



LONDON • SINGAPORE • DUBAI • KUALA LUMPUR

Wednesday 7 October 2026 • 10.30am – 5.15pm

The Paul Darling Construction Conference 2026



Kate Grange KC



Camilla ter Haar



Samantha Jones



Santosh Carvalho

Building Safety Act Panel Discussion: Recovering the Costs of Remediation

PURSuing A CLAIM

- **Defective Premises Act 1972**

“(1)A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(a)if the dwelling is provided to the order of any person, to that person; and

(b)without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.”

- **Civil Liability (Contribution) Act 1978**

“...any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).”

- **Section 149 of the Building Safety Act 2022**

“Liability for past defaults relating to cladding products”

WHO PAYS?

- **Anticipatory Building Liability Orders:** *Crest Nicholson Regeneration Ltd v Ardmore Construction Ltd* [2026] EWHC 789 (TCC)
- **Apportionment:**
 - Under section Civil Liability (Contribution) Act 1978
 - s.2(1): "***Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.***" [emphasis added]
 - Under section 130 of the Building Safety Act 2022
 - s.130(1) "*The High Court may make a building liability order if it considers it just and equitable to do so.*" [emphasis added]
 - ***Mulalley & Co Ltd v Sto Ltd & Sto SE & Co. KGaA*** [2026] EWHC 1552 (TCC)

WHO PAYS?

- **Remediation Contribution Orders: s.124 of the BSA**

- *Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership (Vista Tower)* [2026] UKUT 18 (LC)
- *Secretary of State v EDR Builders Ltd and Hollybrook (UK) Ltd* (FTT Case Ref: LON/00BB/BSB/2024/0011) (21 May 2026)
- *Secretary of State for Housing, Communities and Local Government v Urban Splash and others.*

STRATEGY IN PURSUING CLAIMS

- Section 9 of TCC Guide (2026): Building Safety Act Business
 - *Wallace Estates Ltd v Durkan Estates Ltd & Anor* [2026] EWHC 2133 (TCC)

DISCUSSION

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • SINGAPORE • DUBAI • KUALA LUMPUR





John Denis-Smith

The Commercial Debts Bill and What It Means for Construction Contracts

BACKGROUND

- 1998 Act (Late Payment of Commercial Debts (Interest) Act 1998)
- Statutory interest at 8% above official Bank of England base rate, but s. 9 permits a lesser “substantial remedy”
- July 2025: estimated 14,000 businesses closing annually due to late payments

THE BILL

- The Bill (Commercial Payments Bill) is a government sponsored Bill
- HL Report stage (15 September 2026), Third reading (20 October 2026)
- Passage through House of Commons would follow
- Entry into force likely in Spring 2027 at the earliest

RETENTION

Clauses 12-17, introducing new HGCRA 1999 ss 113A-113F

1. Retention Ban

Sections 113A-113D: also covers related agreement and variations

2. Phasing Out

- Section 113B has phasing out of retention clauses in pre-existing construction contracts after three-year transition period

RETENTION

3. Charges for unauthorised retention

- Section 113E: where deduction deducted without the issue of a valid pay less notice, payee may recover by an implied term the “fixed sum” in addition to statutory interest and compensation under the 1998 Act
- Section 113E(3): the fixed sum is set at the greater of £40 or 50% of the retention debt wrongfully withheld

4. Powers to make regulations

- Section 113F empowers the Secretary of State to amend ss 113A-113C
- Secretary likely to be the Secretary of State for Business and Trade

PAYMENT

Clause 2, inserting new 1998 Act ss 2C and 2D and amending HGCRA 1996 ss 110 and 110B

1. Maximum Payment Period

- 60 day payment period between private parties
- Exemption under new s 2E where (1) contract between larger undertakings and (2) the contract is in writing and specifies basis for exemption
- 30 days for such contracts with public authorities

PAYMENT

Clause 10(3), Sch 2, paras 3 and 4 amending HGCRA 1996 ss 110B and 111

2. Payee Notices

- Where a payee notice in default of payer's notice is given, section 110B(3) does not apply so service of default payee notice does not postpone final date for payment.

3. Pay Less Notices

- No later than 7 days prior to final date
- Non-compliant pay less notice is invalid and regarded as not given

VERIFICATION PROCEDURES

Clause 1 and 1998 Act new s 2C

- Cap on validation procedures, limited to 30 days from delivery unless fair and reasonable in accordance with the test in UCTA 1977 Sch 2
- Burden on purchaser to satisfy the test of reasonableness

LATE PAYMENT INTEREST

Clauses 5 to 7 and 1998 Act amended s 4 and new s 2G and s 6A

- Mandatory statutory right to late payment interest
- Rate is 8% above Bank of England base rate (unchanged from 1998 Act)
- Previous allowance of “substantial remedy” abolished

PROCUREMENT ACT

Sch 1, paras 18-22 and new sections 68A, 88A of Procurement Act 2023

- 2023 Act ss 68 and 88 already contains provision for 30-day payment
- Now to apply to regulated below-threshold contracts and regulated below-threshold sub-contracts thus ensuring the 30-day regime flows down the supply chain
- Clause 7 applies statutory late payment interest under 1998 Act

PAYMENT PRACTICES

- Part 2 of the Bill inserts new ss 2H-2P in Enterprise Act 2016
- The Small Business Commissioner (SBC) may investigate if a large or medium size (51 + employees) contractor persistently engages in poor payment practices
- Poor practice includes regular late payments to subcontractors or attempting to bypass the 60-day payment cap
- UK Government's guidance indicates that if a company's data shows that 25% or more of its invoices are paid late, this can automatically prompt the SBC to launch a compliance check or formal investigation

KEY TAKEAWAYS

- Retention appears certain to be abolished from Spring 2029
- 50% fine on unauthorised retention deduction
- Statutory interest on late payments to be 8% above Bank of England base rate
- 1998 Act case law otherwise unaffected

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.



Marion Smith KC



Vivek Kapoor



Madelaine Power



Daniel Miles, JS Held

Quantum Pitfalls in International and UK Construction Disputes

AGENDA

- Global claims
- Joint statements and spreadsheets
- Valuation Methods
- Quantum and Section 68 AA96
- Liquidated damages
- Rebalancing under domestic and international legal systems
- *Triple Point*: PDKC's final Supreme Court case

GLOBAL CLAIMS

SCL D&D Protocol, 2nd edition 2017

- Global claim = “one in which the Contractor seeks compensation for a group of Employer Risk Events but **does not or cannot** demonstrate a **direct link** between the loss incurred and the individual Employer Risk Events.”
- “...discouraged by the Protocol, despite an apparent trend for the courts to take a more lenient approach when considering global claims.”
- Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC), Akenhead J

JOINT STATEMENTS

BDW Trading v Integral Geotechnique [2018] EWHC 1915 (TCC) at [18]

“.. an expert may ... provide a copy of the draft joint statement to the solicitors, ... the expert should not ask the solicitors for their general comments or suggestions on the content ... and the solicitors should not make any ... save to both experts in the very limited circumstances identified in the TCC Guide. ... There may be cases, ... exceptional, where ... legal representatives are concerned, ... that the experts' views ... may have been infected by some material misunderstanding of law or fact. If so, then there is no reason ... why that should not be drawn to the attention of the experts ... in the open so that everyone, ... can see what has happened ...”

JOINT STATEMENTS AND SPREADSHEETS

[Andrews v Kronospan](#) [2022] EWHC 479 (QB)

[TCC Guide 2026](#) :

- TCC Guide 14.5 (Meetings of experts)
- TCC Guide 14.7.2 (Experts' Reports) – legal advisers “**must identify issues with which each expert should deal in his or her report. Thereafter it is for the expert to draft and decide upon the detailed contents and format of the report**”. Legal advisers may invite experts to “**consider amendments to their reports to ensure accuracy, internal consistency, completeness, relevance to the issues or clarity of reports**”.

[CPR PD 35](#) para 9 – joint meetings legal representatives' role limited to agreeing an agenda for expert discussions, not to attend without court's permission. Experts do not require the authority of the parties to sign their joint statement.

Slip rule for arithmetical errors – [S. 57 Arbitration Act 1996](#).

METHOD

- *Santos Ltd v Fluor Australia Pty Ltd* [2025] QSC 184, Freeburn J.
- *System Dynamics*, Ralph Goodchild, SCL Paper No. 212, September 2018, "Proven by Computer? System Dynamics and Disruption Claims"

QUANTUM CHALLENGES UNDER S.68

- *Terna Bahrain v Al Shamsi* [2012] EWHC 3283 (Comm)
- *Republic of Kosovo v ContourGlobal Kosovo LLC* [2024] EWHC 877 (Comm)
- *The Federal Republic of Nigeria v. P&ID* [2023] EWHC 2638 (Comm)

LIQUIDATED DAMAGES: PENALTY?

- *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67
- *Eco World - Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC)
- *Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd* [2022] EWHC 1842 (TCC)

REBALANCING LIQUIDATED DAMAGES

- [KSA Civil Transactions Law](#), Royal Decree 191 – in force 16 December 2023
- [Qatar Civil Code](#), Law No. 22 of 2004
- [New UAE Civil Code](#), Federal Decree-Law No. 25 of 2025, Contracts entered into after 1 June 2026

TRIPLE POINT

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

- Termination issue – unanimous.
- Negligence carve-out – majority 3:2.
- The cap – unanimous.

