved document contains:

- general guidance on the performance expected of materials and *building work* in order to comply with each of the requirements of the Building Regulations, and
- practical examples and solutions on how to achieve compliance for some of the more common building situations.

They may not provide appropriate guidance if the case is unusual in terms of its design, setting, use, scale or technology. Non-standard conditions may include any of the following:

- difficult ground conditions
- buildings with unusual occupancies or high levels of complexity
- very large or very tall buildings
- large timber buildings
- some buildings that incorporate modern construction methods.

Competency

Anyone using the approved documents should have sufficient knowledge and skills to understand the guidance and correctly apply it to the *building work*. This is important because simply following the guidance does not guarantee that your *building work* will comply with the legal requirements of the Building Regulations. Each approved document contains legal requirements (which you must follow) and guidance (which you may or may not choose to follow). The text in a box with a green background at the beginning of each section of an approved document is taken from the Building Regulations. This text sets out the legal requirements.

Requirement

The explanation which follows the legal requirements is guidance (see Diagram *i* below). The guidance then explains one or more ways to demonstrate how *building work* can be shown to comply with the legal requirements in common circumstances. The terms in green lettering in an approved document are key terms, listed and explained in the appendix to that approved document. Guidance in the approved documents addresses most, but not all, situations that building owners will face. Situations may arise that are not covered. You or your advisers will need to carefully consider whether following the guidance will mean that the requirements of the Building Regulations will be met.

Applicability

I SIMPLY DO NOT UNDERSTAND!

- In a Functional Requirements System **Everything is a Choice**
- The **Building as a whole is to be assessed for compliance** (i.e. The Fire Safety Strategy): A demonstration of compliance is Always necessary
- Those Responsible for such Assessment are Designers, Builders, Installers and Owners
- Guidance describes components and not the building – **Conformity with Guidance Cannot Determine Compliance**
- **Guidance, in itself, does not guarantee compliance** – If guidance is to be used it needs to be demonstrated that it is applicable

7 Compliance or non-compliance with approved documents

(1) A failure on the part of a person to comply with an approved document does not of itself render him liable to any civil or criminal proceedings ; but if, in any proceedings whether civil or criminal, it is alleged that a person has at any time contravened a provision of building regulations—

(a) a failure to comply with a document that at that time was approved for the purposes of that provision may be relied upon as tending to establish liability, and

(b) proof of compliance with such a document may be relied on as tending to negative liability.

TECHNICAL AND LEGAL DO NOT ALWAYS APPEAR ALIGNED – ALIGNMENT IS ESSENTIAL!

Thank You!

BUILDING LIABILITY ORDERS
&
INFORMATION ORDERS

8 October 2025

Camilla ter Haar

URS CORPORATION LTD V BDW TRADING LTD [2025] UKSC 21

SETTING THE SCENE

- **Ground 1:** Supreme Court rejected the argument that English law recognised a principle of voluntariness which rendered BDW's loss outside the scope of URS' duty and/or too remote.

- **Ground 2**: Section 135 of the BSA 2022 applies to claims which are dependent on s.1 DPA (not restricted to actions "under" the DPA. One important consideration for this was that the central purpose and policy of BSA 2022 was to ensure that those responsible for historic building safety defects can be held to account [104] – 106].

- **Ground 3:** A developer may owe and be owed a duty under s.1(1) of the DPA.
  - Duty under the DPA was to protect both those who acquire an interest in the dwelling and have an interest in the dwelling other than by acquisition or purchase
  - The DPA does contemplate losses such as those incurred by a developer in remedying defects caused by a contractor's breach of duty.

- **Ground 4**:The right to contribution under s.1 Contribution Act arises when (1) damage has been suffered by C for which D1 and D2 are each liable and (2) D1 has paid or been ordered or agreed to pay compensation in respect of the damage to C. At that point, but not before, D1 is entitled to recover contribution from D2 [212].

TWO KEY DECISIONS

- *381 Southwark Park Road RTM Company Ltd & Ors v Click St Andrews Ltd (in liq) & Anor (No 3)* [2024] EWHC 3569 (TCC); 219 ConLR 29
- *BDW Trading Ltd v Ardmore Construction Ltd & Ors (No 2)* [2025] EWHC 434 (TCC); 219 ConLR 1

381 SOUTHWARK PARK ROAD RTM COMPANY LTD & ORS V CLICK ST ANDREWS LTD (IN LIQ) & ANOR (NO 3) [2024] EWHC 3569 (TCC); 219 CONLR 29

- The Background:
  - Concerned defects in & damage to a block of flats known as St Andrews House.
  - C1 is a residents' right to manage company; C2 – C11 are leaseholders.
  - D1, an SPV which at relevant time owned freehold & head lease, wholly owned subsidiary of D1.
  - C1 and Ds entered into Freehold Purchase Agreement, pursuant to which D1 would develop the property. C1 would then purchase the freehold for £100,000.

381 SOUTHWARK PARK ROAD RTM COMPANY LTD & ORS V CLICK ST ANDREWS LTD (IN LIQ) & ANOR (NO 3)
[2024] EWHC 3569 (TCC); 219 CONLR 29

- In a previous judgment ([2024] EWHC 3179 (TCC), Jefford J found that there was a **relevant liability** under s.130(3)(b).

- Was D2 an **associated company** of D1 under s.131(1) of the BSA 2022?
  - In short: yes [6] – [8]
  - D2 (Click Group Holdings) holds all the shares of Click Above Limited. D1 (Click St Andrews Ltd) is a wholly owned subsidiary of Click Above Limited.
  - D2 therefore controlled D1 indirectly in the sense that it was able, through that corporate structure, to secure that the affairs of D1 were conducted in accordance with its wishes.

381 SOUTHWARK PARK ROAD RTM COMPANY LTD & ORS V CLICK ST ANDREWS LTD (IN LIQ) & ANOR (NO 3) [2024] EWHC 3569 (TCC); 219 CONLR 29

- Was it **just and equitable** to make the order? Yes.
  - Jefford J had regard to the purposes of the Act [10] – [11]
  - D1 was an SPV whose sole existence was to acquire & develop the property before divesting of the freehold. Thinly capitalised and dependent on inter-group loans.
  - D2 not a "wealthy" parent: Jefford J agreed with the approach of counsel for C that emphasis should be on financial position of D1 rather than the parent company.
  - Noted that there may be cases in which a respondent may argue that it had not had the opportunity to have a fair trial if it had not participated in the original trial. [19] – [20] Not relevant here where D2 did participate in the trial.
  - Noted that the Act does not require a party to be identified or joined in the proceedings before a BLO is made. However, sensible to join a party to proceedings if it is known an application will be made against them.

BDW TRADING LTD V ARDMORE CONSTRUCTION LTD & ORS (NO 2) [2025] EWHC 434 (TCC); 219 CONLR 1

- Background:
  - BDW developed 5 relevant buildings.
  - R1, Ardmore Construction Ltd, was the design and build contractor.
  - BDW accepted responsibility to building owners & leaseholders for the fire safety & structural defects & agreed to fund remedial works.
  - R1's liability in relation to one building established in an adjudication award, paid & not disputed. R1 disputed liability in respect of the other 4 buildings.
  - BDW concluded that R1 did not have sufficient financial reserves to meet liabilities, intended to apply for BLO against those associated pursuant to s.131 BSA 2022.
  - R1 is wholly owned by R2. R2 wholly owned by R3. R3 wholly owned by R4. Rs 2 &3 admit they are associates, R4 does not.

BDW TRADING LTD V ARDMORE CONSTRUCTION LTD & ORS (NO 2) [2025] EWHC 434 (TCC); 219 CONLR 1

"(3) An information order may be made only if it appears to the court—

(a) that the body corporate is subject to a relevant liability (within the meaning of section 130), and

(b) that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant (or the applicant and others) to make, or consider whether to make, an application for a building liability order."

BDW TRADING LTD V ARDMORE CONSTRUCTION LTD & ORS (NO 2) [2025] EWHC 434 (TCC); 219 CONLR 1

- **Against who can order be made?**
  - The body corporate subject to a relevant liability (s.132(3)(a).
  - Applications against R2-4 therefore failed. [17]
  - Albeit that this conclusion was contrary to the example of Information Orders given in the Explanatory Notes to the BSA 2022.

BDW TRADING LTD V ARDMORE CONSTRUCTION LTD & ORS (NO 2) [2025] EWHC 434 (TCC); 219 CONLR 1

- **It appears to the court that the body corporate is subject to a relevant liability (within the meaning of section 130)** (s.132(3)(a)):
  - Not sufficient that relevant liability is asserted on reasonable, plausible or credible grounds [25]
    - "is subject" ≠ "might be subject" [25]
  - "appears to the court" = "view arrived at by the court" [25]
  - Not necessary for the relevant liability to be established [27] (but no difficulty if it has) [29]
  - The court is **not** invited to determine the question of liability but **simply** to form a view on the question [27]
  - Applications not vehicles for resolving building disputes. Should be short & uncomplicated [29]

BDW TRADING LTD V ARDMORE CONSTRUCTION LTD & ORS (NO 2) [2025] EWHC 434 (TCC); 219 CONLR 1

- **Conclusion:**
  - Adjudicator's decision – liability paid – so D1 cannot be subject to that liability now.
  - As for the other developments, the evidence showed that D1 **might** have a liability, but did not show that it **actually** had such a liability.
  - Information order not made.
- **Noted:**
  - Scope of Information order:
    - Must relate to persons who are or have at any time in the specified period been associated with the body corporate
    - It is appropriate to require the information and documents to be provided for the purpose of enabling the applicant to make or consider to make an application for a BLO.

RCOS AND SRTS

ALEXANDER BURRELL (CERTAIN SLIDES FROM KERRY BRETHERTON KC, DAVID SAWTELL, DAVID HOPKINS)

TRIATHLON HOMES LLP V STRATFORD VILLAGE DEVELOPMENT PARTNERSHIP AND OTHERS
[2025] EWCA CIV 846

BACKGROUND

- FTT made Remediation Contribution Orders ("RCOs") under Section 124 of the BSA.
- The RCOs required SVDP (the original developer of the estate) and Get Living (the current, in effect, owner of SVDP) to pay substantial sums in respect of the costs of remedying fire safety defects [1].
- RCOs made on the application of Triathlon, a provider of social housing who has long leasehold interests in the social housing in the blocks [2].
- EVML responsible for management of the estate [2].
- Building Safety Fund had paid £26m to EVML (out of £27.5 agreed to be provided) to fund works [43].

GROUNDS OF APPEAL

- Ground 1: FTT erred in concluding that it was just and equitable to make the RCOs [5].
- Ground 2: FTT erred in concluding that an RCO can be made in respect of costs incurred before the relevant part of the BSA came into force on 28 June 2022 [5].
- Both failed.
- Wording of Section 124 (as enacted) is at [16].

THE LOGIC OF THE STATUTORY SCHEME

"…this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible" [24]

GROUND 1: JUST AND EQUITABLE

- 10 sub-grounds [54].
- *"…the policy of the Act was to place primary responsibility on the developer"* and *"developer sits at the top of the hierarchy"* [61] and see [69].
- *"…as between those connected to the building and the taxpayer, those who were connected to the building and could afford to pay should do so rather than expect the taxpayer to do so"* [63]. However, no presumption that will always be just and equitable for RCO against developer.
- *"…developer responsible for the defect who retains an interest in the building should stand at the top of the hierarchy or cascade of those who will pick up the costs"* [87].

GROUND 1: JUST AND EQUITABLE

- Fact that works were being carried out and were adequately funded by Building Safety Fund did not render RCO unnecessary. BSA was designed not only to get the works done, but also to deal with "who pays" question [87]. Fund is a last resort [88].
- Irrelevant that Triathlon and Get Living had co-operated to secure funding [105].
- Fund not out-and-out grant; applicant required to use all reasonable endeavours to pursue claims [110]. Public interest in securing reimbursement of funds [112].
- Whether pushing developers and investors too hard might discourage investment – "quite speculative" [113].
- Irrelevant that the beneficial owners of SVDP and Get Living had changed [115 – 121].

GROUND 1: JUST AND EQUITABLE

- Grant Funding Agreement only prevented recovery of costs covered by the Fund from leaseholders in their capacity as lessees [133]. Any other conclusion…

  "…would mean for example that if a developer thought that it might be the target of an RCO, it could prevent any such action being taken by buying a flat in the block in question. The same would apply to others such as contractors, or the suppliers of cladding materials. It is impossible to see what rational purpose could be served by such an interpretation, and it would cut across the policy of the BSA which it cannot be supposed Government intended" [133].

