

Construction and Engineering Matters

June 2026



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Contents

RBH Building Contractors Ltd v James:
When can a residential occupier withhold payment?..... 1

Separate and distinct: The relationship between
payment notices and pay less notices examined in
Laing O'Rourke v Shepperton 5

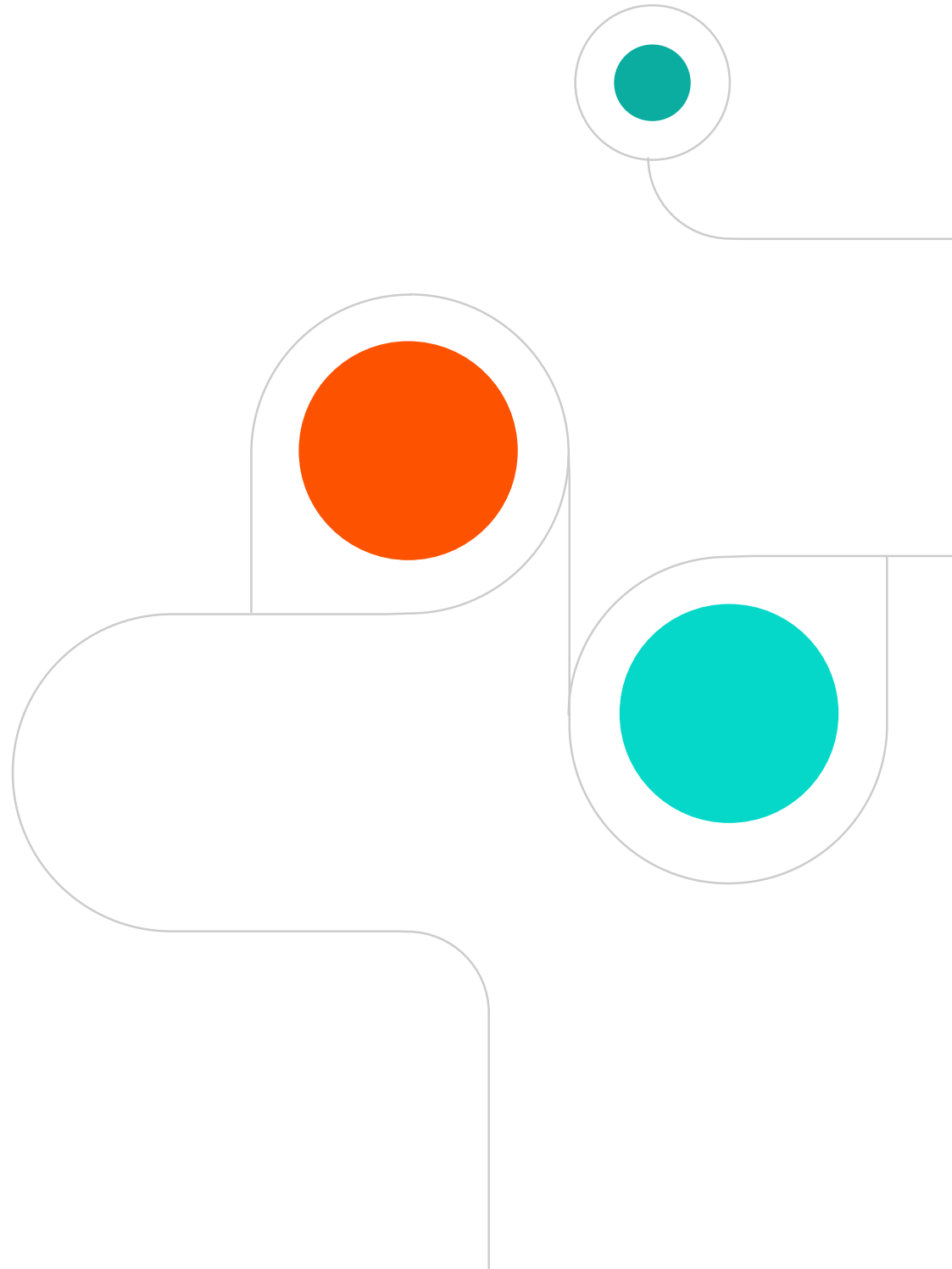
FIDIC: "If X, then Y" – The Privy Council's guidance
on contractual issues 8