THANK YOU: ANY QUESTIONS?



39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • SINGAPORE • DUBAI • KUALA LUMPUR

39 Essex
CHAMBERS



Marion Smith KC

Marion.SmithKC@39essex.com



Vivek Kapoor

Vivek.Kapoor@39essex.com



Madelaine Power

Madelaine.Power@39essex.com



Daniel Miles, JS Held

Daniel.Miles@jsheld.com



Lunch
See you at 13:55



David Sawtell KC



Rebecca Drake



Melissa Shipley

**Adjudication in 2025 -26:
Tales of the Unexpected?**

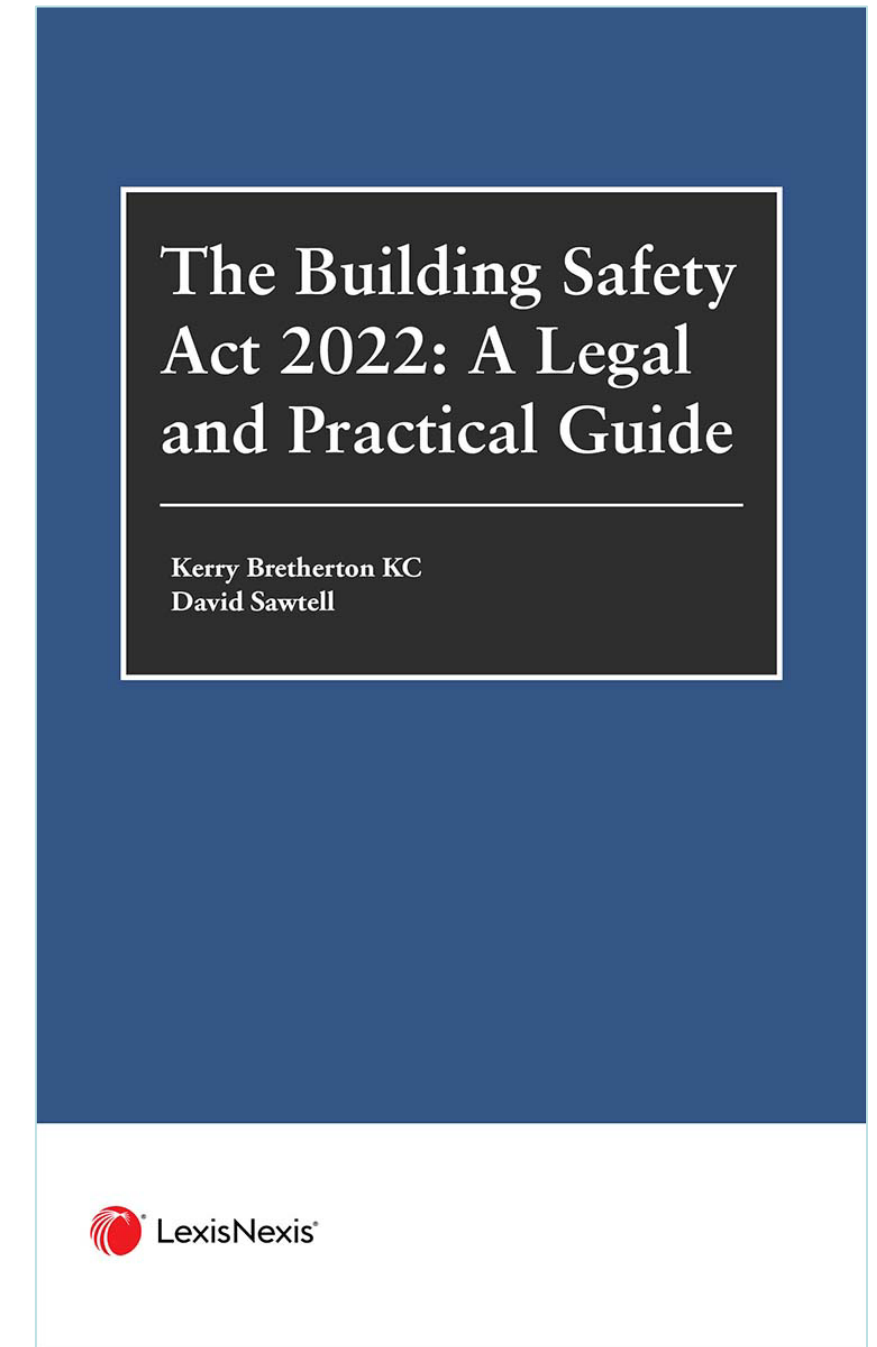
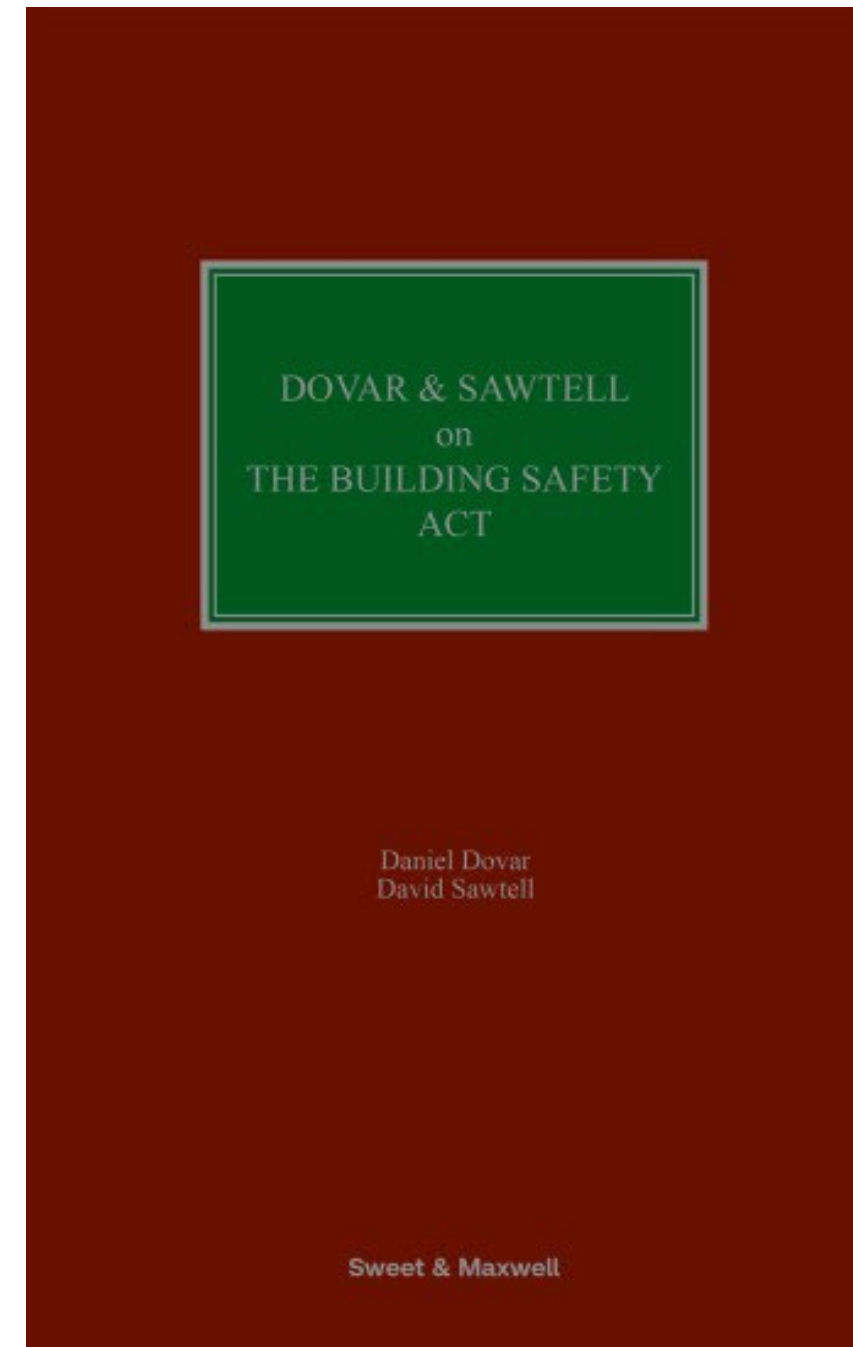
ADJUDICATING BUILDING SAFETY CASES – WHERE ARE WE NOW?

David Sawtell KC



BUILDING SAFETY CASES AND ADJUDICATION

- Not just fire safety – also structural.
- Can arise in a number of circumstances e.g. residential, commercial, PFI etc.
- Following the Grenfell Tower fire, the number of disputes involving building safety has increased.
- It was not clear at first how the Building Safety Act 2022 would impact adjudication.



CREST NICHOLSON REGENERATION LTD AND OTHERS V ARDMORE CONSTRUCTION LTD (IN ADMINISTRATION) AND OTHERS [2026] EWHC 789 (TCC), 225 CONLR 1

- Constable J gave guidance on anticipatory building liability orders, adjudication and the adjudicator's jurisdiction to decide a claim under the Defective Premises Act 1972 ('DPA 1972').
- Permission to appeal was refused by Constable J, but granted by the Court of Appeal (due to be heard 15 December 2026).
- Creditors approved seven CVAs across the remaining Ardmore group companies. Other entities in administration.
- It is unclear if the appeal will be pursued or not.