GROUND 2: RETROSPECTIVITY

- *URS "…self-evidently strongly in favour of section 124 being given retrospective interpretation"* [149].
- Necessary to interpret Section 124 in a way that gives effect to the purposes of the BSA [151]. Include interpreting Section 124 *"…as providing the statutory mechanism for leaseholders who have paid to seek to pass on the costs they have already incurred – whether before or after the Act came into force"* [151].
- RCOs could be made in respect of costs incurred before 28 June 2022.

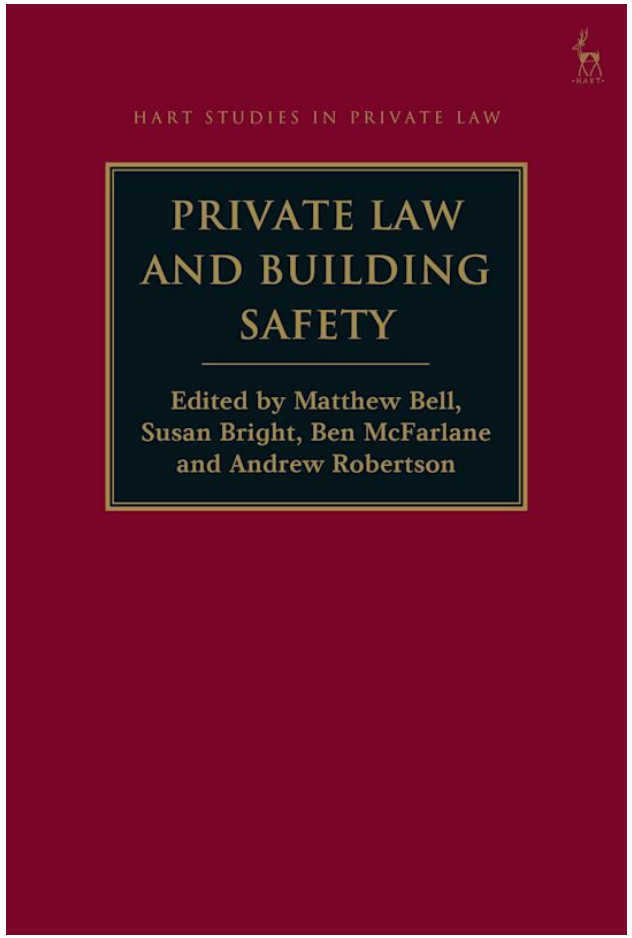
LESSONS

1. Developers at the top of the hierarchy.
2. How will developers be able to argue that an RCO is not just and equitable?

THOUGHTS ON *TRIATHLON….*

- The Court of Appeal did not have to look beyond the original developer and its immediate associates.
- The changing identity of the beneficial owners of the developer was given practically no weight: "*if you invest in a company, you take the risk of unforeseen liabilities attaching to that company*." ([118])
- What the Court of Appeal did not have to do was consider whether 'more remote' associates could be made liable (save for consider, *obiter*, extreme hypothetical cases involving shared directors at [65]).

THOUGHTS ON *TRIATHLON….*



- Published 24 July 2025
- David Sawtell, 'Rationalising Associate Liability under the Building Safety Act 2022' in Bell, Bright, McFarlane and Robertson (eds), *Private Law and Building Safety* (Hart, 2025)
- "*the test of ' just and equitable ',carrying with it an element of judicial discretion, should be applied in such a way as to ensure that only those parties that had either (1) meaningful control and knowledge (and hence culpability) or (2) a sufficiently close connection with the overall enterprise giving rise to the defects such that it would be fair for liability to be imposed, should be made liable*." (235)

GREY GR LTD PARTNERSHIP V EDGEWATER (STEVENAGE) LTD (2025) 218 CON. L.R. 66

- Judgment – 24 January 2025
- RCO made against variety of respondents
- Considers 'Relevant Defect' and 'Just and Equitable'
- Relevant Defect:
  - Defect – not simply non-compliance with building regulations at time of construction [68].
  - Building safety risk – "*any risk above "low" risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk."* [72]

GREY GR LTD V EDGEWATER

- Just and equitable:
  - *"We agree that some circumstances will suggest additional linking factors (which may be short of linkage with the development or evidence of abuse) and those may call for an explanation and/or evidence of countervailing factors. Ultimately, these cases will be very fact-sensitive and this is a matter for our discretion."* [357]
  - *"In relation to these companies, the linking factors outweigh the factors against making an order,"* [373]
  - Associate involved in property development/building sector [361], associate presented itself publicly as part of same group [362], common directors had actual day to day control over associate [363-368], financial links between developer and associated company [369-371].

THE EMPIRE STRIKES BACK? *ZAMPETTI V FAIRHOLD ATHENA LIMITED (EMPIRE SQUARE)* (2025)

ZAMPETTI V FAIRHOLD ATHENA LIMITED (EMPIRE SQUARE) (2025)

- Empire Square, in Borough, London. 572 apartments, developed in 2004 – 2006.
- Applications for a remediation order (s.123 BSA) and remediation contribution order (s.124 BSA) heard together.
- The developer, Berkeley, had entered into the self-remediation terms (SRTs). The decision discusses the distinction between the RCO / RO regime and the SRTs.

ZAMPETTI V FAIRHOLD ATHENA LIMITED (EMPIRE SQUARE) (2025)

- EPS render system was used on the external walls.
- March 2023: Berkeley enters into the SRTs. Accepted that Empire Square would fall within its scope.
- June 2023: leaseholders apply for a RO.
- October 2023: Southwark issues improvement notices. By the time of the hearing, the freeholder had not started to remediate the most serious defects.

ZAMPETTI V FAIRHOLD ATHENA LIMITED (EMPIRE SQUARE) (2025)

Remediation order:

- Tribunal disagreed with the earlier decision in the *Chocolate Box* case that the test for a RO is whether it would be 'fair and just'. These words do not appear in the legislation.
- The Act is *solution* focused rather than blame focused: it is concerned with the building not with the parties to the application.
- "*We must take a purposive approach - ask ourselves what the best answer is in this application, to achieve remediation of the relevant defects in the building for the safety of the leaseholders. The outcome of that assessment must be within a range of reasonable decisions, but would not be open to challenge unless no reasonable decision maker, on the facts know to it, could have come to the same decision*." [85].
- The fact a developer has entered into the SRTs and has expressed willingness to remediate was no fetter to the FTT's discretion.

ZAMPETTI V FAIRHOLD ATHENA LIMITED (EMPIRE SQUARE) (2025)

Remediation contribution order: (application brought by freeholder)

- Immediate order for payment of incurred costs (waking watch, expert report, management costs).
- It was held to be a 'reasonable decision' to retain the waking watch even after a fire alarm system had been installed. "…*contractual principles of loss and mitigation are not the same as the test in the Act; we are concerned with what is just and equitable.*" [139]
- This included legal costs incurred to date as well. Held to be 'relevant steps'. Over £300k of costs went off to assessment.

ZAMPETTI V FAIRHOLD ATHENA LIMITED (EMPIRE SQUARE) (2025)

Comments on the SRTs

- SRTs do not appear to bear much of a relationship to the BSA
- e.g. definition of a life-critical safety risk; recoverability of the cost of a waking watch.
- Problem that the RO is not binding on the developer – may leave a situation where the landlord has to carry out works beyond what the SRTs require and recover the cost via a RCO.
- FTT made an order for the estimated sums that the landlord will incur in remediating the building. (BUT suspended on conditions, namely, that the developer would carry out the works identified in the RO).

R (RYDON HOLDINGS LIMITED) V SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES [2025] EWHC 2182 (ADMIN)

- Concerned JR brought by parent company of Rydon Maintenance Limited (main contractor in Grenfell Tower).
- Decisions of Michael Gove, to designate Rydon Holdings Limited as a Designated Participant Developer ('unfit' to remediate).
- Wide range of grounds of challenge (procedural impropriety, Tameside, predetermination, irrationality).
- Claim dismissed, judgment included discussion regarding scope of amenability of government decisions made under the SRTs, as well as substantive grounds.

39 Essex Chambers
#39Events

Hannah McCarthy
39 Essex Chambers

Hannah Fry
39 Essex Chambers

Flash Update on Insolvency

NATIONAL HOUSE BUILDING COUNCIL V PEABODY TRUST

- [2025] EWCA Civ 932
- Court of Appeal, 21 July 2025
- Under an NHBC insurance policy for insolvency cover, the cause of action accrued at the time when additional costs were incurred by an employer, as a consequence of a contractor's insolvency, rather than on the date of the contractor's insolvency.

MIDAS CONSTRUCTION LTD (IN ADMINISTRATION) V HARMSWORTH PENSION FUNDS TRUSTEES LTD

- [2025] EWHC 1122 (TCC)
- TCC, 9 May 2025
- A sub-contractor in administration which had obtained three adjudicator's decisions in its favour under two construction contracts, including a decision that it was owed £1.55 million by the defendant, was ordered to give security totalling £550,000 for the costs of proceedings that the defendant might bring, as a condition for enforcement of the monetary decision. The court rejected the submission that the security should be given in stages.

39 Essex Chambers
#39Events

Adam Robb KC
39 Essex Chambers

Jess Connors
39 Essex Chambers

Ruth Keating
39 Essex Chambers

Anna Moody
39 Essex Chambers

Gerry Brannigan
Partner, HKA

Panel 2: Causation of Disputes on Building Projects

KNOWING WHERE IT GOES WRONG – HKA'S SEVENTH ANNUAL CRUX REPORT

8TH EDITION OF CRUX DUE TO BE PUBLISHED BY THE END OF OCTOBER 2025

HKA propose actions that parties can take to mitigate risk or pre-empt the most persistent sources of projects' distress.

CRUX Insight Seventh Annual Report: *Changing the Narrative - HKA*

CRUX Dashboard - HKA

Location filter

All

Sector filter

All

Start date filter

1996 2023

Input a date range or use the slider

End date filter

1998 2035

Input a date range or use the slider

Ctrl+Click to clear filters

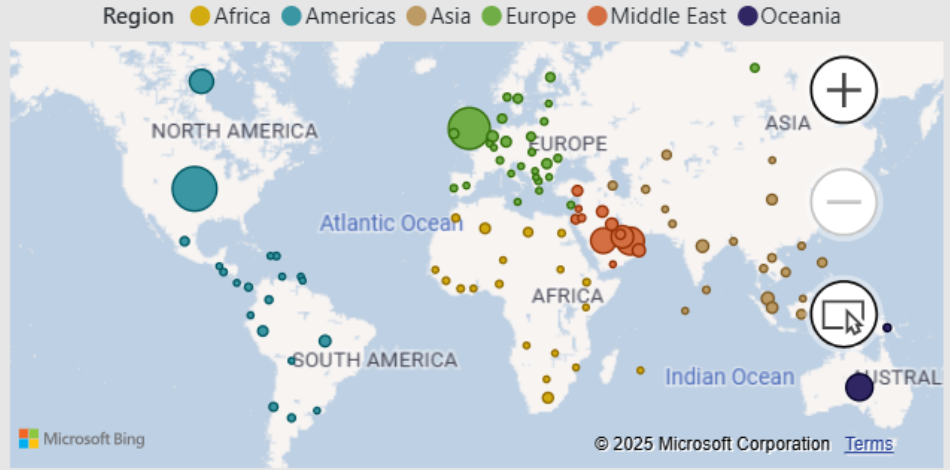
Number of projects

2,002

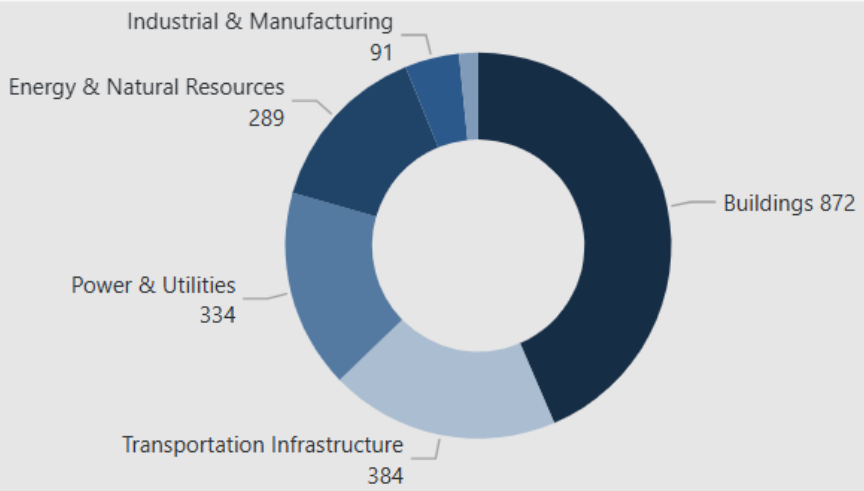
Average CAPEX (USD)