In the spotlight: Contract interpretation and extensions
of time under the JCT: Lessons from *Mace v Baltic* 12

Costs penalty in the context of a refusal to mediate:
a consideration of reasonableness in *MJS Projects*
v RPS Consulting 14

Pre-construction services agreement breaches and
liabilities: Where do they go?..... 16

Contacts..... 21



RBH Building Contractors Ltd v James: **When can a residential occupier withhold payment?**

In the case of *RBH Building Contractors Limited v (1) Mr Ashley James; and (2) Mrs Tracy James* [2026] EWCA Civ 511, the Court of Appeal provided useful guidance regarding two aspects of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), the “residential occupier” exception under section 106 of the HGCRA and the validity of a pay less notice.

Background

RBH Building Contractors Limited (RBH), a building contractor, was engaged by Mr Ashley James and Mrs Tracy James (“Mr and Mrs James”) to provide site and project management services in relation to the construction of a large luxury house on a site at Ferndown, Saunton, North Devon. The contract made between the parties was oral, and was later modified so that RBH would be reimbursed costs of procuring subcontractors and materials.

Following disputes, RBH ceased work in about April 2024, having been paid over £1.3 million and the works were left incomplete. The remaining works were completed by others.

On 18 November 2024, RBH served an application for payment in the sum of £663,016.16. The application attached a spreadsheet that ran to 10 pages and 527-line items, which were individual invoices.

On 27 November 2024, Mr and Mrs James issued a “Notice of intention to withhold payment” in which they stated: “We intend to withhold payment of £663,016.16 and accordingly intend to make payment of £0”. The notice contained 11 bullet points disputing the various elements of RBH’s payment application.

RBH commenced a “smash and grab” adjudication on the basis that Mr and Mrs James’ withholding notice was an invalid pay less notice. However, Mr and Mrs James argued that the adjudicator had no jurisdiction because they were residential occupiers pursuant to section 106 of the HGCRA, therefore the HGCRA and the statutory Scheme for Construction Contracts did not apply (Scheme). The adjudicator rejected the argument and found that Mr and Mrs James’ withholding notice was not a valid pay less notice and ordered payment of £663,016.16 to RBH.

Mr and Mrs James did not comply with the adjudicator’s decision. Accordingly, RBH commenced enforcement proceedings in the Technology and Construction Court (TCC) and sought summary judgment. In the same proceedings, Mr and Mrs James sought a declaration that their withholding notice was a valid pay less notice.

At first instance, the TCC did not enforce the adjudicator’s decision on the basis that the judge considered Mr and Mrs James had a real prospect of establishing the residential occupier exemption and found that the withholding notice was a valid pay less notice.

The issues on appeal

RBH appealed the TCC’s decision. The Court of Appeal was asked to consider two issues:

1. Whether the judge was wrong in law not to conclude Mr and Mrs James were not residential occupiers within the meaning of section 106 of the HGCRA. RBH also claimed that the judge was wrong to conclude that it was arguable that the adjudicator did not have the necessary jurisdiction.
2. Mr and Mrs James’ withholding notice was not a pay less notice because it did not specify the sum that the payer considered to be due, and/or the basis on which that sum was calculated. Therefore, it was not in accordance with section 111 (4) of the HGCRA.



Ground one: The residential occupier exception

Section 106 (1) (a) of the HGCRRA states that parts of the act do not apply to a construction contract with a residential occupier.

Mr and Mrs James argued that they had intended to occupy the property at the time the contract with RBH was made but intended to rent it out "Airbnb style" during holiday periods because that was necessary to repay the development loan.

Lord Justice Coulson held that the following principles should be applied when determining whether a person intends to occupy the property as their residence for the purposes of section 106 of the HGCRRA:

- The burden of proof must always be on the party seeking to trigger the statutory exception.
- The determination of intention to occupy is a matter of fact. It may be capable of being determined on a summary basis because the threshold is not high, albeit it will not be appropriate if there is credible evidence both ways. The fact that the issue arises in the context of adjudication enforcement makes no difference as there is no overriding presumption in favour of enforcement if it is realistically arguable that the adjudicator did not have the necessary jurisdiction.
- The determination must be made as to the existence (or otherwise) of the intention to occupy at the time the contract was made. Evidence of intention both before and after the contract was made may also be relevant if only to test the accuracy of the court's determination of the position at the time of the contract.
- There are two elements to the test. The first is whether there is a *bona fide* intention to occupy in the future (this being largely subjective and the weight to be given depends on the individual case – contemporaneous evidence viewed objectively may be of particular value); the second element of the test is whether the person who wishes to occupy has a realistic chance, rather than a fanciful prospect of bringing that occupation about.
- The intention to occupy in order to trigger section 106 must have a temporal aspect. It cannot be sufficient for the employer to intend to occupy the property after letting out for 20 years. There was also a suggestion that an intention to occupy within a reasonable time after the completion of the works would be sufficient.