CREST NICHOLSON REGENERATION LTD AND OTHERS V ARDMORE CONSTRUCTION LTD (IN ADMINISTRATION) AND OTHERS [2026] EWHC 789 (TCC), 225 CONLR 1

Short recap....

- Ardmore Construction Ltd ('ACL') designed and built a residential development in Portsmouth. Completed in 2009.
- Following the Grenfell Tower disaster in 2017, extensive fire safety defects were identified in the external walls.
- In 2025, Crest commenced adjudication against ACL in respect of defects in the external walls. The day before the decision, ACL went into administration.
- Adjudicator determined that ACL was liable to pay Crest £14.9m. While the contract claim was time-barred, ACL was in breach of its duty under section 1(1)(a) of the DPA 1972.

WAS ENFORCEMENT BEFORE THE COURT?

- There was no summary judgment application to enforce the Decision. Crest argued it did not need to. Instead, the decision was a binding determination of ACL's liability.
- Constable J held that, if the decision was capable of being a relevant liability, the Court could determine the existence of such liability when ordering its transmission to an associate.
- (If he was wrong on this, he would have granted summary judgment anyway).

IS A DECISION A 'RELEVANT LIABILITY' FOR THE PURPOSE OF S.130 BSA 2022?

- The Adjudicator's Decision is binding until the dispute is finally determined by the Court. If the decision is not challenged in Court, it constitutes a binding determination of a party's liability for all time. The Decision therefore created a 'liability'.
- The BLO Defendants can claim (or counterclaim) in restitution for return of the moneys ordered to have been paid subject to the BLO: *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc* [2015] UKSC 38.
- There is also the 'just and equitable' safety valve to prevent injustice.

DID THE ADJUDICATOR HAVE JURISDICTION?

The three arguments:

- 1) The Adjudicator does not have jurisdiction to determine a claim under the DPA 1972, as it did not arise under the contract.
- 2) The Adjudicator awarded sums to a party (CNO) who was not a party under the contract.
- 3) Even if CNO was a party to the contract, it was not owed a duty under section 1(1)(a) DPA 1972,

(1) THE DEFECTIVE PREMISES ACT 1972

- *"Any dispute which by virtue of Part II of the Housing Grants, Construction and Regeneration Act 1996 is to be referred to adjudication shall be referred to adjudication in accordance with the Technology and Construction Solicitors Association Adjudication Rules (TeCSA Adjudication Rules) current at the time of reference."*
- Cf *BDW Trading v Ardmore Construction Limited* [2024] EWHC 3235 (TCC), 217 ConLR 119 – Joanna Smith J held that a similarly worded clause provided jurisdiction over a claim under the DPA 1972. Permission to appeal had been granted, but the administrators decided not to continue with the appeal.

(1) THE DEFECTIVE PREMISES ACT 1972

- Held that the obligation to comply with the DPA 1972 was created (at least indirectly) by the construction contract.
- *"A construction which meant that a claim for breach of clause 2.5.2.5 was included within the agreed dispute resolution framework but the identical claim for a direct breach of the DPA was not, is the sort of distinction which would not accord with the reasonable commercial expectations of the parties". [153]*
- Also adopted the reasoning in *BDW Trading v Ardmore Construction Limited* at [41] – [80] – adopted Lord Hoffmann's analysis of arbitration clauses in *Fiona Trust v Privalov* [2007] UKHL 40.

(2) SUMS AWARDED TO NON-PARTY TO CONTRACT

- Only a party to the construction contract has a right to refer a dispute to adjudication. CNR was the employer, but the adjudication was started by CNO and CNR (on its case, with CNO as undisclosed principal).
- The Agency Agreement was produced in the adjudication.
- This argument was rejected following an analysis of the documents.

(3) DUTY UNDER S.1(1)(A) DPA 1972

- Constable J: if CNO was a party to the D&B Contract such that they were entitled to adjudicate against ACL, the question of whether a duty was, or was not, owed was merely an issue in the adjudication. It was not a jurisdictional issue.
- Otherwise, the decision could be severed to enable enforcement, and only allow enforcement in CNR's favour at the summary judgment stage.

ANTICIPATORY BLO

(As discussed by the BSA panel)

- Ardmore argued that ordering an Anticipatory BLO would be premature, and that issues of 'just and equitable' should be determined after a full trial.
- *Willmott Dixon Construction Limited v Prater* [2024] EWHC 1190 (TCC) – Jefford J consider that the main claim and additional claim should be heard together. Constable J held that when the BLO application is heard remains always open to the judge as a matter of case management.

ADJUDICATION BLO – JUST AND EQUITABLE?

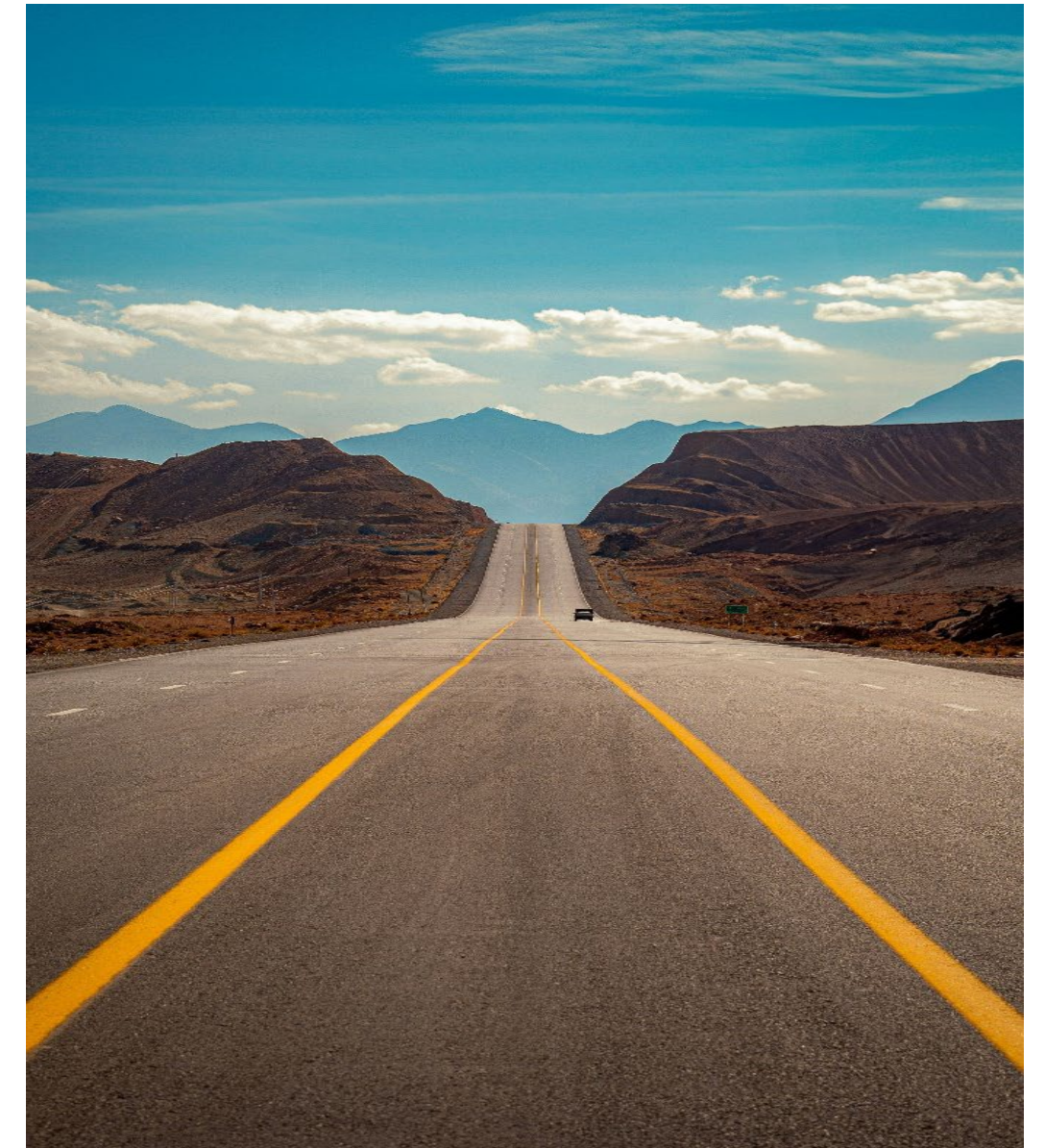
- Interim solution?
- No cash flow need?
- BLO 'by the back door'?
- Ds' financial position?
- Cheaper remedial scheme?
- Inequality of arms?

Adjudication BLO made.



DISCUSSION – ADJUDICATING A BUILDING SAFETY CASE

- Expert evidence – liability (and quantum).
- Crystallising the dispute.
- Setting out the defects.
- Consider your causes of action.
- What relief is sought? Declarations? Damages?
- How will you enforce the decision?
- If enforcement is planned by way of BLOs, then who?
What arguments could be raised?



DISCUSSION – AREAS TO CONSIDER

- Could the Court of Appeal over the two *Ardmore* cases to hold that a DPA 1972 claim cannot be referred to adjudication?
- Building safety cases are often complicated and detailed. Should some of the issues be 'split' into separate adjudications? How can they be case managed?
- Should a party seek to enforce the decision at the same time as seeking a BLO against an associate?