$1.28bn

Project locations (interactive)



Project sectors (interactive)



Top causes of claim and/or dispute

Causes of claim and/or dispute	% projects
Change in scope	36.9%
Design was incorrect	21.5%
Design information was issued late	21.3%
Design was incomplete	19.8%
Contract management and/or administration failure	18.0%
Poor management of sub-contractor/supplier and/or their interfaces	17.9%
Contract interpretation issues	17.8%
Workmanship deficiencies	17.7%
Access to site/workface was restricted and/or late	16.8%
Physical conditions were unforeseen	16.6%
Approvals were late	14.9%
Cash flow and payment issues	14.5%
Level of skill and/or experience	12.4%
Claims were spurious	12.2%
Operational performance	11.8%
Materials and/or products were delivered late	9.7%
Installation failure	9.2%
Tender errors and/or inaccurate estimates	8.7%
Weather conditions were exceptionally adverse	8.6%
Shortage of skilled and non-skilled workers	8.2%
Targets and/or expectations were unrealistic	7.6%
Inadequate responses to information requests	7.4%
Poor interface management with a third party	6.3%
Personality and/or cultural differences	5.8%
Bias and/or failure to cooperate	5.6%

CRUX INSIGHT

Location filter

Multiple selections

Sector filter

Buildings

Search

- Select all
- [x] Buildings
- [ ] Energy & Natural Resources
- [ ] Industrial & Manufacturing
- [ ] Power & Utilities
- [ ] Technology
- [ ] Transportation Infrastructure

Input a date range or use the slider

End date filter

1998 2035

Input a date range or use the slider

Ctrl+Click to clear filters

Number of projects

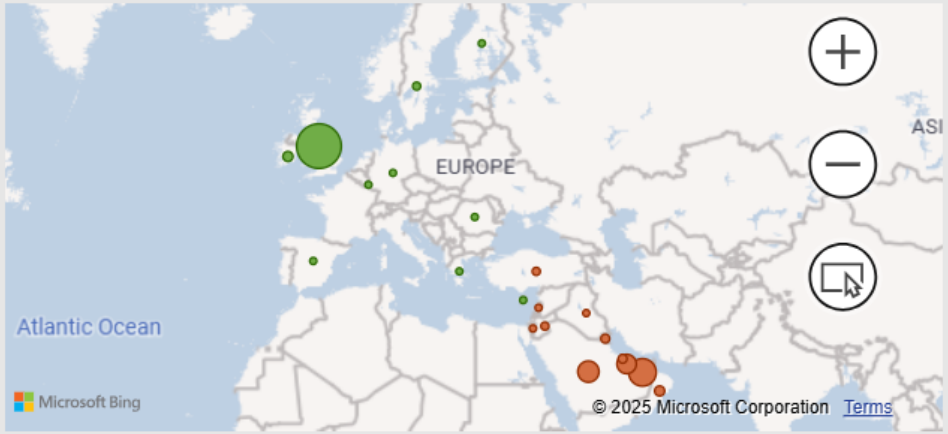
475

Average CAPEX (USD)

$393.09M

Project locations (interactive)

Region Europe Middle East



Project sectors (interactive)

Top causes of claim and/or dispute

Causes of claim and/or dispute	% projects
Change in scope	35.8%
Design was incorrect	27.6%
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Claims were spurious	8.8%
Operational performance	8.6%
Tender errors and/or inaccurate estimates	7.8%
Inadequate responses to information requests	7.4%
Poor interface management with a third party	6.3%
COVID-19	6.1%
Shortage of skilled and non-skilled workers	5.7%
Targets and/or expectations were unrealistic	5.3%
Materials and/or products were delivered late	3.4%
Bias and/or failure to cooperate	3.2%
Personality and/or cultural differences	3.2%

CRUX INSIGHT

Location filter

Multiple selections

Sector filter

Buildings

Search

- Select all
- [x] Buildings
- [ ] Energy & Natural Resources
- [ ] Industrial & Manufacturing
- [ ] Power & Utilities
- [ ] Technology
- [ ] Transportation Infrastructure

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End date filter

1998 2035

Input a date range or use the slider

Ctrl+Click to clear filters

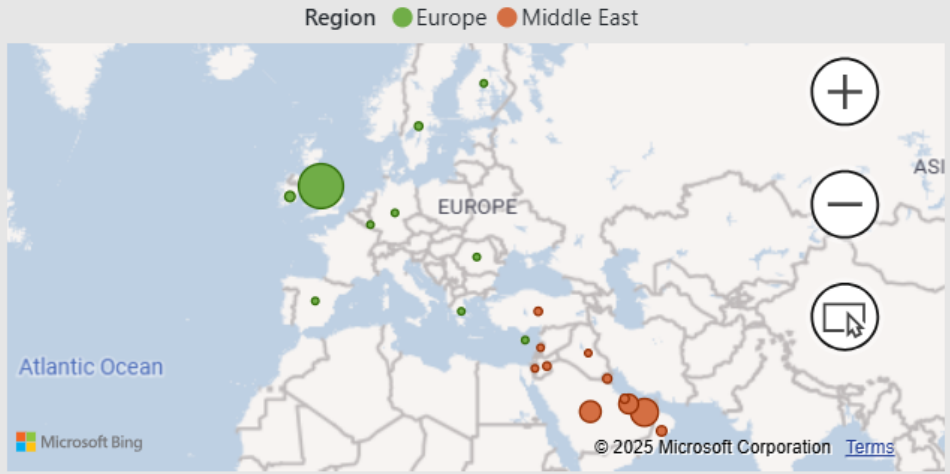
Number of projects

475

Average CAPEX (USD)

$393.09M

Project locations (interactive)



Project sectors (interactive)

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Targets and/or expectations were unrealistic	5.3%
Materials and/or products were delivered late	3.4%
Bias and/or failure to cooperate	3.2%
Personality and/or cultural differences	3.2%

CRUX INSIGHT

CRUX DATA – UK BUILDINGS

269
Projects

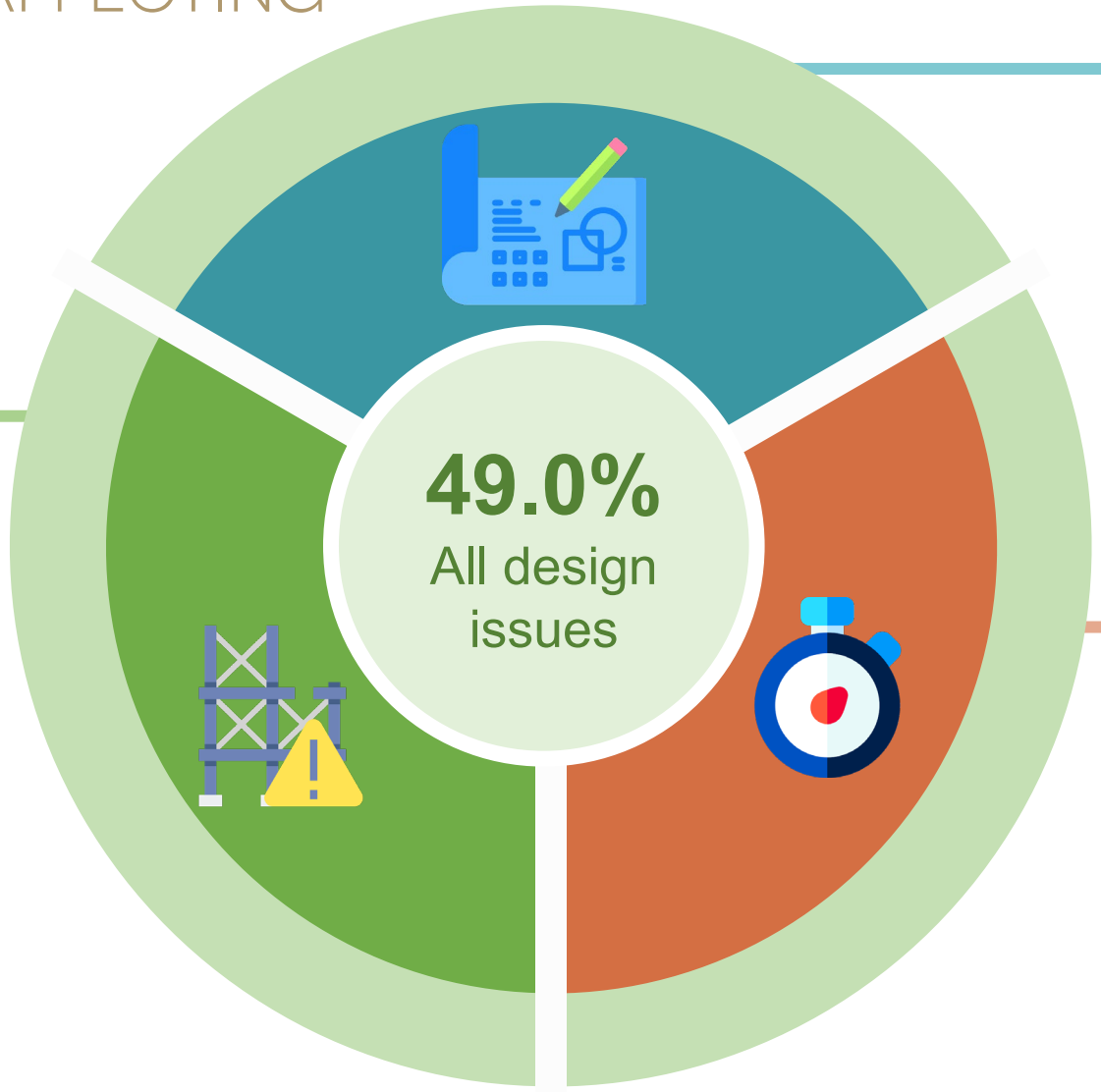
Residential
Top buildings sub-sector (number of projects)

$110 million
Average CAPEX (USD)

60.0%
Average EoT claimed as a percentage of planned duration

33.2%
Average cost claimed as a percentage of CAPEX

DESIGN ISSUES AFFECTING UK BUILDINGS



49.0%
All design issues

33.5%
Design was incorrect

16.0%
Design was incomplete

13.4%
Design information was issued late

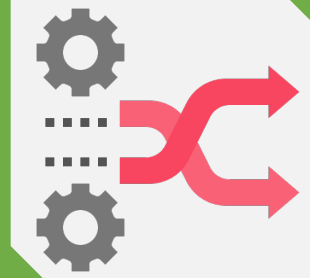
UK BUILDINGS – TOP CAUSES OF CLAIMS AND DISPUTES (BY PERCENTAGE OF PROJECTS WITH THESE ISSUES)

Design was incorrect

33.5% of projects

Workmanship deficiencies

32.7% of projects

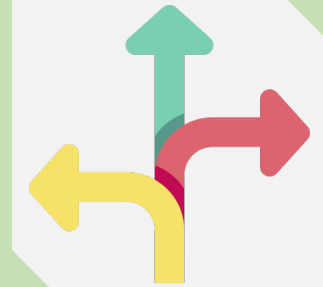


Change in scope

20.1% of projects

Design was incomplete

16.0% of projects



Poor management of sub-contractor and/or their interfaces

15.2% of projects

LINKS TO CRUX REPORT & DASHBOARD

8TH EDITION OF CRUX DUE TO BE PUBLISHED BY THE END OF OCTOBER 2025

CRUX Insight Seventh Annual Report:
Changing the Narrative - HKA

CRUX Dashboard - HKA

CAUSATION OF DISPUTES ON BUILDING PROJECTS

8 October 2025

Factual Causation

Jess Connors

FACTUAL CAUSATION

- A “but for" cause
- “An effective" cause
- *Beattie Passive Norse Ltd v Canham Consulting Ltd*
  - [2021] EWHC 116 (TCC) – trial
  - [2021] EWHC 1414 (TCC) – costs
- *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC)