The Court of Appeal held that the judge at first instance was right to conclude that the evidence provided by Mr and Mrs James was sufficient to meet the relatively low threshold of demonstrating a realistic prospect of success to resist enforcement of the adjudicator's decision on the basis of the residential occupier defence. Mr and Mrs James adduced evidence supporting their intention to occupy the property as their main residence. Lord Justice Coulson noted that their purchase of the site in 2019 represented the culmination of several years of planning, following their decision to relocate from Essex to Devon. While they also incurred the higher rate of stamp duty applicable to second residential properties, in accordance with their plan, they subsequently sold their house in Essex and moved to Devon. Furthermore, during the construction works, Mr and Mrs James resided in a caravan on the site, registered with a local general practitioner (GP) and were entered on the electoral roll. The property itself had bespoke design features consistent with an intention to make it their long-term home.

RBH's principal argument was in relation to the terms of a development loan, which included an undertaking that the property would not be used as a dwelling and under which the property was referred to as the "development property". The loan was also only to be used for business purposes.

However, Lord Justice Coulson held that, although the development loan and the undertakings pointed clearly in the opposite direction, RBH had not been aware of the terms of the development loan until part way through the enforcement proceedings. Accordingly, he did not accept, either as a matter of law or fact, that they could override or render nugatory the other evidence referred to. RBH's argument that an intention to rent out the property on an Airbnb basis for approximately 13 weeks (or 25%) each year defeated the residential occupier defence, was also rejected.

Ground two: The pay less notice

Notwithstanding that the appeal on ground one failed, which made the appeal on ground two academic, the court went on to consider the issues raised in respect of the pay less notice, acknowledging the fact that they might have wider importance.

By way of reminder, section 111 (4) of the HGCRRA requires that the pay less notice must specify: (a) the sum that the payer considers to be due on the date the notice is served, and (b) the basis on which that sum is calculated.

RBH argued:

- Mr and Mrs James' withholding notice did not set out the sum they considered to be due.
- It did not provide an adequate basis for saying why the sum payable should be £0. Several bullet points did not say what sum Mr and Mrs James accepted was due.
- Where the bullet points contained figures, they totalled approximately £295,000, which was less than half the sum claimed.
- In paragraphs 79–85 of the judgement, Lord Justice Coulson, summarised principles from relevant authorities relating to pay less notices:
 - First, what matters is not now how the recipient of the notice in fact understood it. The question is how a reasonable recipient would have understood the notice.
 - The notice must be construed in context. In this way the reasonable recipient will, among other things, be credited with knowledge of the relevant contract. If the notice in question is a pay less notice, the recipient will be taken to know the detail of its own payment notice to which the pay less notice is a response.
 - A payment notice or a pay less notice must comply with the contractual requirements or, in this case, the statutory Scheme. The notice must clearly set out the sum that is due and/or the sum to be paid (even if it is £0), and the basis on which that sum is calculated. Beyond that, it is a question of fact and degree. The court will be "unimpressed by textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis".
- The courts recognise that there are particularly adverse consequences for an employer's failures, and this is relevant to the test of the reasonable recipient.
- There is no requirement for a valid notice to have a particular title, or to make specific reference to a relevant contract clause or term of the Scheme, because the question is whether, viewed objectively, the notice had the requisite intention to fulfil that function.
- One way of testing whether a pay less notice is valid is whether it provides an adequate agenda for adjudication as to the true value of the works, it being insufficient for the notice merely to identify a figure without more detail of the basis.
- The content of payment notices and pay less notices should be considered in a common-sense way. They should not be allowed to become tick box exercises, or traps for the unwary.