CONTRACT

**IS THERE A CONTRACT AT ALL?
AND WHAT IS IT?**

Rebecca Drake



HIGH TECH CONSTRUCTION LTD V WLP TRADING AND MARKETING LTD
[2026] EWHC 152

- Dispute over whether JCT Design and Build Subcontract existed
- Real prospect of establishing that the JCT contract did not exist: summary judgment refused
- Courts will not necessarily uphold the usual “pay now, argue later” approach to adjudication if a dispute re: existence/identity of the foundational contract
- An adjudicator cannot acquire jurisdiction by deciding that a disputed contract exists where that very question is an “existential” jurisdictional issue

CLERKENWELL LIFESTYLE (UK) LTD V HG CONSTRUCTION LTD
[2026] EWHC 1406

- Did emails create a binding 12-week extension of time agreement?
- Conduct relevant
- Adjudicator's decision enforced

ASSIGNMENT: *PARAGON GROUP LTD V FK FACADES LTD*
[2026] EWHC 78

- HJJ Stephen Davies – was the Claimant was legally entitled to refer its claim as assignee against the defendant contractor to adjudication?
- No direct authority on the point, whether under the HGCRA and the Scheme, or under the express terms of the contract (a JCT Minor Works 2016)
- Held C could adjudicate that the Claimant could so adjudicate although found the point “finely balanced”

BELONG (CONSTRUCTION) LTD V SEDDON CONSTRUCTION LTD
[2026] EWHC 1275

- Pre-Construction Services Agreement
- Incorporated the then draft main contract ("Proposed Contract Documents")
- JCT Standard Building Contract 2016 ("Main Contract")
- Liabilities accrued during the pre-construction phase can survive entry into a subsequent main contract

LESSONS FROM 2025–2026 CASES ON CONTRACT EXISTENCE

- Objective assessment of parties' communications and conduct
- A contract is not created merely because substantial works were performed
- A purported agreement must identify sufficiently what the parties actually agreed
- Subsequent conduct can be powerful evidence as to whether a contract was made, even though it generally cannot be used to interpret the meaning of contractual words
- In adjudication cases, there is a crucial distinction between misidentifying an admitted contract and relying upon a contract which never existed at all

NATURAL JUSTICE AND (NOT) RAISING POINTS WITH THE PARTIES

7 October 2026

Melissa Shipley



RECAP

- Very high bar
- Successful only in rare circumstances
- Material
- Sympathy for difficult task...
- ...BUT no going off on a frolic of their own.

CASE 1:

PREMIER MODULAR LIMITED V MAIDSTONE AND TUNBRIDGE WELLS NHS TRUST [2026] EWHC 1404 (TCC)

BACKGROUND

- NEC4
- Mains water supply for testing and commissioning
- 30 October 2023 v 20 February 2024
- Compensation Events: 60.1(1), 60.1(14) and/or 60.1(18)
- Accepted Programme = Appendix 3 programme
- The Accepted Programme contained no obligation on the Trust to make permanent water available by any particular date

ADJUDICATOR'S DECISION

- Contract Programme Rev3 30.10.23 became an Accepted Programme
- Water main to be provided by 30 October 2023
- Compensation Event under 60.1(3)

WHAT'S WRONG WITH THAT?

Strike 1: Not argued by either party

Strike 2: *"...directly contrary to the common position..."* [35]

Strike 3: Not put to the parties



WHAT'S WRONG WITH THAT?

- *“...that looks very much like an adjudicator going off on a frolic of his own...”* [36]
- *“...the Adjudicator went off on a “frolic” by, in effect, inventing a case for PML which he considered to be superior to that which they actually advanced.”* [42]

CASE 2:

ENTEXOL LIMITED V SKED CONSTRUCTION LIMITED **[2026] CSOH 80**

BACKGROUND

- Scottish case
- Contra charges
- Late completion – Sked said 13 November 2024, fixed by instruction
- Adjudicator rejected, said time was at large
- Sked said adjudicator should have invited submissions on what a reasonable period would be

DECISION

- Consequence v reason
- Time at large was a “*red herring*” [9]

TALES OF THE UNEXPECTED? LEARNING POINTS



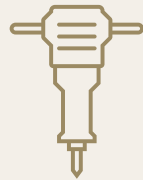
- Still confined to rare cases
- Pressures of adjudication
- Are cases representative of the scale of the problem?



Scarlett Milligan

The Expansion of Personal and Corporate Liability for Health and Safety Offences in Construction

UP TO THREE REGIMES



Health and safety

s.33 HSWA 1974

Enforced by HSE or the local authority



Fire safety

art. 32 Fire Safety Order

Enforced by the fire and rescue authority (HSE on construction sites: art. 25)



Building safety

**Building Act 1984 and BSA 2022
Part 4**

Enforced by the Building Safety Regulator (HRBs) or local authority building control

A fire in a high-rise can engage all three regimes

HSE FATALITY AND ENFORCEMENT STATISTICS

126

workers killed in work-related incidents in Great Britain, 2025/26

104

members of the public killed in work-related incidents

31

deaths from falls from height – about a quarter of worker deaths

25

worker deaths in construction, the highest of any sector

59,219

RIDDOR reportable injuries in 2024/25

246

HSE prosecutions in 2024/25
With a 96% conviction rate

4,400

Notices issued by HSE in 2024/25

£33m

In HSE-issued fines in 2024/25

FIRE SAFETY ENFORCEMENT STATISTICS: ENGLAND AND WALES

296

fire deaths across England and Wales in 2024/25, the latest year both nations publish

53k

fire safety audits by fire and rescue authorities in England and Wales in 2024/25

3,355

formal notices issued in England in 2025/26, up 46% on 2019/20 (Wales publishes no count)

1,224

prohibition notices issued in England in 2025/26, up 27% in a year

33

prosecutions in England in 2025/26: one for every 100 formal notices, down from 52 in 2019/20

£500k

largest fine on an organisation under the Fire Safety Order, England and Wales, 2023–25

£25k

median fine on organisations over the same period; £3,800 for individuals

6

Fire Safety Order articles cited in the typical enforcement notice; 1 in 9 cites only one

KEY DUTIES: THE HEALTH AND SAFETY AT WORK ETC. ACT 1974

	The duty	Who owes it	To whom it is owed
s.2	To ensure, so far as is reasonably practicable, the health, safety and welfare at work of employees	Employers	Their own employees
s.3	To conduct the undertaking so as to ensure, so far as is reasonably practicable, that others are not exposed to risks to health or safety	Employers and the self-employed	Everyone who is not their employee – contractors, visitors, the public
s.4	To take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that premises, means of access and egress, plant and substances are safe	Anyone with control, "to any extent", of non-domestic premises used as a place of work – and, by s.4(3), anyone with a repairing or safety obligation under a contract or tenancy	Non-employees who use those premises as a place of work or use plant or substances provided there
s.6	To ensure articles and substances for use at work are safe, and to test, examine and provide information about them	Designers, manufacturers, importers, suppliers, installers and erectors	Everyone put at risk by the article or substance at work
s.7	To take reasonable care for his own health and safety and that of others affected by his acts or omissions, and to co-operate with the employer	Every employee	Himself and anyone else affected

KEY DUTIES: THE CDM REGULATIONS 2015

	The duty	Who owes it	To whom it is owed
reg 4	To make suitable arrangements for managing the project , with sufficient time and resources, so it is carried out without risks to health or safety; and to maintain and review them	The client (domestic clients: see reg 7)	Workers and anyone else affected by the project
reg 9	When preparing or modifying a design, to eliminate, reduce or control foreseeable risks to those building, maintaining, cleaning or using the structure	Every designer	Those who build, maintain, clean or use the structure
reg 11	To plan, manage, monitor and coordinate the pre-construction phase , and to prepare the health and safety file (reg 12)	The principal designer	Workers and anyone else affected by the project
reg 13	To plan, manage, monitor and coordinate the construction phase , including the construction phase plan (reg 12)	The principal contractor	Workers and anyone else affected by the project
reg 15	To plan, manage and monitor their own work , and to comply with the principal contractor's directions	Every contractor	Their workers and anyone affected by their work

KEY DUTIES: THE REGULATORY REFORM (FIRE SAFETY) ORDER 2005

	The duty	Who owes it	To whom it is owed
art. 8	To take general fire precautions ensuring, so far as reasonably practicable, the safety of employees , and those reasonably required to make the premises safe for others	The responsible person: the employer, or whoever controls the premises; by art. 5(3), anyone with control to any extent	Employees, and other relevant persons lawfully on or near the premises
art. 9	To make a suitable and sufficient assessment of the fire risks , keep it under review and record it in full	The responsible person and anyone within art. 5(3)	Relevant persons
art. 14	To keep emergency routes and exits clear and leading as directly as possible to safety	The responsible person and anyone within art. 5(3)	Relevant persons who may need to escape
art. 22	Where two or more responsible persons share duties in respect of premises, to co-operate and co-ordinate their fire safety measures	Each responsible person, e.g. landlord, tenant and contractor on a shared site	Relevant persons in the shared premises
art. 23	To take reasonable care for his own safety and that of others affected by his acts or omissions at work, and to co-operate with his employer	Every employee	Himself and other relevant persons