BEATTIE PASSIVE NORSE V CANHAM (2021)

- 2 blocks of terraced houses
- Canham (D): consulting engineers
- Beattie: main contactor
- BPN (C): employer of Beattie and Canham
- Foxdown: Beattie's groundworks subcontractor

BEATTIE PASSIVE NORSE V CANHAM (2021)

- Canham's design: pad foundations with ground beams
- Two revisions of foundation drawings – but both omitted dowel connections
- Canham's expert agreed omitting connections was negligent

BEATTIE PASSIVE NORSE V CANHAM (2021)

- BPN's POC pleaded:

  "while the Claimants were seeking to complete the Works, they discovered significant deficiencies in the design and, therefore, construction of the foundations and lack of adequate connection between the foundations and the ground beams and structure…."

  and so the Claimants "decided, reasonably and in order to mitigate their loss, to demolish and rebuild both Blocks"

- BPN claimed £3.7m cost of demolition from Canham
- Judge awarded £2k (and made a cost order against BPN)

BEATTIE PASSIVE NORSE V CANHAM (2021)

- *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA)
  - "The effects of the breach of contract may continue through other causes to produce the final result." (Beldam LJ)
  - "conduct which contains no element of fault will not without more be treated as a cause in law … Causation involves taking account of recognised legal principle, but that having been done, it is a question of fact in each case." (Hobhouse LJ)
  - "the Defendants' breaches were an effective cause of the Plaintiffs' loss. It follows that the judgment in favour of the Defendants cannot be upheld and the appeal must succeed" (Hobhouse LJ)

BEATTIE PASSIVE NORSE V CANHAM (2021)

- *McGlinn v Waltham Contractors Ltd (No.3)* [2007] EWHC 149 (TCC)
- *Greenwich Millennium Village Ltd v Essex Services Group Ltd* [2013] EWHC 3059 (TCC)
- *Board of Governors of the Hospital for Sick Children v McLaughlin & Harvey plc* (1987) 19 Con LR 25, 96, HHJ Newey QC

  "However reasonably the plaintiff acts, he can only recover in respect of loss actually caused by the defendant. If, therefore, part of a plaintiff's claim does not arise out of the defendant's wrongdoing, but is due to some independent cause, the plaintiff cannot recover in respect of that part."

BEATTIE PASSIVE NORSE V CANHAM (2021)

- Judge (Fraser J):
  - Wrong drawings given to Foxdown
  - Missing connections didn't necessitate demolition
  - Demolition was necessary due to grossly defective work

BEATTIE PASSIVE NORSE V CANHAM (2021)

- BPN part-completed localised repairs to missing connections in Block B
- Canham's negligence was an effective cause of this loss, even though Block B was later demolished.
- Whole of the localised remedial works for the connections would have cost £4k, so allow £2k

BEATTIE PASSIVE NORSE V CANHAM – THE COSTS DECISION

- No order for costs up to the date of Canham's RFI (14 months before trial)
- BPN to pay Canham's costs on an indemnity basis from the date of the RFI
- Payment on account of £500k
- "The clear assertion is made in the Defence that the foundations were not constructed as designed by Canham. That point was actually known by each of [BPN's] directors … to be true. Yet it was swerved in the Reply, which stated that it was "*unparticularised*". It plainly should have been admitted."
- RFI: "Is it C's case that the foundations …were constructed in accordance with D's design?" Answer: "Yes, as far as the details in the design could be discerned." Judge: *"This was … directly untrue"*

MARTLET V MULALLEY (2022)

- 5 tower blocks
- Mullaley (D) applied cladding 2005 – 2008
- Two types of breach of contract alleged by Martlet (C, successor in title):
  - installation breaches
  - specification breaches
- Martlet's £ claim:
  - Actual cost of replacing cladding (in fact incurred)
  - Reasonable cost of repairing the installation defects

MULALLEY'S ARGUMENT ON FACTUAL CAUSATION

- D admitted some installation defects but didn't cause complete replacement
- Real cause: Grenfell
- Limited repair scheme to remedy installation defects
  - much lower; and
  - not recoverable anyway, since C had chosen to replace instead of repair

COULD C HAVE RECOVERED IF ONLY INSTALLATION BREACHES?

J (HHJ Stephen Davies) set out three possibilities [277]:

1. C recovers nothing because no causal connection between installation breaches and replacement works (D's primary case)
2. C recovers actual replacement costs in full (C's primary case)
3. C only recovers reasonable cost of works to remedy installation defects (though it didn't do those works) – because that operates as a cap on C's damages.

COULD C HAVE RECOVERED IF ONLY INSTALLATION BREACHES?

- Should the Court apply the “but for" or the “an effective cause" test?
- *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 (CA), per Hobhouse LJ
- *Greenwich Millennium Village Ltd v Essex Services Group plc* [2013] EWHC 3059 (TCC) at [171] *ff*
- *FCA v Arch Insurance UK Ltd & others* [2021] UKSC 1, [181] – [182]

COULD C HAVE RECOVERED IF ONLY INSTALLATION BREACHES?

- What is the relevant loss?
  - Cost of replacing the cladding (per D); or
  - Diminution in value, even if measured in reasonable cost of repair (per C)
- *Coles v Hetherton* [2013] EWCA Civ 1704 per Aikens LJ, and also *McGlinn v Waltham Contractors* [2007] EWHC 149 (TCC)
- *Martlet v Mulalley* [291] "In this case, if one adopts a definition of loss that focusses on the existence of **real loss in legal terms** rather than on specific expenditure for a specific purpose, it is plain that the claimant suffered a loss as a result of the defective installation."

WHAT WAS THE "REAL LOSS IN LEGAL TERMS"?

- The installation defects increased fire risk at the towers and required remediation
- By the time C realised this, it had also realised that remediation was required to address the presence of combustible cladding
- Although rectifying the installation defects alone would have involved different remedial work, the only sensible way to address both problems was to replace the cladding
- So this was a good case for the application of the "an effective cause" test instead of the "but for" test

WHY THE "BUT FOR" TEST WAS INAPPROPRIATE

Martlet v Mulalley [292]

- The "but for" test did not deliver a fair result because it meant C either had:
  - to repair the defective cladding and still be left as owner of four high rise residential buildings which presented a known and - by current standards - unacceptable safety risk to their occupants due to the presence of combustible cladding, or
  - to replace the defective cladding but then have no right of recourse against D, as the company legally responsible for the defective installation, for any part of the cost incurred, even though that work and that cost had the effect of resolving the problem for which the defendant was legally responsible

WHY THE "BUT FOR" TEST WAS INAPPROPRIATE

Martlet v Mulalley [293] – [294]

- the installation breaches were an effective cause of the loss suffered which led to the decision to replace the cladding, so D is liable for such loss
- The other effective causes (regulatory change and Grenfell) were not the fault of any third party
- Chronologically, relevant loss occurred first
- No break in the chain of causation due to the subsequent change in the fire safety regulatory regime: *Borealis v Georgas Trading* [2010] EWHC 2789 (Comm) at [42] - [47], per Gross LJ

COULD C HAVE RECOVERED IF ONLY INSTALLATION BREACHES?

- J (HHJ Stephen Davies) set out three possibilities [277]:

1. ~~C recovers nothing because no causal connection between installation breaches and replacement works (D's primary case)~~
2. C recovers actual replacement costs in full (C's primary case)
3. C only recovers reasonable cost of works to remedy installation defects (though it didn't do those works) – because that operates as a cap on C's damages.

WHY WAS C'S RECOVERY OF ACTUAL COSTS CAPPED?

- Reasonableness
- Mitigation
  - *The MV Maersk Colombo* [2001] EWCA Civ 717 and *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) [127], **cited by D**
  - *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 and *Wilding v British Telecommunications plc* [2002] ICR 1079, **cited by C**
- Betterment
  - *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd* [2020] EWCA Civ 308, per Leggatt LJ

CAUSATION OF DISPUTES ON BUILDING PROJECTS

8 October 2025

Ruth Keating

LEGAL CAUSATION

- *County Ltd v Girozentrale Securities* [1996] 3 All ER 834 at paragraph 108 that: *"It is often said that legal causation is a matter of fact and common sense. Causation involves taking account of recognised legal principle but, that having been done, it is a question of fact in each case."*

- Recent consideration of causation in *URS Corp Ltd v BDW Trading Ltd* [2025] UKSC 21.

BACKGROUND: *URS CORP LTD V BDW TRADING LTD*

- In 2019, BDW discovered defects in high-rise residential buildings.
- In 2020 and 2021, BDW carried out remedial works to the buildings.
- Section 135 of the Building Safety Act 2022 (BSA) came into force in June 2022.
- Issues before the Supreme Court on Defective Premises Act 1972, the Civil Liability (Contribution) Act 1978 and the BSA.
- Issue 1 before the Supreme Court:
  - *"Is loss that is otherwise recoverable in the tort of negligence irrecoverable if it is incurred (i) without an enforceable legal obligation to do so, and (ii) in respect of property in which the claimant has no proprietary interest, because such loss is voluntarily incurred, and that means it falls outside the scope of the defendant's duty of care and/or is too remote?"*
- Opinion: Do the courts get muddled on remoteness, foreseeability, mitigation and causation?

THE JUDGMENTS OF THE SUPREME COURT

- The majority judgment of Lord Hamblen and Lord Burrows.
- The concurring judgment of Lord Leggatt.
- URS argued that there is a *"voluntariness principle"* – providing a bright-line rule of law explaining why the loss in this case was outside the scope of the duty and/or was too remote (at paragraph 29).
- Counsel for URS submitted that it does not matter whether, as a matter of legal taxonomy, this principle is characterised as an aspect of the rule that losses, if they are to be recoverable, must fall within the scope of:
  - the defendant's duty, or
  - as an aspect of the rule that losses must not be too remote, or
  - as an aspect of the rule that losses must have been caused, in the view of the law, by the defendant's breach of duty.
- Whichever characterisation is preferred, such voluntarily incurred losses are in principle irrecoverable.

THE JUDGMENT OF THE MAJORITY

- URS's written case neatly encapsulated its submissions as follows (at paragraphs 48-49):

  "[T]he losses claimed in this case are the costs related to remedial works undertaken: (i) after BDW had ceased to have any proprietary interest in the developments; and (ii) in the absence of any enforceable obligation to undertake such repairs."

- At paragraph 53 the court rejected URS's submission: *"Drawing together the threads…we do not consider that they establish a principle of voluntariness that operates as a bright line rule of law rendering loss too remote or outside the scope of the duty of care in the tort of negligence."*

- However, at paragraph 55 of the judgment continued :

  "The more obvious role for any principle of voluntariness is in considering whether the chain of causation from breach of duty to loss has been broken by the claimant's own voluntary conduct or whether, subsequent to the cause of action, the claimant has failed in its so-called "duty" to mitigate its loss. In other words, there is a strong argument that voluntariness most naturally falls to be considered within the concepts of legal causation or mitigation rather than scope of duty and remoteness." (emphasis added)

THE JUDGMENT OF THE MAJORITY

- At paragraph 60:

  "The problem for URS as regards mitigation is that reasonableness is indisputably of central importance. The enquiry in respect of mitigation is whether the claimant could have avoided its loss by taking reasonable action or whether expenses (or other additional losses) incurred, increasing its loss, were reasonably incurred. That is clearly a fact- specific enquiry that would have to await trial. The reasonableness of the claimant's conduct may also be of importance in determining legal causation and, even if not, it would appear that a fact-specific enquiry would be needed in order to decide whether the "chain of causation" between breach of duty and loss has been broken. In respect of neither concept can it be said that voluntariness constitutes a rule of law to the effect that there has been no legal causation or there has been a failure to mitigate." (emphasis added)

- Three factors suggesting that BDW was not, in a true sense, acting voluntarily when it incurred the cost of the remedial works:
  - There was a risk that the defects would cause personal injury or even death to the homeowners for which BDW might be legally liable (at paragraph 63).
  - BDW had a legal liability to the homeowners under the DPA or in contract to incur the cost of repairs (at paragraph 64).
  - There would be potential reputational damage to BDW if BDW did nothing once it knew of the danger to homeowners (at paragraph 65).