RBH argued that the total sum of the 11 bullet points disputed was not clearly stated in the letter and there was a mismatch between the £0 stated and the total of the disputed items. The total meant that Mr and Mrs James were saying that RBH actually owed them £600,000, but that sum was not stated in the letter. In addition, RBH noted that the language used at the start of the "withholding notice" was a reference to relevant terminology in the earlier version of the HGCRRA, before it subsequently updated to "pay less notices".

In response, Mr and Mrs James said that the pay less notice was clearly just that. The words at the beginning of the notice were clear, notifying RBH of their intention to withhold payment of the sum claimed.

The Court of Appeal upheld the findings of the TCC that Mr and Mrs James' withholding notice was a pay less notice. Lord Justice Coulson also observed that RBH's payment application was an unsatisfactory document. RBH stated that it itemised all the work done and that it was a valuation of all the works. However, it was just a list of invoices that did not indicate the work done other than in very general terms, for example, "groundworks" and others just gave a name of a subcontractor. It failed to explain why the sums were due, and owing and the recipient had to do all the work in trying to identify what was due and why – particularly in circumstances where the net sum of £660,000 odd said to be due had apparently not been the subject of previous invoices and was not separately explained. Lord Justice Coulson said that if it was a payment notice under section 106 of the HGCRRA, it barely limped over the threshold, and Mr and Mrs James' pay less notice had to be considered against that background.

Moreover, the withholding notice stated that Mr and Mrs James intended to withhold payment of the entirety of the sum claimed. It could not have been any clearer that they were not paying any part of that sum. As to the letter referring to "withholding" as opposed to not paying the sum claimed, Lord Justice Coulson, stated there was nothing in the point when considering the validity under the HGCRRA – titles and references to particular clauses or functions do not matter as mentioned above. It is all about substance. He confirmed that the only other thing that the notice needed to do, in accordance with the authorities cited, which led to the points above is "to make it tolerably clear on the figures why Mr and Mrs James said nothing was due to RBH" and he went on to conclude that this is exactly what the notice did.

Conclusion

The decision provides welcome appellate clarity on two issues, one of which at least often arises in adjudications and at the enforcement stage, but yet rarely reaches the Court of Appeal. On the residential occupier exemption, the court highlighted that the issue is highly fact specific and adopting the first instance reasoning, renting out the property Airbnb style in the circumstances here for 25% of the year did not forfeit their right to be called residential occupiers.

As for pay less notices, the court reaffirmed a substance over form approach. A pay less notice is valid where it makes tolerably clear to a reasonable recipient with knowledge of the works, the sum considered due and the basis for it.

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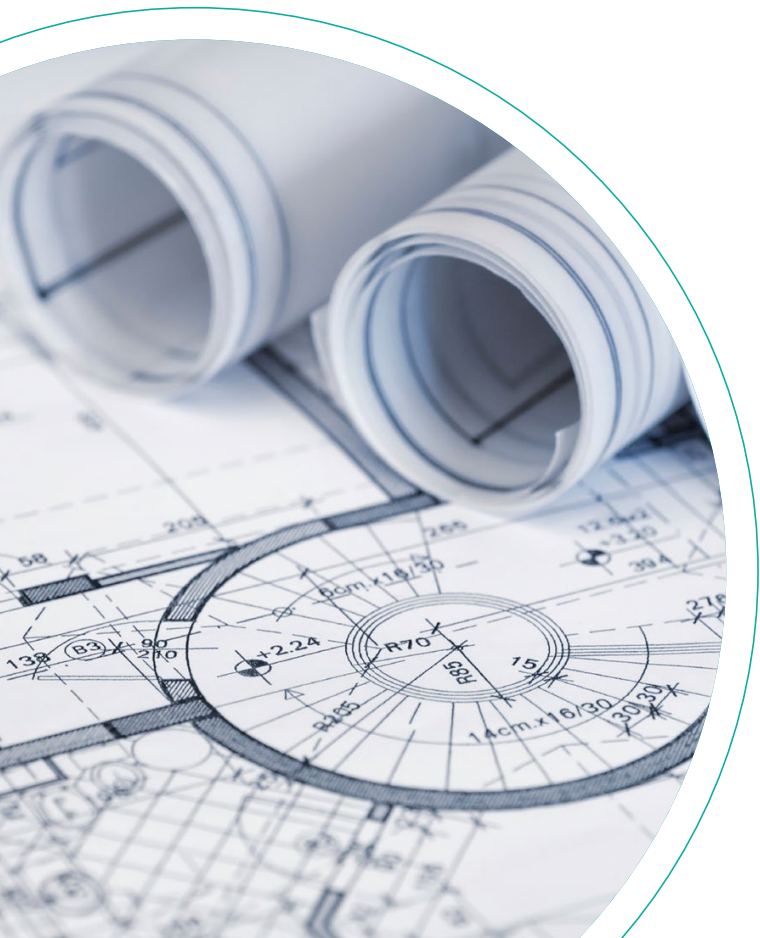
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Separate and distinct: The relationship between payment notices and pay less notices examined in *Laing O'Rourke v Shepperton*