KEY DUTIES: THE FIRE SAFETY ACT 2021 AND 2022 REGULATIONS

	The duty	Who owes it	To whom it is owed
s.1	Extends the Order, in buildings with two or more flats, to the structure and external walls (including cladding, balconies and windows) and flat entrance doors	The building's responsible person and anyone within art. 5(3)	Residents and other relevant persons
reg. 5	To record the design and materials of the external walls , their fire risk and any mitigation, and send it to the fire service	The responsible person for a high-rise residential building (18m or 7 storeys)	Residents and firefighters
reg. 7	To make monthly checks of firefighting lifts and equipment and report faults to the fire service	The responsible person for a high-rise residential building	Residents and firefighters
reg. 9	To give residents fire safety instructions , including the evacuation strategy and how to report a fire	The responsible person for any building with two or more sets of domestic premises	Residents
reg. 10	To check communal fire doors every 3 months , and use best endeavours to check flat entrance doors every 12 months	The responsible person for a residential building over 11m	Residents

KEY DUTIES: BUILDING SAFETY ACT 2022 AND BUILDING ACT 1984

	The duty	Who owes it	To whom it is owed
s.35 BA 1984	Not to contravene the building regulations , including the Part 2A duties to plan, manage and monitor work for compliance	Anyone carrying out building work, including the client, principal designer and principal contractor	Future occupants and anyone in or about the building
ss.35B–C BA 1984	To comply with a compliance notice or stop notice served by building control or the BSR	The person on whom the notice is served	Those put at risk by the non-compliant work
s.76 BSA 2022	Not to allow a higher-risk building to be occupied before a completion certificate is issued	The relevant accountable person	Residents of the building
s.77 BSA 2022	Not to allow an occupied higher-risk building to remain unregistered with the BSR	The principal accountable person	Residents of the building
s.101 BSA 2022	To assess and manage building safety risks : spread of fire and structural failure (or any Part 4 requirement, e.g. ss.83–84)	Each accountable person for an occupied higher-risk building	People in or about the building

CRIMINAL OFFENCES: THE GATEWAY PROVISIONS

HSWA 1974: s.33

- s.33(1)(a) breach of a duty under ss.2–7; (c) breach of regulations
- s.33(1)(e), (g) breach of an inspector's requirement or an improvement or prohibition notice

Fire Safety Order: art. 32

- art. 32(1)(a)–(b) breach of arts 8–22B, 38 or art. 24 regulations, where it risks death or serious injury
- art. 32(1)(d) failure to comply with an enforcement notice
- art. 32(2)(h) breach of a prohibition notice

Building Act 1984 and Building Safety Act 2022

- BA ss.35, 35B–C breach of building regulations, a compliance notice or a stop notice
- BSA ss.76–77 occupation without a completion certificate or registration
- BSA s.101 accountable person's breach creating critical risk

INDIVIDUAL OFFENCES: SECTION 37 HSWA AND ITS EQUIVALENTS

HSWA 1974: s.37

- Where a company's offence is committed with the **consent** or **connivance** of, or is attributable to any **neglect** on the part of, a director, manager, secretary or similar officer, that person is guilty of the offence as well.
- Consent and connivance need knowledge of the material facts and a decision to carry on: AG's Reference (No. 1 of 1995) [1996] 1 WLR 970. Neglect does not – it is enough that the officer ought to have been put on enquiry: R v P Ltd [2007] EWCA Crim 1937.
- "Manager" means a person in a position of real authority, a decision-maker: R v Boal [1992] QB 591. It reaches beyond company directors: Armour v Skeen 1977 SLT 71.

Fire Safety Order: art. 32(8)–(9)

- art. 32(8)–(9): the same test of consent, connivance and neglect for director, manager, secretary or similar officer

Building Act 1984 and BSA 2022

- BA 1984 s.112A and BSA 2022 s.161: directors, managers, secretaries or similar officers are also guilty of the company's Building Act and Building Safety Act offences if it involved their consent, connivance or neglect.

CORPORATE ATTRIBUTION: CRIME AND POLICING ACT 2026, S.250

“Where a senior manager of a body corporate or partnership (“the organisation”) acting within the actual or apparent scope of their authority commits an offence ... the organisation also commits the offence”

- Applies to all three regimes – came into force from 29 June 2026.
- A senior manager is someone who plays a significant role in managing or organising a substantial part of the organisation’s activities / making decisions – see s.250(3)
- Before s.250 you had to find the “directing mind and will”, in practice the board – close to unachievable in a layered organisation.
- Will have reached beyond risk-related offences, e.g. false information to the regulator (s.33(1)(k)), obstruction of an inspector (s.33(1)(h)), false entries.
- It effectively revives corporate gross negligence manslaughter, by letting the prosecution attribute a senior manager’s gross negligence to the company.
- There is no “adequate procedures” defence. Unlike the Bribery Act s.7, a compliance programme goes to prosecutorial discretion and sentence, not to guilt.

SECONDARY CRIMINAL LIABILITY: THE ACT OR DEFAULT OF ANOTHER

HSWA 1974: s.36

- "Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence" – and may be convicted "whether or not proceedings are taken against the first-mentioned person".
- This takes the scope of liability outside the stricter circle of duty holders – e.g. external health and safety consultant, a designer, an engineer, equipment supplier, installer, supervisors who are too junior for s.37.

Fire Safety Order: art. 32(10)

- The same rule in near-identical words
- Reaches beyond the responsible person and art. 5(3) duty holders, e.g. a fire risk assessor or contractor.

Building Act 1984 and BSA 2022

- No identical provisions
- BA s.35 applies to "a person who contravenes" the building regulations - the offence therefore can reach designers and contractors as well as duty holders, IF requirements are placed on them

HOMICIDE OFFENCES

Gross negligence manslaughter

- Common law offence
- A duty of care owed to the deceased; a negligent breach of it.
- At the time of the breach, a reasonably prudent person in the defendant's role would have foreseen a serious and obvious risk of death: *R v Rose* [2017] EWCA Crim 1168 — an obvious risk is a present risk which is clear and unambiguous.
- Causation: *R v Broughton* [2020] EWCA Crim 1093.
- Conduct so bad in all the circumstances as to amount to a criminal act or omission: *R v Adomako* [1995] 1 AC 171. Mistakes, even very serious ones, are not enough.

Corporate manslaughter

- Section 1, Corporate Manslaughter and Corporate Homicide Act 2007.
- The way in which activities were managed or organised caused the death and amounted to a gross breach of a relevant duty of care.
- The way activities were managed or organised by senior management must be a substantial element in the breach. This is what defeats most cases against large organisations.
- Consent of the DPP required
- Publicity orders under s.10
- Remedial orders under s.9.

SENTENCING: VERY LARGE ORGANISATIONS

Organisation (turnover)	Range of fines
Micro (not more than £2m)	£50 – £450,000
Small (£2m – £10m)	£100 – £1.6m
Medium (£10m – £50m)	£1,000 – £4m
Large (£50m and over)	£3,000 – £10m
Very large (“very greatly exceeds” £50m)	Courts should consider fines above £10m

R v Thames Water Utilities Ltd [2015] EWCA Crim 960

- The fine must be large enough to bring the message home to those who own and manage the organisation.
- For a very large organisation with a turnover outside the scale in the sentencing guidelines, that may mean a figure well outside the tables.

SENTENCING: CORPORATE MANSLAUGHTER, AND INDIVIDUALS

Corporate manslaughter

- Unlimited fine; offence range £180,000 to £20 million.
- A publicity order should ordinarily be imposed (s.10).
- Unlike an HSWA, FSO or BA/BSA fine, the sentence is within the Attorney General's unduly lenient sentence scheme.

Individuals

- Outcomes run from a fine to two years' custody on indictment, the same maximum for FSO, BA and BSA offences.
- The starting point for fines ranges from 25%-700% of weekly income, but there is no limit on the fine that can be imposed.
- Disqualification under CDDA 1986 s.2 – discretionary.

39 ESSEX CHAMBERS' MULTI-DISCIPLINARY EXPERTISE

1

**Immediate
aftermath**

2

**Police/HSE etc.
investigation**

3

**Enforcement
notices**

4

**Internal
investigation**

5

Inquest

6

Public inquiry

7

**Criminal
prosecution**

8

Civil claim

9

**Collateral
consequences incl.
regulatory /
disciplinary
proceedings**

THANK YOU FOR LISTENING! ANY QUESTIONS?





Tea and Coffee Break at CR6
See you at 15:20



Adam Robb KC



Hannah McCarthy



Ruth Keating

Trigger Happy? Terminating a Construction Contract

EXITING CONTRACTS THE PITFALLS

OVERVIEW

- What is the threshold?
- Notices
- Cakeism (can you have it both ways?)

COMMON LAW VS CONTRACTUAL

- Common law:
 - Repudiatory breach
 - Renunciation
- Contractual
 - Material
 - Substantial
 - Any

COMMON LAW: REPUDIATORY BREACH

1. A breach which goes to the root of the contract; *Suisse Atlantique*, 1967 (HL)
2. A breach (notably, inexcusable delay) which renders the contract radically different from that originally undertaken; *Cottonex Anstalt*, 2016 (CA)
3. Conduct which is substantially inconsistent with a party's contractual obligation; *Ross T Smyth*, 1940 (HL)
4. Conduct which objectively indicates an intention to abandon and altogether refuse to perform the contract; *Eminence Property*, 2010 (CA)
5. Conduct which deprives the injured party of substantially the whole benefit which it was intended he should obtain in exchange for his own further performance of the contract; *Hongkong Fir*, 1962 (CA)
6. Conduct which deprives the injured party of a substantial part of the benefit to which he was entitled under the contract; *Decro-Wall*, 1971 (CA)
7. It would be unfair on the injured party to confine him to damages, without the option of terminating; *Decro-Wall*, 1971 (CA)
8. Lord Wilberforce, *The Nanfri* [1979] AC 757 HL at 778 – 779

COMMON LAW: RENUNCIATION

“Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory....

Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform... Whether such conduct is renunciatory depends upon whether the threatened difference in performance is repudiatory.....

An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so to say: ‘I would like to but I cannot’ negatives intent just as much as ‘I will not.’”

Grand China Logistics Holding (Group) Co. Ltd v Spar Shipping AS (Rev 1)

[2016] EWCA Civ 982

COMMON CONTRACTUAL TERMINATION THRESHOLDS

- “*any breach*” or breach of “*any obligation*”
- “*material breach*”
- “*substantial breach*”

“*ANY BREACH*”

- *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 (HL)
- *Rice (Garden Guardian) v Great Yarmouth BC* [2000] 6 WLUK 829 (CA)
- *Peregrine Systems Ltd v Steria Ltd* [2004] EWHC 275 (TCC)
- *Obrascon Huarte Lain SA v AG of Gibraltar* [2014] EWHC 1028 (TCC)
- *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWCH 1765 (TCC)
- *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm)
- *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] SGCA 23

RICE – TERMINATION CLAUSE

Clause 23.2.1:

"if the contractor... commits a breach of any of its obligations under the contract... the Council may ... terminate the contractor's employment under the contract by notice in writing having immediate effect".

[emphasis added]

“ANY BREACH”

- *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 (HL)
- *Rice (Garden Guardian) v Great Yarmouth BC* [2000] 6 WLUK 829 (CA)
- *Peregrine Systems Ltd v Steria Ltd* [2004] EWHC 275 (TCC)
- *Obrascon Huarte Lain SA v AG of Gibraltar* [2014] EWHC 1028 (TCC)
- *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWCH 1765 (TCC)
- *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 31156 (Comm)
- *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] SGCA 23

PEREGRINE SYSTEMS

Clause 7:

“Licensee shall have the right to terminate this Agreement or any Product Schedule(s) if: (i) Peregrine breaches any term of this Agreement and (if it is possible to remedy the breach) fails to remedy that breach within thirty (30) days of written notice of the breach being given to it by Licensee; ...”

[emphasis supplied]

Peregrine Systems Ltd v Steria Ltd [2004] EWHC 275 (TCC)

“*ANY BREACH*”

- *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 (HL)
- *Rice (Garden Guardian) v Great Yarmouth BC* [2000] 6 WLUK 829 (CA)
- *Peregrine Systems Ltd v Steria Ltd* [2004] EWHC 275 (TCC)
- *Obrascon Huarte Lain SA v AG of Gibraltar* [2014] EWHC 1028 (TCC)
- *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWCH 1765 (TCC)
- *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 31156 (Comm)
- *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] SGCA 23

FIDIC (1999) CLAUSE 15.2

15.2 The Employer shall be entitled to terminate the Contract if the Contractor:

*(a) **fails to comply** with Sub-Clause 4.2 [Performance Security] or **with a notice under Sub-Clause 15.1**...*

(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8...or;

(ii) to comply with a notice issued under Sub-Clause 7.5 ... or Sub-Clause 7.6 ... within 28 days after receiving it;

FIDIC (1999) CLAUSE 15.2 (CTD)

...

*In any of these events or circumstances, the **Employer may**, upon giving 14 days' notice to the Contractor, **terminate the Contract** and expel the Contractor from Site.*

FIDIC (1999) CLAUSE 15.1

15.1

*If the Contractor fails to carry out **any obligation under the Contract**, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.*

OBRASCON HUARTE(1)

Akenhead J, paragraphs 319, 323(d):

"Generally in relation to termination for fault clauses, courts have often construed them in a commercial way so as to exclude reliance on trivial breaches. This stems from the often followed approach of Lord Diplock in Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 at 201D. ...

.... determination clauses such as this one will generally be construed as permitting termination for significant or substantial breaches as opposed to trivial, insignificant or insubstantial ones. That accords with commercial common sense."

OBRASCON HUARTE (2)

Akenhead J, paragraph 321:

*"... in construing both Clauses 15.1 and 15.2 of the Contract, a commercially sensible construction is required. The parties cannot sensibly have thought (objectively) that a trivial contractual failure in itself could lead to contractual termination. Thus, there being one day's culpable delay on a 730 day contract or 1m² of defective paintwork out of 10,000m² good paintwork would not, if reasonable and sensible commercial persons had anything to do with it, justify termination **even if the Contractor does not comply with a Clause 15.1 notice**. What is trivial and what is significant or serious will depend on the facts."*

OBRASCON'S ARGUMENT

Where a contract contains a provision such as clause 15.2 which entitles an employer to terminate by reason of

- a failure to remedy a breach of contract which has been the subject of a clause 15.1 notice; or
- a breach of contract of the type identified in clause 15.2(b)-(c)

the breach of contract that is relied upon must be **analogous to a repudiatory breach of contract**

Rice (t/a The Garden Guardian) v Great Yarmouth BC [2003] TCLR 1

Dominion Corporate Trustees Ltd v Debenhams Properties Ltd [2010] EWHC 1193 (Ch)

THREE REASONS WHY NOT (1)

Akenhead J, paragraph 323(a)

One needs to consider each contract, whether it is a lease, leasehold development, construction or other commercial contract, on its own terms.

For instance, if the termination clause allowed for termination “for any breach of contract no matter how minor”, the meaning is clear and would not require some repudiatory breach.”

THREE REASONS WHY NOT (2)

Akenhead J, paragraph 323(b)

*Most of these cases did not involve contracts like the Contract in this case which gives a list of grounds on which termination can take place **which includes one which is not unlike the test for English common law repudiation**, namely Clause 15.2 (b) (where the Contractor “**plainly demonstrates the intention not to continue performance of his obligations under the Contract**”).*

This ground can be and is contractually distinguished from the other grounds, such as Clause 15.2(c)(i) (failure “to proceed with the Works in accordance with Clause 8”, that is in effect often a failure to proceed with “due expedition and without delay”).

*One can ask rhetorically: **why have the ground of the “intention not to continue performance of [contractual] obligations” as well as failure to proceed with due expedition and without delay unless they are or at least can be two separate grounds?***

THREE REASONS WHY NOT (3)

Akenhead J, paragraph 323(c):

The cases relied upon by OHL in this context had a relatively simple right to terminate (for a, or any, breach).

*The Contract here at least for the Clause 15.2(a) basis (failure “to comply...with a notice under Sub-Clause 15.1”) had a **warning mechanism** whereby termination could be avoided by the Contractor's compliance with the Clause 15.1 notice.*

*In that sense, **the Contractor is given the chance to avoid termination whilst the simple termination for any breach can come out of the blue.***

Commercial parties would sensibly understand that this contractual chance is a warning as well to the Contractor and the remedy is in its hands in that sense.

TOPALSSON V ROLLS ROYCE

- *Topalsson GmbH v Rolls-Royce Motor Cars Limited* [2023] EWHC 1765 (TCC), O'Farrell J

- Supply of digital twin software for a new car configurator

- Clause 13.11:

*“If in the reasonable opinion of RRMC the Supplier **fails to perform the Services in accordance with this Agreement** or to deliver Deliverables by the applicable delivery dates or milestone dates or if RRMC rejects the Deliverables, without limitation to any other of its rights or remedies, RRMC shall have the following rights:*

*.... **to terminate this Agreement** in whole or part with immediate effect by giving written notice to the Supplier.”*

CASES DISTINGUISHING *RICE*

- ***BNP Paribas v Wockhardt EU Operations (Swiss) AG*** [2009] EWHC 3116 (Comm)
- ***Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services*** [2009] SGCA 23

“The purchaser may terminate the Agreement without notice should the caterer breach any item of under Clauses 1.4, 2.3 and 2.7.”

“*SUBSTANTIAL BREACH*” (1)

Crane Co v Wittenborg A/S, Unreported,
21 December 1999 (CA), [Clause 15B](#):

*Either party shall be entitled forthwith to terminate this Agreement by written notice to the other if that other party commits **any substantial breach** of any of the provisions of this Agreement and in the case of breach capable of remedy fails to remedy the same within 90 days of receipt of a written notice giving full particulars of the breach and requiring it to be remedied.*

“*SUBSTANTIAL BREACH*” (2)

- ***PBS Energo AS v Bester Generacion UK Ltd*** [2020] EWHC 223 (TCC)
- Clause 16.2(b) – the Contractor may terminate if:
 “the Employer substantially fails to perform his obligations under the Contract”
- Failure to pay on time
- ***Dalkia Utilities Services plc v Celtech International Ltd*** [2006] EWHC 63 (Comm)
Christopher Clarke J

FIDIC 2017 RED BOOK CLAUSE 15.2.1(A)

The Employer shall be entitled to give a Notice (which shall state that it is given under this Sub-Clause 15.2.1) to the Contractor of the Employer's intention to terminate the Contract or, in the case of sub-paragraph (f), (g) or (h) below, a Notice of termination, if the Contractor:

- (a) fails to comply with:
 - (i) a Notice to Correct;
 - (ii) a binding agreement, or final and binding determination, under Sub-Clause 3.7 [Agreement or Determination]; or
 - (iii) a decision of the DAAB under 21.4 [Obtaining DAAB's Decision] (whether binding or final and binding)

and such failure constitutes **a material breach of the Contractor's obligations under the Contract**