LORD LEGGATT'S CONCURRING JUDGMENT

- At paragraph 175 of his judgment Lord Leggatt emphasised that: *"The concept of voluntary choice is often used to explain why the mitigation principle limits (or sometimes increases) the damages recoverable by a claimant in respect of a breach of duty by the defendant. Although traditionally described as a duty, it is now well recognised that mitigation is not a duty owed to the wrongdoer but is an aspect of causation".* (emphasis added)

- He added at paragraph 180: *"…both the mitigation principle and the intervening act principle can be regarded as denying damages for exactly the same reason, and the courts sometimes use the principles interchangeably."*

- Paragraph 191: *"The claimant's response to a predicament created by the defendant's breach of duty may quite reasonably and in the ordinary course of business be influenced by factors which are not capable of quantification or which, even if they could be quantified, would – if incurred – not represent recoverable losses."*

- Examples: difficult decisions under pressure; sacrifices; and reputational damage.

- Mr Justice Fraser in the High Court: *"reputational damage is a type of loss for which cannot recover damages from URS both because it is not a type of loss against which a professional structural engineer owes a duty of care to protect a developer and because it is too remote"*

PITFALL: EXPERT EVIDENCE

- *MJS Projects (March) Ltd v RPS Consulting Services Ltd* [2025] EWHC 831 TCC.

- Her Honour Judge Kelly said at paragraph 5:

  "Perhaps unusually, there are few factual disagreements between the parties. Those factual disputes that there are mainly relate to what the Defendant's design actually showed and what was constructed. Both of those issues are intertwined with the expert evidence, on which this case mainly turns. The parties now agree that some of the construction work done by MJS Construction was negligent or in breach of contract with the Claimant. They do not agree on the extent of that negligence and breach of contract by MJS Construction. The central issue between the parties is causation of the damage." (emphasis added)

- At paragraph 188 the court reiterated that: *"this case turns largely on the expert evidence."*

PITFALL: EXPERT EVIDENCE

- At paragraph 116 onwards of the judgment:
  - He did not have experience with design of container yards. He did have experience of above ground structures but they were mostly residential.
  - From October 2012 the vast majority of his work had been providing expert witness reports.
  - He said he saw it *"almost as a benefit"* that he was *"not the best designer or technician"* so he could opine on what a reasonably competent engineer could do.

- He agreed that he had not set out what should have been set out by an expert in a report (at paragraph 121).

- *"When it was suggested he had a duty to give his opinion on all issues in his report, he said he also had to consider his instructions. On being pushed, he agreed that if issues were within his remit, he should have addressed them in the report"* as per paragraph 122.

WHO KNOWS WHAT FE ANALYSIS IS?

GEMINI GENERATED IMAGE

WHO KNOWS WHAT FE ANALYSIS IS?

- Claimant's expert had used Finite Element (FE) analysis modelling.
- Paragraph 124 of the judgment:
  - Accepted that he had not explained in his first report what FE analysis was.
  - The background for his opinion had not been set out.
  - He only had eight days after the Christmas break to write the report but he accepted that he *"could have asked for more time".*
- *"He went on to suggest that if the Judge did not know what FE analysis was, they "could Google it"."*
- At paragraph 190 the judge was highly critical:
  - She did *"not have confidence"* in his evidence.
  - She agreed with the Defendant counsel's submissions that his evidence should be treated with *"significant caution".*
- As per paragraph 196 the judge said that his evidence:

  "relies heavily on his FE analysis as the basis for his opinion that the Defendants design is defective. However, he did not provide any explanation as to what an FE analysis is, how it works, whether there were any limitations to its use or the outcomes it produced. When he was asked how the court was supposed to understand FE analysis without an explanation, he said the court could "Google" FE analysis and that would probably give a better answer than he could."

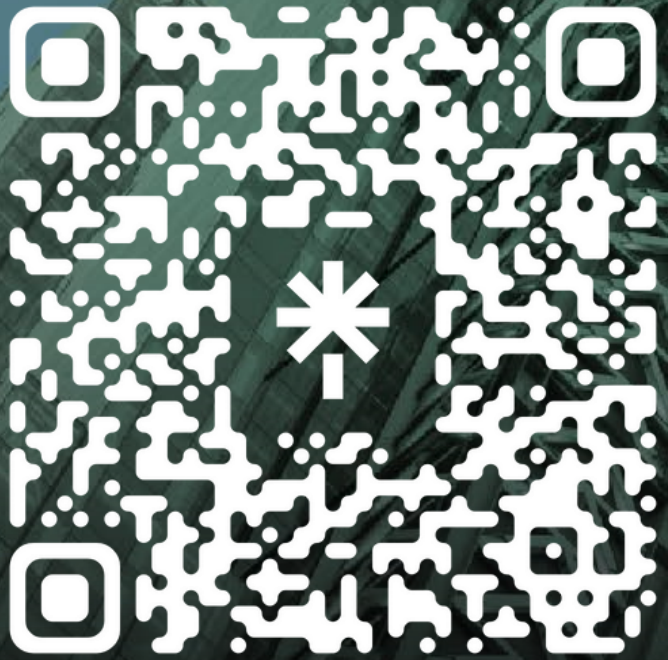
FINAL TAKEAWAYS

- At paragraph 208 the judge said:

  "I recognise that a comparison of Curriculum Vitae is not always helpful. However, in this instance in my judgment it is. The vast majority of [the Claimant's expert's] work has focused on forensic engineering and dispute resolution for all sorts of different projects, [the Defendant's expert's] experience includes forensic work but also engineering publications and most importantly extensive experience in the practical design of structures…Having real-world experience of issues such as these in my judgment lends credibility to [the Defendant's expert's] analysis of the design issues and his conclusion that the design works."

- Key takeaways:
  - On cases such as this the decision will often turn *"largely on the expert evidence."*
  - For experts, real world experience is important as well as dispute resolution experience.
  - Don't say just 'Google it'. The need to explain permeates everything – the factual background, the legal arguments but also the technical evidence or the expert evidence.
  - All of those strands are crucial to building a coherent picture on a case on causation.

39 Essex Chambers
#39Events



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39 Essex Chambers
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Marion Smith KC
39 Essex Chambers

Rebecca Drake
39 Essex Chambers

Melissa Shipley
39 Essex Chambers

Nicholas Higgs
39 Essex Chambers

Panel 3: The Irresistible Rise of Adjudication?

BDW TRADING LIMITED V ARDMORE CONSTRUCTION LIMITED [2024] EWHC 3235 (TCC)

THE ADJUDICATION DECISION

- Adjudicator held that Ardmore had breached its duties under a construction contract (and that limitation did not apply by reason of deliberate concealment) and, separately, that Ardmore was liable under the DPA 1972 [1].

THE CHALLENGES

- Four challenges [2]:
  - Crystallisation.
  - No jurisdiction to determine claim under the DPA.
  - Inherent unfairness owing to the inequality of arms in terms of documentation.
  - Intentionally failed to consider a material defence.

DPA

- Article 5 of the Contract: *"If any dispute or difference arises under this Contract either Party may refer it to adjudication…"* [35].
- Ardmore submitted *"under this Contract"* not capable of encompassing claim under DPA [37].
- Does the Fiona Trust principle apply to adjudications? Yes:
  - Fiona Trust signified departure from linguistic distinctions [56].
  - Rejected argument that Fiona Trust principle cannot apply by analogy because adjudication is a creature of statute [58].

DPA

- Does the Fiona Trust principle apply to adjudications? Yes:
  - Paragraph 31 of *J Murphy & Sons v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC) was a careful and detailed analysis of the ways in which adjudication and arbitration are similar [63].
  - Parties to the Contract, as rational businesspeople, are likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal [74].

INEQUALITY OF ARMS

- High threshold for successful natural justice challenge [88]. Legal principles at [89].
- Rejected:

  – Adjudicator satisfied that he could do broad justice between the Parties. The court should be slow to interfere with that conclusion [118].
  – Passage of time itself not enough to create unfairness [119].
  – Given the history, Ardmore should have been taking steps over a number of years to find, and gather together, the documentation relating to the works [123].
  – Ardmore chose not to inspect the Development when it had the opportunity to do so [125].
  – Materiality not satisfied [135].

WHY NOW?

- Permission to appeal given on paper on 11 February 2025.
- Hearing listed on 23 October 2025…

Case
Reference: CA-2025-000014

Title: BDW Trading Limited v Ardmore Construction Limited

Type: Appeal

Appeal / Application:
from the order of Mrs Justice Joanna Smith DBE
Business and Property Courts, Technology and Construction Court (QBD) dated 16-Dec-2024

Hearing Status: Float on 23-Oct-2025 or 23-Oct-2025 - estimated length (in hours): 4:30

Venue: London

BUT…

ARDMORE CONSTRUCTION LIMITED

Company number **01185592**

Follow this company | File for this company

Overview | Filing history | People | Charges | Insolvency | More

1 Insolvency case

Case number 1 — In administration

Administration started
28 August 2025

THOUGHTS

- What if the appeal doesn't go ahead? Flurry of DPA adjudications?
- Direction of travel. See, in particular, *Bresco Electrical Service Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, paragraphs 39 – 41.

THOUGHTS

- Pragmatic and practical reasons? *2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform*, King's College:
  - The number of referrals received by participating ANBs reached the highest number on record in the past year (between May 2023 and April 2024) at 2,264. 9% increase on the previous year (page 9).
  - High compliance. 52% of questionnaire respondents stated that, in the past year, not a single adjudicated dispute was referred to litigation or arbitration. A further 18% stated that less than 5% of cases were subject to such referral (page 9).
  - TCC fully enforced 77% of adjudication decisions if the case resulted in a reported judgment.

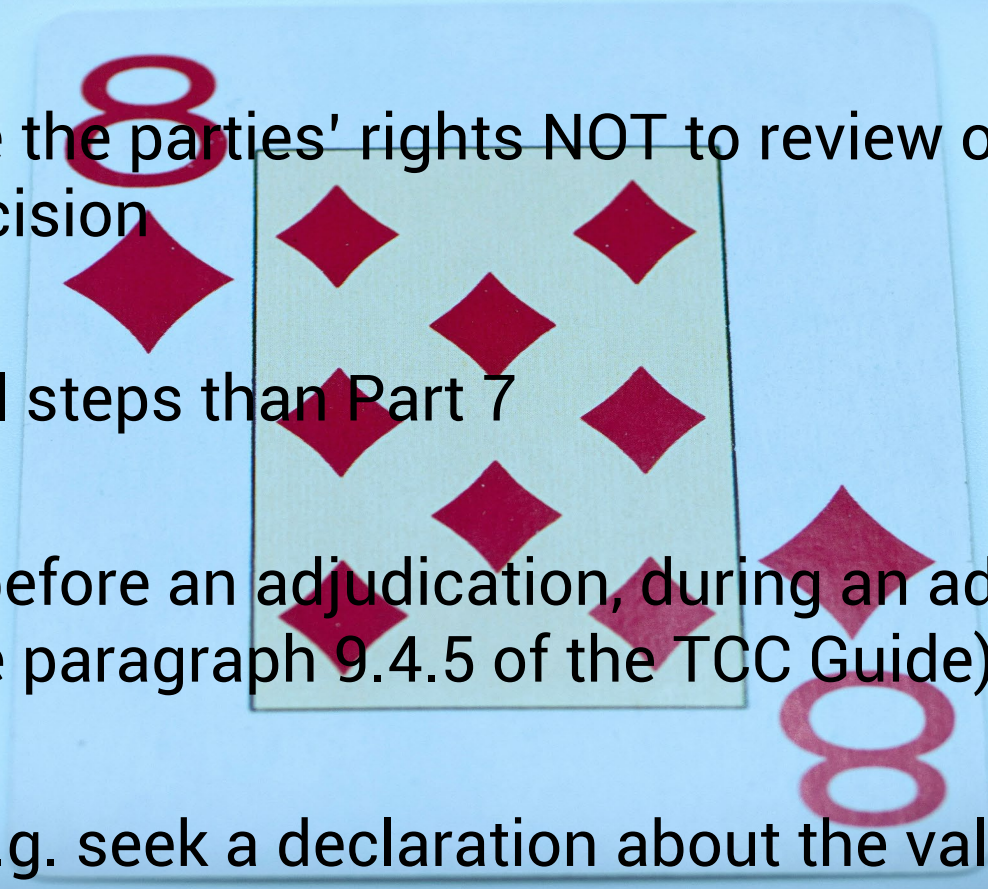
PART 7 VS PART 8 – WHICH IS APPROPRIATE?

PART 7

- Standard method of adjudication enforcement after adjudication decision
- Expedited TCC process
- OR used after an adjudication decision to determine the parties' rights afresh

Credit: Image by WealthDFM.com

PART 8



- Finally determine the parties' rights NOT to review or appeal the Adjudicator's decision
- Fewer procedural steps than Part 7
- Can be brought before an adjudication, during an adjudication or after an adjudication (see paragraph 9.4.5 of the TCC Guide)
- Can be used to e.g. seek a declaration about the validity of a payment notice or pay less notice

SUITABILITY FOR PART 8

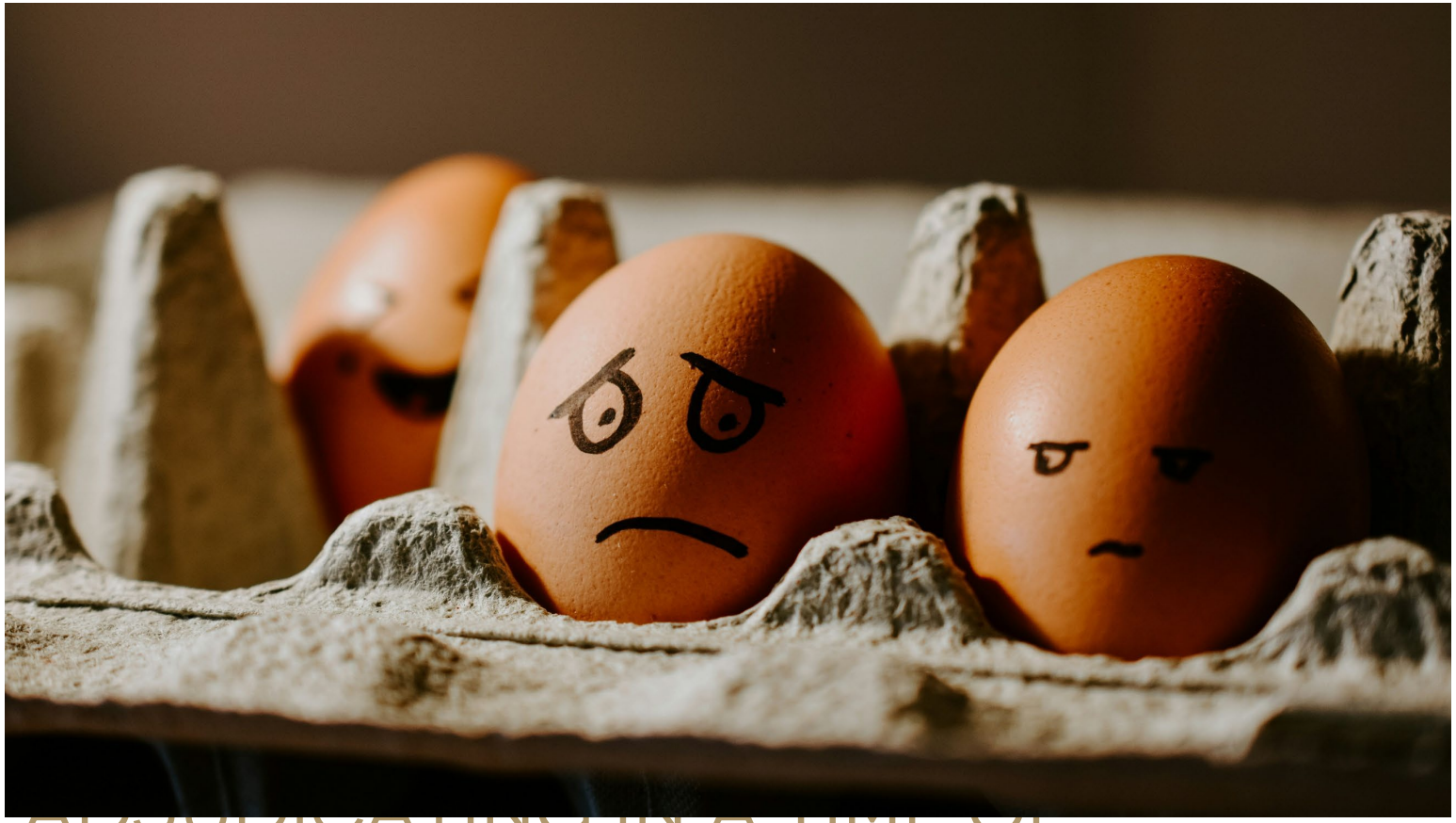
- CPR r8.1(2)
- “[p]roceedings under Part 8 will only be entertained by the court where there is no substantive dispute on the facts": *Michael J Lonsdale (Electrical) LTd v Bresco Electrical Services Ltd (In Liquidation)* [2018] EWHC 2043 (TCC)
- Should not involve a substantial dispute of fact. See *ISG Construction Ltd v English Architectural Glazing Ltd* [2019] EWHC 3482 (TCC): involved issues of fact and law “inherently unsuitable for determination"
- *TClarke Contracting Ltd v Bell Build Ltd* [2024] EWHC 992 – too many disputes of fact which required witness evidence

PROCEDURE FOR PART 8

- Importance of drafting the declaration sought clearly
- Importance of choice of TCC venue: see HHJ Davies in *Workman Properties Limited v ADI Building and Refurbishment Limited* [2024] EWHC 2627
- Can you bring it at the same time as enforcement proceedings? See *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 1947 (TCC) and *Placefirst Construction Ltd v CAR Construction* [2025] EWHC 100 (TCC)
- Transfer from Part 8 to Part 7: *Berkeley Homes (South East London) Ltd v John Sisk and Son Ltd* [2023] EWHC 2152 (TCC)

OTHER PROCEDURAL CONSIDERATIONS

- *VMA v Project One Ltd* [2025] EWHC 1815
- *Clegg Food Projects Limited v Prestige Car Direct Properties Limited* [2025] EWHC 2173 (TCC)



ADJUDICATING IN A TIME OF GEOPOLITICAL TURMOIL

(With thanks to Nik@unsplash)

ADJUDICATING IN A TIME OF GEOPOLITICAL TURMOIL: FORCE MAJEURE

- Force majeure not a term of art in English law;
- Operation depends on the wording of the specific clause.
- ***RTI Ltd v. MUR Shipping BV*** [2024] UKSC 18
- Lords Hamblen and Lord Burrows (with whom the remaining members of the SC agreed)

RTI LTD V. MUR SHIPPING BV [2024] UKSC 18

- *"[41] The principle of freedom of contract is fundamental to the English law of contract. One aspect of that principle is that … parties are generally free to contract on whatever terms they choose. As Lord Diplock put it in Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, at p 848:*

- *"A basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept."*

RTI LTD V. MUR SHIPPING BV [2024] UKSC 18

"[44] … *One may regard it as a general principle of contractual interpretation that parties do not forego valuable rights without it being made clear that that was their intention*."

ARE FORCE MAJEURE CLAUSES EXCLUSION CLAUSES?

- ***Great Elephant Corp v Trafigura Beheer BV*** The Crudesky [2013] EWCA Civ 905) per Longmore LJ at [25]

- ***Tonzip Maritime Ltd v. 2Rivers Pte Ltd*** [2025] EWHC 2036 (Comm) Andrew Hochhauser KC as a deputy High Court Judge

FORCE MAJEURE CLAUSES: 2 APPROACHES TO DEFINITION

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

"36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

(a) It is outside the immediate control of the Party giving the Force Majeure Notice;"

FORCE MAJEURE CLAUSES : DEFINITION

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

“36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

(b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;"

FORCE MAJEURE CLAUSES : DEFINITION

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

"36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

(c) It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, ***any rules or regulations of governments or any interference or acts or directions of governments****, the restraint of princes,* ***restrictions on monetary transfers and exchanges****;"*

FORCE MAJEURE CLAUSES : DEFINITION

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

“36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

(d) It cannot be overcome by reasonable endeavors from the Party affected."

MUR SHIPPING V RTI LTD [2024] UKSC 18: OVERVIEW

- Contract for carriage of goods to Ukraine. Payment in US dollar under the contract.
- Clause 36.3 (d) parties required to undertake “reasonable endeavours” to “overcome" the Force Majeure Event.
- RTI's parent company subject to sanctions by US authorities.
- MUR sought to rely on Clause 36 as the sanctions “prevented” (difficulties and delays") payment in US dollars.
- RTI rejected the Force Majeure Notice + offered to pay in euros + bear any additional costs or exchange rate losses MUR suffered converting euros to US dollars.

MUR SHIPPING V RTI LTD [2024] UKSC 18:RESULT

Force majeure made out - MUR not required to accept non-contractual performance.

1. **The object of reasonable endeavours provisos** - force majeure clause generally interpreted as applicable only if the invoking party shows the event or state of affairs was beyond its reasonable control and could not be avoided by the taking of reasonable steps –i.e. question of causation. This is addressed by reference to the parameters of the contract.
2. **Freedom to contract** - also means there is freedom not to contract and that includes freedom not to accept an offer of non-contractual performance.
3. **Clear words** needed to forego valuable contractual right – not present.
4. **The importance of certainty** in commercial contracts.

FORCE MAJEURE CLAUSES: THE NOTICE PROCEDURE

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

"36.4. A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice within 48 hours (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

(a) sets out or attaches details of the Force Majeure Event, and"

FORCE MAJEURE CLAUSES : THE NOTICE PROCEDURE

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

"36.4. A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice within 48 hours (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

(b) states that the Party giving the Force Majeure Notice wishes to claim force majeure in respect of such Force Majeure Event."

FORCE MAJEURE CLAUSES : THE NOTICE PROCEDURE

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

"36.4. A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice within 48 hours (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

(c) give reasonable estimated duration of the Force Majeure Event to the extend [sic] it is reasonably possible to do so at the time of giving the Force Majeure Notice."

FORCE MAJEURE CLAUSES : THE CONSEQUENCES OF FAILURE TO GIVE NOTICE?

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Clause 36

"36.5. A Party which fails to give a Force Majeure Notice upon the occurrence of a Force Majeure Event in accordance with Clause 36.4 shall not be permitted to claim force majeure in respect of such Force Majeure Event."

ENFORCING ADJUDICATION IN THE INSOLVENCY CONTEXT

ARE THERE ISSUES STILL NOT RESOLVED?

Credit Jerology @Giphy

BRESCO WAS HALF A DECADE AGO...

- Bresco Electrical Services Ltd (In Liquidation) (Appellant/Cross-Respondent) v Michael J Lonsdale (Electrical) Ltd (Respondent/Cross-Appellant) [2020] UKSC 25

- The 'jurisdiction' point: An insolvent party can refer a claim to adjudication.

- The 'futility' point: The Court should not usually interfere with the exercise of a right to adjudication, which is a method of ADR in its own right.
  - It is possible that the courts will not grant summary enforcement of the adjudicator's decision due to the insolvency process, but that does not deprive the adjudication of its potential usefulness to the liquidators.

WHAT IS THE APPROACH TO SUMMARY JUDGMENT?

- Bresco at [64]: "*The reasons why summary enforcement will frequently be unavailable are set out in detail in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] 1 All ER (Comm) 1041, paras 29-35 per Chadwick LJ. As he says, the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution.*"

WHAT IS THE APPROACH TO SUMMARY JUDGMENT?

- What was said in *Bouygues*?

- Insolvency set-off allows the insolvent's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance.

- On the facts where Dahl-Jensen was in liquidation:
  - *"If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors.*
  - *If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim."*

JOHN DOYLE CONSTRUCTION LIMITED (IN LIQUIDATION) V ERITH CONTRACTORS LIMITED [2020] EWHC 2451 (TCC)

- Mr Justice Fraser (as he then was) at [62] sets out when summary judgment would be available to a company in liquidation who seeks to enforce an adjudicator's award in its favour:

1. The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract. Where, as here, the dispute referred was the valuation of the referring party's final account, summary judgment will potentially be available (dependent upon the other considerations below). If the dispute referred is a more narrowly defined one, such as the valuation of a single component part of an interim payment, or one single head of claim, then it will not.

2. Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application. I draw this conclusion from what Lord Briggs says at [65], where he stated "there may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour."

3. There is no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim.

HOW ABOUT THE CVA CONTEXT?