“MATERIAL BREACH” CASES

- *National Power plc v United Gas Co Ltd* [1998] 7 WLUK 694
- *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), Christopher Clarke J
- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* (“Medirest”) [2013] EWCA Civ 200

NATIONAL POWER V UNITED GAS (1)

Clause 17.1.2:

"Either party shall be entitled to give notice of termination of this Agreement with immediate effect if:

*... the other Party shall be in **material breach** of any of its obligations hereunder and fails to commence to remedy the same within 7 days after notice requiring such breach to be remedied."*

NATIONAL POWER V UNITED GAS (2)

- *"... a material breach under clause 17.1.1 is one which in all the circumstances is wholly or partly remediable and is or, if not remedied, is likely to become, **serious in the wide sense of having a serious effect** on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms"*

“*MATERIAL BREACH*” CASES

- *National Power plc v United Gas Co Ltd* [1998] 7 WLUK 694
- *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), Christopher Clarke J
- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* (“Medirest”) [2013] EWCA Civ 200

DALKIA V CELTECH(1)

Clause 14.4:

*In the event of the CLIENT **[Celtech]** being in material breach of its obligations to pay the CHARGES the COMPANY **[Dalkia]** shall have the right to terminate this Agreement immediately.*

DALKIA V CELTECH(2)

Christopher Clarke J, at [92]:

"It is common ground that the expression "material breach" does not mean a repudiatory breach. If "material" was synonymous with "repudiatory", the clause would add nothing to Dalkia's remedies at common law.

... Dalkia, submits that "material" covers any breach which is more than trivial or, to put it another way, which is not immaterial.

... Celtech submits that the materiality of the breach must be judged by reference to the nature of the contract. Whilst the breach need not be repudiatory it must be of seriousness sufficient to justify bringing to an end a long term contract involving something of a partnership endeavour between the parties."

DALKIA V CELTECH(3)

"Whether a breach of an agreement is "material" must depend upon all the facts of the particular case, including the terms and duration of the agreement in question, the nature of the breach, and the consequences of the breach."

Dalkia v Celtech, referring to *Glolite Ltd v Jasper Conran Ltd*, 28 January 1998,
The Times, Neuberger J

“*MATERIAL BREACH*” CASES

- *National Power plc v United Gas Co Ltd* [1998] 7 WLUK 694
- *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), Christopher Clarke J
- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* (“*Medirest*”) [2013] EWCA Civ 200

MID ESSEX, JACKSON LJ

- [126] ... *I must consider what “material breach” means in the context of clause 28.4.1 of the conditions. In my view this phrase connotes a breach of contract which is **more than trivial, but need not be repudiatory**. Clause 28.4 has the drastic effect of allowing Medirest to cancel a long term contract on one month’s notice. Having regard to the context of this provision, I think that “material breach” means **a breach which is substantial. The breach must be a serious matter, rather than a matter of little consequence.***

PROVIDENCE V HEXAGON [2026] UKSC 1

2016 Edition of the JCT Standard Form of D&B Contract

8.9.1 If the Employer:

- .1 does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on that amount ... or...
- .3 fails to comply with clause 3.16 **[requirement to comply with CDM Regulations]**

the Contractor may give to the Employer **a notice** specifying the default or defaults (a '**specified**' default or defaults).

PROVIDENCE V HEXAGON (2)

Clause 8.9.2

*If after the Date of Possession ... but before practical completion of the Works the carrying out of the whole or substantially the whole of the uncompleted Works is **suspended** for a continuous period of [2 months] by reason of any impediment, prevention or default, whether by act or omission, by the Employer or any Employer's Person, then, unless it is caused by the negligence or default of the Contractor or any Contractor's Person, the Contractor may give to the Employer **a notice** specifying the event or events (a '**specified**' **suspension event or events**).*

PROVIDENCE V HEXAGON (3)

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

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

- .1 the Employer repeats a specified default;
- .2 a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby,

then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer **terminate** the Contractor's employment under this Contract.

PROVIDENCE V HEXAGON (4)

- Providence = Contractor, Hexagon = Employer
- 15 December 2022: final date for payment of payment notice #27
- 16 December 2022: Contractor serves Clause 8.9.1 default notice
- 29 December 2022: Employer pays payment notice #27 in full
- 17 May 2023: final date for payment of payment notice #32
- 18 May 2023: Contractor serves Clause 8.9.4 termination notice
- 24 May 2023: Employer disputes lawfulness of this notice
- 31 May 2023: Employer “accepts” Contractor’s “repudiation”

PROVIDENCE V HEXAGON (6)

Question for the Supreme Court:

Can the Contractor **terminate** its employment under clause 8.9.4 of the JCT Form in a case where a right to give the further notice referred to in clause 8.9.3 (*i.e.* to **terminate** under clause 8.9.3) has never previously accrued?

THRESHOLDS: THE TAKEAWAYS

- Read the clause in context.
- In the right context, “any” might mean literally “any”.
- “material” or “substantial” might mean repudiatory in one context, but something less in another context.
- Check what other remedies the contract provides for a particular breach.

TWO NOTICE CASES

- *Obrascon Huarte Lain SA v AG for Gibraltar* [2014] EWHC 1028 (TCC)
- *Thomas Barnes & Sons Plc v Blackburn with Darwen BC* [2022] EWHC 2598

OBRASCON HUARTE – NOTICES (1)

Clause 1.3:

"Wherever these Conditions provide for the giving or issuing of consents, determinations, notices and requests, these communications shall be ... delivered to the address ... in Appendix A"

The Appendix A address for OHL was its Madrid office.

OBRASCON HUARTE – NOTICES (2)

- 16 May 2011: 1st Clause 15.1 notice – site office
- 5 July 2011: 2nd Clause 15.1 notice – site office
- 28 July 2011: 1st termination notice – site office
- 3 August 2011: OHL response purporting to accept GOG's repudiation of the contract
- 4 August 2011: 2nd termination notice – Madrid

OBRASCON HUARTE – NOTICES (3)

"367. ... In these circumstances, in effect and in practice the parties operated as if the site office was an appropriate address at which service of notices could be effected."

- But no finding of waiver of Clause 1.3
- ***Bremer HandelsGesellschaft MBH v Vanden*** [1978] 2 Lloyd's Rep 109
- ***Newbold v The Coal Authority*** [2013] EWCA Civ 584

OBRASCON HUARTE – NOTICES (4)

- Termination of the parties' relationship under the terms of such contracts is a serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination.
- Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.
- It is a matter of contractual interpretation:
 - (1) As to what the requirements for the notice are; and
 - (2) Whether each and every specific requirement is an indispensable condition compliance without which the termination cannot be effective.
- That interpretation needs to be tempered by reference to commercial common sense.

THOMAS BARNES (1)



39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • SINGAPORE • DUBAI • KUALA LUMPUR

Essex
CHAMBERS

THOMAS BARNES (2)

- EOTs to 13 April 2015
- Default notices:
 - 1 April 2015
 - 10 April 2015
 - 12 May 2015
- 4 June 2015 (Thursday):
 - 13:02 – termination notice sent by email
 - 13:23 – termination notice handed over on site
- 8 June 2015 (Monday): termination letter sent by post deemed received by Contractor

THOMAS BARNES (3)

Was the impact on C of being removed from site in such circumstances, effectively 2 working days earlier than it could validly have been removed anyway, repudiatory conduct?

No:

- (a) C had effectively ceased all meaningful activity on site and was in no position to complete the works even in accordance with a proper EOT had one been granted;
- (b) C must be taken to have known, objectively, that D was entitled to terminate under the contract; ...

THOMAS BARNES (4)

- (c) C knew that D was intending to terminate the contract by receipt of the termination notice before it was excluded from site;
- (d) C knew from the last section of the termination notice that D was seeking to exclude C from site and to secure it under and in accordance with the termination provisions of the contract;
- (e) C must be taken to have known, objectively, from the top of the termination notice that D intended to and doubtless was in the process of serving the termination notice by the required contractual means;
- (f) there was no adverse impact upon C in being removed from site 2 days earlier than it would have had to leave anyway.

THOMAS BARNES (5)

- [258] The clear impression conveyed by the claimant's solicitors' email in response, stating that the claimant was accepting the alleged wrongful termination as repudiatory, was that the claimant was **very pleased to be given the opportunity to leave site and to be able to advance a case founded upon repudiation**. The claimant **could have, but did not, say that there was no basis for removing it from site other than on two working days written notice**. Looking at it from a wider perspective, the defendant could validly have removed the claimant from site on the Monday following the Thursday. The claimant had no opportunity or inclination or ability to do anything lawful or meaningful to improve its position in the meantime so as to avoid the consequences of what it had already done and omitted to do.

CAKEISM: CONTRACT VS COMMON LAW (1)

- Can the common law right to accept a repudiatory breach co-exist with a contractual termination procedure?
- If a party has a right to terminate under the contract and a right at common law to accept repudiatory breach, can that party exercise those rights at the same time in the alternative?

CONTRACT VS COMMON LAW (2)

JCT (2016) D&B Clause 8

Clause 8.3.1

The provisions of clauses 8.4 to 8.7 are without prejudice to any other rights and remedies of the Employer.