- Reminder: What is a CVA? A voluntary arrangement entered into by agreement with a specified majority of creditors (following a vote) which will bind all creditors and prevent actions being taken against the company to recover debts. Overseen by an insolvency practitioner.

> *"… the general position relating to a CVA may, depending on the facts, be very different to the situation where the claimant company is in insolvent liquidation. In the latter case, claims being made by the company are part of what might be called a damage limitation exercise, whereby the liquidators endeavour as best they can to pay dividends to creditors. A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cashflow."* Bresco at [108], emphasis by Adrian Williamson KC in *FTH*

FTH LTD V VARIS DEVELOPMENTS LTD
[2022] EWHC 1385 (TCC)

"Such authorities [addressing CVAs] are of limited assistance in this case because they turn upon their own facts. Nor does Bresco provide very definitive guidance as to how the Court should approach a case where a claimant subject to a CVA seeks summary enforcement of an adjudicator's decision. Clearly there is jurisdiction to grant summary judgment, but whether the Court will do so in any given case depends on the facts of that case.

I have concluded that the proper approach is to consider, on the facts of this case, whether there is a real risk that the summary enforcement of an adjudication decision may deprive Varis of security for its cross-claim. (Compare John Doyle Construction Ltd v Erith Construction [2020] B.L.R. 671, para. 54(5) and 62(3), per Fraser, J). If so, as a matter of discretion pursuant to CPR Part 24, I should decline to order summary enforcement. John Doyle was a liquidation case but I consider that the underlying principles apply to a CVA as well." [20]-[21]

HOW ABOUT THE ADMINISTRATION CONTEXT?

- Reminder: Administration is a statutory procedure under which an administrator (as an officer of the court) can reorganise a company or realise its assets whilst creditors are prevented from taking action by a statutory moratorium. Usually applies to an insolvent company. Can be entered either by application to court, or by the company, its directors or the holder of a qualifying floating charge filing the relevant documents at court.

- Must aim to:
  - Rescue the company as a going concern;
  - Achieve a better result for creditors than if the company had been wound up; or
  - Realisation of company property for preferential or secured creditors.

- Is a company in administration in a different position to one in liquidation or a CVA?

MALIN INDUSTRIAL CONCRETE FLOORS LIMITED (IN ADMINISTRATION) V VOLKERFITZPATRICK LIMITED [2024] EWHC 2890 (TCC)

Whether my analysis above is right or wrong, however, my ultimate conclusion should be based upon the facts before me and a proper exercise of my discretion in consequence. I am concerned that no encouragement should be given to any party to attempt to use insolvency tactically as a shield to avoid proper payment of an adjudicator's award. … in the absence of such a [statutory insolvency] set off intervening, as I have already observed, the evidence in support of the counterclaim, although raising it from a bare level to one with a real prospect, still fails to assert a prima facie likelihood (my emphasis) that the damage complained of was caused by postulated potential failings of the Claimant as opposed to extraneous factors or the default of others. In my view, given the underlying "pay now, argue later" purpose of this regime as a whole, there should be a further requirement imposed upon the Defendant in order to avoid enforcement in these particular circumstances. [46]

(See also *JA Ball Ltd (in administration) v St Philips Homes (Courthaulds) Ltd* [2022] EWHC 3690 (TCC) especially [67]-[68] per HHJ Kramer quoted in *Malin*)

ALTERNATIVE ROUTES?

- What are the alternatives to bringing claims against insolvent parties?
  - Applicable party to the Contract: *Estor Limited v Multifit (UK) Limited* [2009] EWHC 2565 (TCC); *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 47.
  - Implied Novation: *Capita ATL Pension Trustees Ltd v Sedgwick Financial Services Limited* [2016] EWHC 214 (Ch); *Rolls-Royce Holdings Plc v Goodrich Corp* [2023] EWHC 1637 (Comm) *Magee v Crocker* [2024] EWHC 1723 (Ch).
  - Assignment: s.136 LPA 1925; *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 Q.B. 607, 615.
  - Parent Company Guarantee: *Liberty Mercian Ltd v Cuddy Civil Engineering* [2013] EWHC 2688 (TCC)

THANK YOU!

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David Hopkins
39 Essex Chambers

Santosh Carvalho
39 Essex Chambers

The Use of AI in the Construction Industry and Construction Disputes

A (VERY) BRIEF HISTORY OF AI

A (VERY) BRIEF HISTORY OF AI

"In from three to eight years we will have a machine with the general intelligence of an average human being. I mean a machine that will be able to read Shakespeare, grease a car, play office politics, tell a joke, have a fight. At that point the machine will begin to educate itself with fantastic speed. In a few months it will be at genius level and a few months after that its powers will be incalculable."

—Prof Marvin Minsky, MIT

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—Prof Marvin Minsky, MIT

(quoted in *Life* magazine, 20 November 1970)

A (VERY) BRIEF HISTORY OF AI

- 1936: Turing machines
- 1943: First description of artificial neural networks
- 1945: ENIAC
- Early 1950s: First draughts and chess playing programs
- 1956: Dartmouth workshop
- 1958: Perceptron
- 1966: First chatbot, ELIZA

A (VERY) BRIEF HISTORY OF AI

- 1970s: First AI winter
- 1980s: Expert systems
- 1990s: Second AI winter
- 2000s: Big data, deep learning
- 2017–present: Transformer architecture, LLMs

A (VERY) BRIEF HISTORY OF AI

Types and techniques of AI

Type/ technique	Examples
Search and optimisation	Chess engines, route-finding
Classifiers	Spam filters, eDisclosure
Deep learning	Image recognition, machine translation
Generative AI	ChatGPT, Midjourney, Sora

USE OF AI IN THE CONSTRUCTION INDUSTRY

AN INDUSTRY INSULATED FROM AI?

USE OF AI IN THE CONSTRUCTION INDUSTRY

1

Engines of recommendations

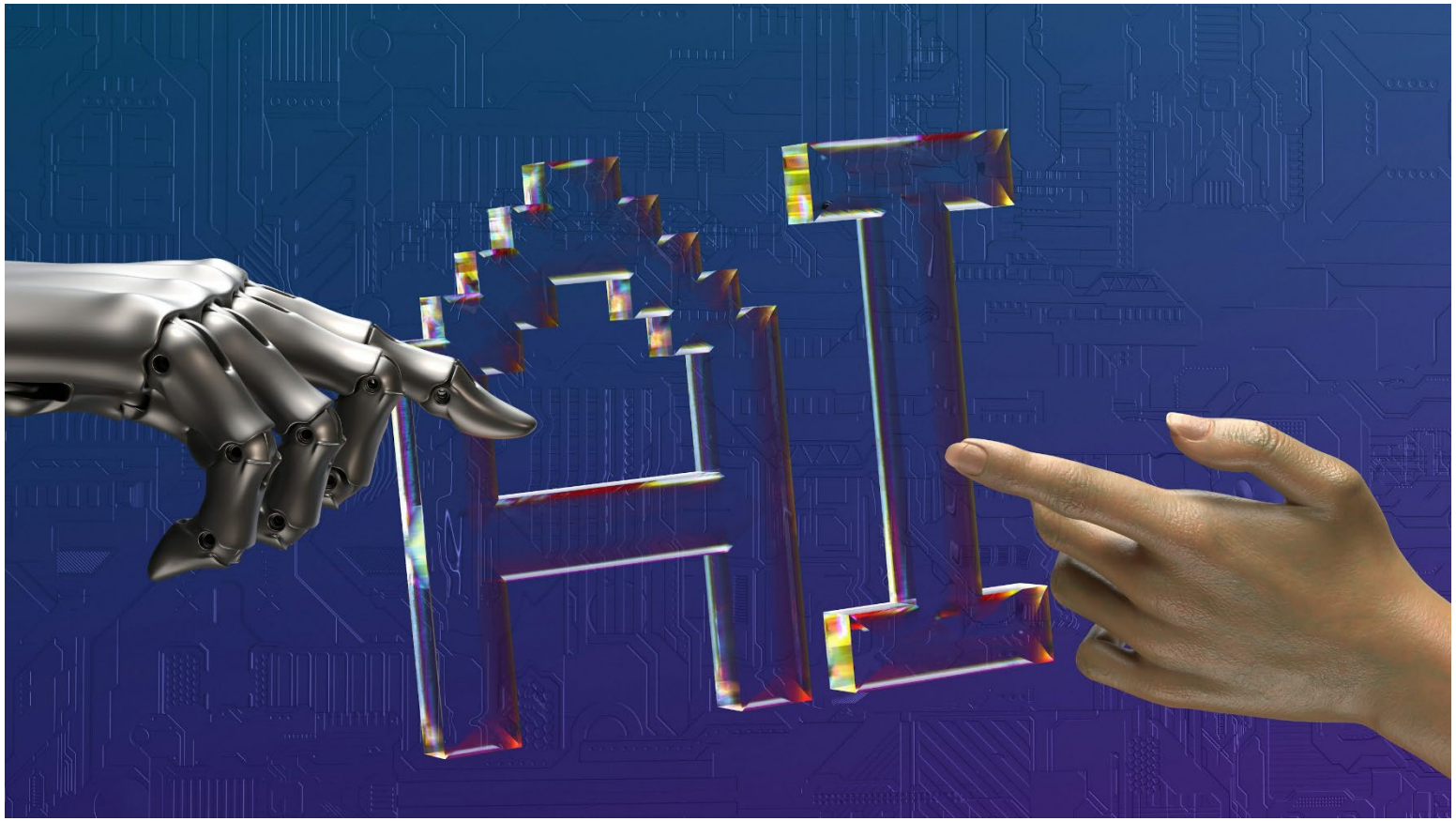
2

Predictive analytics

3

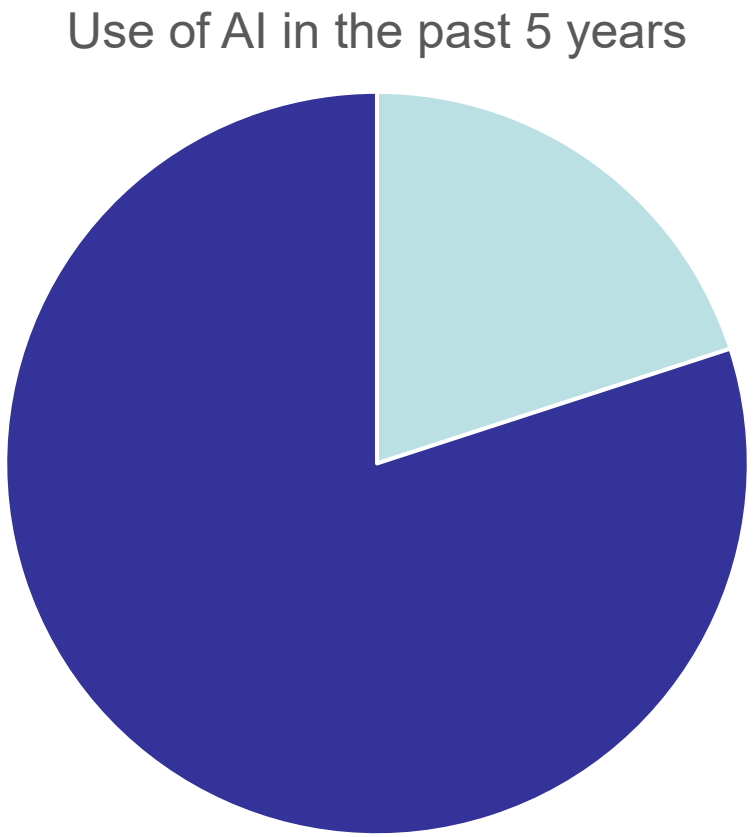
Continuous monitoring

THE TIPPING POINT



USE OF AI IN THE CONSTRUCTION INDUSTRY

WHAT ARE LEGAL PRACTITIONERS SAYING?



RESPONSES BY DECISION-MAKING BODIES

1

CIArb Guidelines

2

‘Radical’ judges

3

AI Arbitrator

ON THE HORIZON

ON THE HORIZON

A ChatGPT analysis of delays to the construction of the Sagrada Família

“Window B covers the period after Gaudí's death (1926) through the Spanish Civil War (1936) and the slow resumption of works mid-20th century. Two discrete, controlling delay events are identifiable from public records:

- **Gaudí's death (June 1926)** — immediate leadership loss and partial re-sequencing/reprogramming of design authority and works.
- **Spanish Civil War / workshop destruction (July 1936)** — vandalism/fire destroyed Gaudí's models and many drawings, and construction was substantially interrupted until post-war years.