The provisions of clauses 8.9 and 8.10 and (in the case of termination under either of those clauses) the provisions of clause 8.12, are without prejudice to any other rights and remedies of the Contractor.

CONTRACT VS COMMON LAW (3)

- Does a contractual termination procedure exclude the common law right to terminate for repudiatory breach/ renunciation?
 - ***Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern)*** [1974] AC 689
 - ***Dalkia v Celtech*** [2006] EWHC 63 (Comm) (para 21)
 - ***Stocznia Gdynia SA v Gearbulk Holdings Ltd*** (CA) [2009] EWCA Civ 75 [2010] QB 27

CONTRACT VS COMMON LAW (4)

- Contract termination AND acceptance of repudiatory breach?
 - ***Stocznia Gdanska SA v Latvian Shipping Co (No 3)*** [2002] 2 Lloyd's Rep 436
“Where contractual and common law rights overlap, it would be too harsh a doctrine to regard the use of a contractual mechanism as unequivocally ousting the common law mechanism, at any rate against an express reservation of rights.”
 - ***Dalkia v Celtech*** [2006] EWHC 63 (Comm) (Clarke J)
 - Prima facie rely on both
 - Is the exercise of contractual right inconsistent with acceptance of repudiatory breach?
 - ***Stocznia Gdanska v Gearbulk*** [2010] QB 27
 - ***Vivergo Fuels v Redhall*** [2013] EWHC 4030 (TCC)

CONTRACT INFORMS THE COMMON LAW

- *Durkan Estates Ltd v Wallace Estates Ltd* [2026] EWHC 2003 (TCC)
- Para 49: *"Whilst the Building Safety Act context and the RO materially increase the importance of timely performance, they do not of and in themselves alter the test for repudiation nor convert a non-essential time stipulation into a condition."*
- Para 24: *"In the context of the present case, it is relevant in addition to note that a common law right to terminate does not render the termination provisions of the contract irrelevant... The contractual regime may also inform the objective meaning of the alleged contract-breaker's conduct, in that conduct falling within a regime the parties designated as remediable may not readily be characterised as abandonment."* (Citing *BSkyB Limited & Ors v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) & Ors* [2010] EWHC 86 (TCC) at [1363].)

ANY QUESTIONS?



39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • SINGAPORE • DUBAI • KUALA LUMPUR

Essex
CHAMBERS



Seb Oram



William Charlesworth

Overcoming Conditions Precent (When can I get paid?)

AGENDA

1. The law after *King Crude*
2. The construction cases reanalysed
3. Why does it matter?
4. Formulating a case after *King Crude*

THE LAW AFTER *KING CRUDE*

The issue in *King Crude*

"Where an obligation for payment within a contract is contingent upon the fulfilment by one party of a condition, and that party fails in breach of contract to fulfil that condition, is the condition deemed to be fulfilled with the result that the payment sum can be claimed by the other party in debt? Or must the claim be in damages?"

King Crude Carriers SA v. Ridgebury November LLC [2025] 3 WLR 707 (SC), at [12],
per Lords Hamblen and Burrows JJSC

THE LAW AFTER *KING CRUDE*

The decision in *King Crude*

- Three contracts for the sale of tankers
- Buyer to lodge purchase deposit in escrow account, once opened
- Both parties to provide the escrow holder all necessary documentation to open account
- Buyer fails to supply that documentation (so account not opened and deposit unpaid)
- On termination by seller, is it entitled to judgment for the deposits?

THE LAW AFTER *KING CRUDE*

The outcome

- No principle of English law that conditions precedent "*deemed fulfilled*"
- The law operates instead on express and implied contract terms
- The principle that a contracting party cannot benefit from their own wrong, is not of universal application
- Seller's remedy is in damages, not in debt

THE LAW AFTER *KING CRUDE*

The reasoning

- Lord Watson's view (*Mackay v. Dick*) was derived from a civil law doctrine
- Common law courts had struggled to characterise it (a fiction, waiver or estoppel)
- The principle is unworkable in sale of goods law (transfer of property)
- Not easy to identify limits of the principle
- Allowing a debt claim overcompensates the innocent party

THE LAW AFTER *KING CRUDE*

The law now: a matter of implied terms

"The fictional fulfilment of conditions precedent and the fictional non-fulfilment of conditions subsequent may be principles of the civil law, but they are not principles of English law. In this area of the law of contract English law proceeds, in my view, by means of implied terms. If a term can be implied that a party will not do an act that, if done, would prevent the fulfilment of a condition precedent, then the doing of that act will be a breach of contract; if a term can be implied that a party will not do an act that, if done, would cause a condition subsequent to be fulfilled, then the doing of that act will be a breach of contract. But if a suitable term cannot be implied into the contract then in my judgment, the contract will take effect according to its tenor. The condition precedent will fail and the condition subsequent will be fulfilled."

Thompson v ASDA-MFI Group plc [1988] Ch 241 (Ch), per Scott J., at p.266

THE LAW AFTER *KING CRUDE*

Benefiting from one's own wrong (the CoA's view)

"an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract... save insofar as a contrary intention is sufficiently clearly expressed, or is implicit because the nature of the condition or the circumstances of the case make it inappropriate."

King Crude Carriers SA v. Ridgebury November LLC [2025] KB 311 (CA),
per Popplewell L.J., at [85]

THE LAW AFTER *KING CRUDE*

Benefiting from one's own wrong (the SC's view)

- A contractual presumption (not a rule of law)
- Derives from a presumption that it was not the intention of the parties that either should be entitled to rely on their own breach of duty to: (i) bring the contract to an end; or (ii) obtain a benefit under it
- The authorities "*do not support any wider presumption that a party may not take advantage of its own wrong. There are many contractual circumstances in which a party may do so*" (at [78])
- No application to this case

THE CONSTRUCTION CASES REANALYSED

- The construction cases reanalysed (*Panamena, Cory*)
- “*It is possible*” that the same result could have been reached by recognising a claim for damages (at [63])
- “*There is no good reason to strain to uphold a claim for debt where... [it] may exceed the claimant's net loss*” (at [68])

WHY DOES IT MATTER?

- Terms are not easily implied
- Different principles govern damages claims (causation, loss, mitigation, contributory negligence)
- Not all claims are for money (e.g. extensions of time)

WHY DOES IT MATTER?

Types of construction claim governed by conditions precedent

- Payment claims:
 - Payment Mechanisms/Certification
 - upfront/milestone deposits (*which would in turn usually necessitate the opening of an escrow account*).
- Extensions of time
- Project Certification (e.g. *Practical Completion, Certificate of Making Good. Etc.*)
- Obligations relating to subcontracting (e.g. condition precedent of contractor to obtain collateral warranty from sub-contractor)

WHY DOES IT MATTER?

Practical examples

- JCT D&B 2025
 - cl. 4.19–4.20 (Loss & expense – substantive entitlement & notification condition)
- FIDIC RED BOOK 2017
 - cl. 20.2.1 (28-day Notice of Claim – express contractual consequences)
 - cl. 8.5 (EOT entitlement expressly linked to the Clause 20.2 claims procedure and including Employer prevention)

WHY DOES IT MATTER?

Reopening & Revising a Certificate

- The absence of a certificate is not a bar to the right to payment
- Unless provided for otherwise, the decision of the professional in relation to the certificate is not conclusive of the rights of the parties
- If the decision-making body (court or arbitrator) decides that the professional wrongly refuses to issue a certificate, or wrongly omits an amount from a certificate, it can review the position and determine what ought to have been certified, with payment awarded as if the certificate had been issued correctly.
- The case therefore supports the proposition that certification machinery implements the parties' contractual rights; it does not necessarily finally determine them.

Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814,
per Dyson L.J., at [23]

FORMULATING A CASE AFTER *KING CRUDE*

Practical examples

- As necessitated by it being a claim for damages (unless the parties have agreed otherwise) the appropriate remedy will be damages for breach of contract (subject to usual principles of causation, mitigation and remoteness):
 - Breach
 - Causation
 - Duty (or failure) to mitigate
 - Remoteness
 - Loss

FORMULATING A CASE AFTER *KING CRUDE*

Possible amendments to a Contract

- As was observed by the Supreme Court in *King Crude*, it is open to the Parties to include a term in the contract making it clear that *"a condition precedent to debt obligation does not apply where the failure of the condition precedent is caused by the debtors breach"*.
- Otherwise, the Supreme Court confirmed that English courts will not easily read an implied term into a contract to force a debt to be paid if an express condition precedent is missing.
- While the Standard forms already include clauses stating that a party cannot benefit from its own wrong, *King Crude* shows this is insufficient to convert a damages claim into a debt claim. Future contract drafts will likely incorporate express "*deeming*" provisions within the boilerplate text itself (e.g., *"If the Employer fails to issue the certificate within X days, the certificate shall be expressly deemed issued for the purposes of establishing a debt"*).

KEY TAKEAWAYS

- NO AUTOMATIC DEEMED FULFILMENT
 - Prevention does not, by itself, make a condition precedent satisfied.
- COOPERATION STILL MATTERS
 - A party may breach an express or properly implied obligation to cooperate.
- DRAFT AND ADMINISTER CAREFULLY
 - Identify the condition → comply with it → document any prevention → identify the breach → claim the correct remedy.



Santosh Carvalho



Samuel Moss



Anna Moody

5-minute Pitch

Thank You

Wednesday 7 October 2026 • 10.30am – 5.15pm

The Paul Darling Construction Conference 2026