Applying SCL methodology to a reconstructed baseline shows both events affected the controlling longest path for the window. The Civil War event constitutes a clear, multi-year excusable stop to the controlling path (force majeure/political violence). Gaudí's death is a design leadership loss that caused immediate reprogramming and a processing delay to the longest path. Quantification from public sources can credibly identify the interruption lengths (see Section 7), but a formal contractual EOT requires contemporaneous contractor baselines and as-built CPMs (not publicly available)."

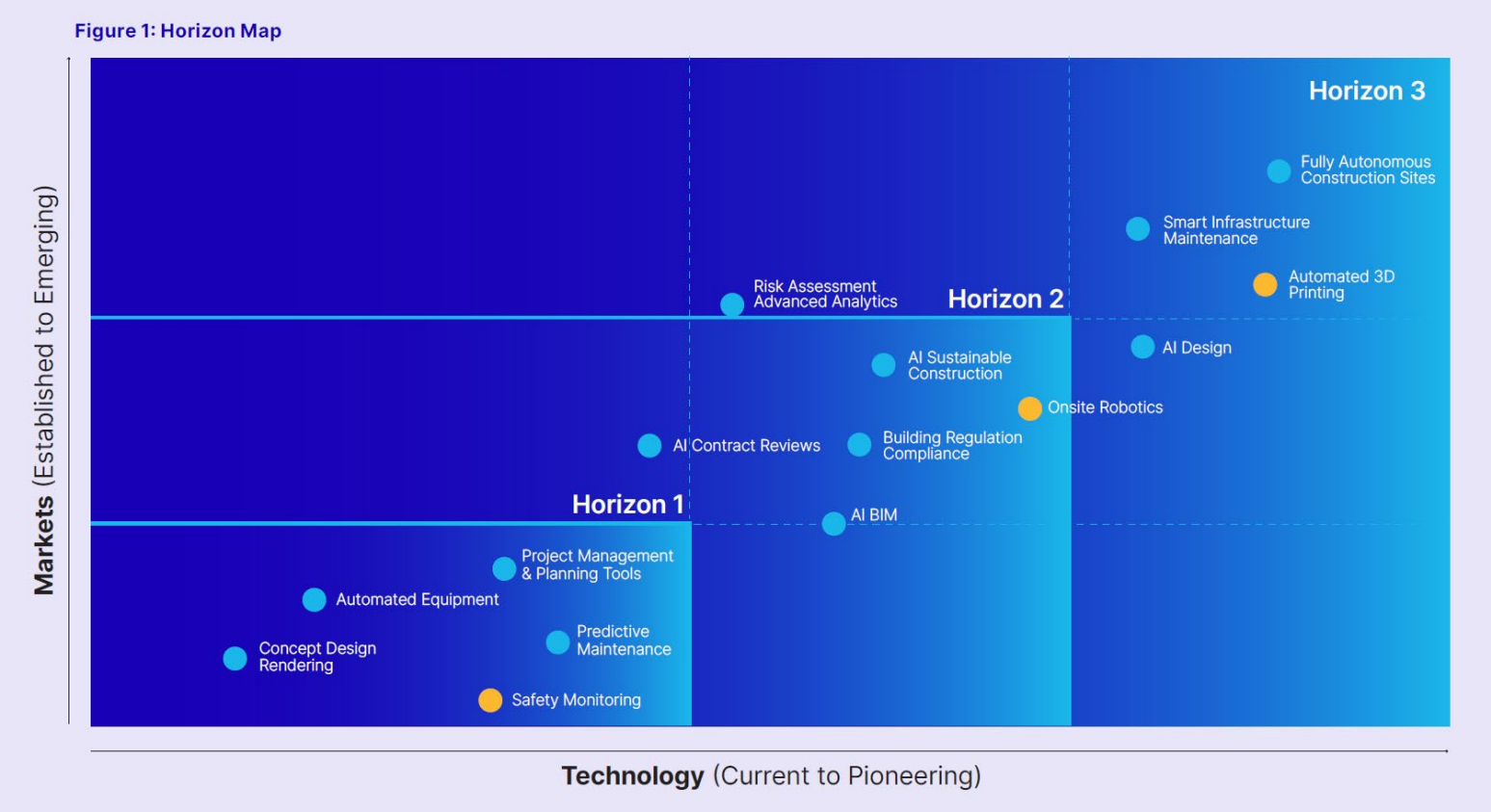
ON THE HORIZON

A ChatGPT analysis of delays to the construction of the Sagrada Família

"Using SCL categories … the principal delay events in Window B are:

- **Event B1 — Gaudí death (June 1926)**
  - **Nature:** design leadership loss / contractor/designer risk.
  - **Effect on baseline:** Immediate need to identify successor, re-establish programmes, and confirm design intent for continuation. Likely caused rework and reconstitution of working drawings (A1) and stalled A4 start for a period.
  - **Causation classification (SCL style):** Not force majeure; a designer risk event but not a contractor breach. Entitlement to EOT depends on contract terms about designer death and who bears design continuity risk. Public evidence: successor appointed but sequence altered.
- **Event B2 — Spanish Civil War / workshop fire (July 1936)**
  - **Nature:** political violence / force majeure (anarchist vandalism, fire destroyed models & drawings).
  - **Effect on baseline:** Destruction of Gaudí's original models/drawings required reconstruction (A1) anew and effectively stopped on-site works — a multi-year suspension. Disruption to A6 (fabrication of models) and A4/A5 (site works) — in practice the longest path was stopped.
  - **Causation classification:** Force majeure/political violence — contractor excused from progress while site works halted, subject to contractual force majeure clauses and duty to mitigate. Public sources report burning and delayed resumption until the late 1930s/1940s.
- **Event B3 — Chronic funding shortage (ongoing owner risk)**
  - **Nature:** owner financing model (private donations) causing intermittent progress.
  - **Effect on baseline & float:** frequent reprogramming, temporary halts, and re-sequencing (A8 interacts across activities). This is an owner risk (if contract placed responsibility on owner), though in the Sagrada Família case the Foundation is also the owner/funder."

ON THE HORIZON



Source: CIOB Artificial Intelligence (AI) Playbook 2024

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COFFEE BREAK- please be back by 15:45

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Edwin Glasgow KC
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Swee Im Tan
39 Essex Chambers

Kelly Stricklin-Coutinho
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Vivek Kapoor
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Panel 4: Dispute Resolution in Construction

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39 Essex Chambers

Transportation Infrastructure and Defects: Adoption Contracts

STRATEGIC PROJECTS: ROAD & RAIL (AND TUNNELLING)

UK:

- Road Investment Strategy & National Highways Delivery Plan (2020-2025): 52 schemes (12+ 'major road' projects; £27bn investment in quality/capacity enhancements)
- HS2: e.g. 'Delta Junction' (Birmingham): viaducts/bridges/motorways intersection
- A122 Lower Thames Crossing (Kent-Essex)
- Isambard AI/datacentre estate (Bristol)
- Network Rail 'ElevArch': bridge reconstruction programme
- Great North Rail Project: viaduct maintenance & strengthening programme

Middle East:

- Gulf Corporation Council Railway System
- Etihad (UAE) Rail Network

‘COLLATERAL’ CONTRACTS

UK:

- S.38 Highways Act 1980: Highway ‘adoption'; developer & surety obligations
- S.278 HA: developer & surety obligations in conjunction with host planning permission(s)
- S.106 Town and Country Planning Act 1990: planning obligations; phasing; funding
- Components: (a) phasing; (b) statutory undertaker interests; (c) substantive covenants: dedications or adoptions; (d) developer indemnification; (e) surety obligations (including default notice ‘trigger'); (f) ‘Parts 1&2' certification

INDUSTRY AND LOCAL DESIGN STANDARDS: A MOSAIC

- Adoption standards: infrastructure body or highway authority
- Design Manual for Roads and Bridges (DMRB)
- Asset maintenance over lifecycle: minimum standards
- Safety risk assessment
- Standards for design, assessment and operation: e.g. UK motorway & trunk roads
- General principles & scheme governance & design: all infrastructure typologies

- Re. engineering & construction contracts: no hierarchical or weighted application

COMMON SERIOUS DESIGN OR CONSTRUCTION DEFECTS

- Collapse compression
- Concrete honeycombing
- Displacement
- Rutting & depressions
- Drains, drainage, water penetration & water settlement
- Sagging & cracking
- Defective repair

- Pre-practical completion defects
- Completion defects
- Latent defects
- Defect (requiring replacement?) vs. 'normal wear and tear'

DEFINING THE DEFECT

- Obligations: design; workmanship; materials
- Common characterisation of ‘defect’: work not in conformity with specification/description and/or with implied term
- Broad definition of ‘defect’ is of reduced application in complex transportation contracts. A sophisticated, scheme-specific contractual definition is preferable
- Consider integration of applicable standards; industry best practice, etc.
- Limited contractual definition of ‘defect’: NEC4 ECC. Other standard form contracts do not define ‘defect’ (e.g. FIDIC conditions)

PRE- AND POST- COMPLETION DEFECTS: COMMON QUESTIONS

- Is the defect of nature as to deprive of 'substantially the whole benefit [or significant part] of the contract works' (FIDIC)?
- Does the defect prevent certification of practical completion (or acceptance)?
- Is there an obligation to maintain or to make good/repair, post-completion?

- 'Design' vs. 'workmanship': building contract specification:
  - specification of (i) infrastructure; (ii) individual components (e.g. surface water drainage)
  - how is specification recorded (e.g. general arrangement drawing)?
  - how/is specification agreed [or has specification merely been supplied]?

- Compliance obligations and defects: to test; to review; to forewarn

ADOPTION: COMMON IMPACTS AND COMPLEXITIES

- Which body may/must exercise adoption? [*R (oao Zipfell) v Norfolk CC* [2024] EWHC 3301]
- At what point is adoption exercisable? [*Freeman v Home Farm Ellingham* [2025] EWHC 878]

- How may adoption interact with any other agreement, warranty, assurance, duty, etc.?
  - Infrastructure ownership
  - Planning permission [*KBC Developments v Wavin* [2023] EWHC 153]
  - Statutory undertaker interests (to avoid disturbance to servicing asset, etc.)
  - Surety obligations and indemnities [*Wiltshire CC v Crest Estates* [2005] EWCA Civ 1087]
  - Regulatory oversight/governance (safety controls, etc.)
  - Non-contractual disputes (under infrastructure body's operating licence, etc.) [Network Rail]
  - Maintenance (under deed of easement; covenant, etc.)

OTHER NOTABLE CASES

- *Hochtief (UK) Construction Ltd., Volkerfitzpatrick Ltd. v Atkins Ltd* [2019] EWHC 2109 (TCC)

➢ **Defective two-span bridge: (i) carrying A256 dual carriageway over Canterbury-Ramsgate railway; (ii) impacting Cliffsend railway underpass**

➢ **Breach of contract (NEC3; structural design) and/or negligence for surface differential settlement and depressions (road liability only)**

- *Fountain v Colonnade Management Ltd v Westminster City Council* [2005] EWCA Civ 1607

➢ S.38 adoption of service road: maintenance and repair obligations

➢ road & service media passing through road structure

➢ defective joints and plinths 'incidentally benefitted'/formed part of structure

➢ 'fair' apportionment of repair costs payable by highway authority, under adoption

OTHER NOTABLE CASES (2)

- *Mega Trucking Company Limited v Highways England Company Ltd., Connect Plus (M25) Ltd.* [2022] EWHC 2099 (QBD)

➢ Smart M25 hard shoulder conversion/ground water filter drain disrepair

➢ Consortium CP(M25)L (incl. principal contractor, BB) responsible for smart conversion joined

➢ S.41 HA: duty to maintain highways: Did filter drain give rise to s.41 breach? Irrelevant: the statutory duty is limited to maintenance and repair of road fabric

➢ S.58 HA: special defence in claim vs. highway authority for non-repair damages: has authority taken such care in all the circumstances reasonably required to ensure that highway is not dangerous: (i) character of highway (incl. traffic load); (ii) standard of maintenance/state of repair to be expected

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Slides, LinkedIn and Latest Intelligence

Thank You

Wednesday, 8 October 2025 • 11:00 - 17:15

Paul Darling KC Construction Conference 2025