The recent judgment of Simon Lofthouse KC, sitting as a deputy High Court judge in the Technology and Construction Court in *Laing O'Rourke Delivery Ltd (LOR) v Shepperton Studios Ltd (Shepperton) [2026] EWHC 612 (TCC)*, held that a defective payment notice did not contaminate nor invalidate Shepperton's pay less notice.



Background

Shepperton engaged LOR under a building contract. Pursuant to an adjudicator's decision provided by Mr. Mark Entwistle, LOR was awarded £5,627,275.11 plus value-added tax (VAT) by way of a notified sum claim, as Shepperton was deemed to have failed to issue a valid payment notice and/or pay less notice (the Decision).

Shepperton failed to pay the award and therefore LOR sought to enforce the Decision. Shepperton advanced various defences, which can be summarised as follows:

1. Its payment notice and pay less notice were valid
2. Even if the payment notice was not valid, it did not undermine the validity of the pay less notice, as this stated an intention to pay less than the notified sum of £5,627,275.11
3. There had been five previous substantive adjudication decisions that valued the account and meant that LOR's technical claim for a notified sum of £5,627,275.11 should either fail, or any financial outcome should be limited in light of the outcome of those prior adjudications
4. LOR was insolvent and there should be a stay on any sums payable

The judgment

Validity of the payment notice

When considering the validity of the payment notice, Simon Lofthouse KC referred to clause 4.7.5 of the contract, which outlined the requirement of a payment notice and provided that:

"Not later than 5 days after each due date the Employer shall give a notice (a 'Payment Notice') to the Contractor, stating the sum that he considers to be or have been due to the Contractor at the due date, calculated in accordance with clause... 4.13 and clause 4.14, and the basis on which that sum has been calculated". (Emphasis added).

The judge went on to observe that "the Gross Valuation [in the payment notice] was neither broken down, nor was there reference to any other document in which it could be seen how that sum was calculated".

This was enough to invalidate the payment notice. Shepperton's suggestion that a breakdown of the gross sum had been provided on Excel spreadsheets circulated to LOR in prior application cycles did not remedy this deficiency, as there was no express reference to these documents in the payment notice.

Validity of the pay less notice

Simon Lofthouse KC then went on to assess the validity of the pay less notice. LOR accepted that the “sums to be deducted [were] sufficiently detailed” in the pay less notice, but argued that “the pay less notice starts off with the wrong figure, it ends with the wrong balance due and as such, the ability to make the deductions is lost as the notice is invalid”. In other words, as the payment notice failed to outline how the gross valuation was arrived at, a pay less notice referencing this figure was invalid.

In assessing the payment mechanism of the contract, and the “commercial purpose behind the requirement for detail as to how sums are calculated”, the judge determined that as the payment notice was invalid, LOR had a right to payment of the amount outlined in the payment application subject to a valid pay less notice being issued.

He went on to state that the pay less notice contained the information outlining the details that Shepperton sought to deduct, and that he did “not consider that the ability to deduct falls away simply because the mathematical calculation of which those deductions are part commences with the incorrect figure”.

Consequently, the judge deemed the pay less notice to be valid and determined LOR was entitled to £3,198,660.64 plus VAT, being the difference between the sum applied of £5,627,275.11 and the sums detailed in the pay less notice, totalling £2,428,614.47.

The approach of the court in treating the payment notice and pay less notice as separate and distinct documents aligns with the previous guidance of Davies J in *Lidl Great Britain Limited v Closed Circuit Cooling Limited t/a 3CL* [2023] EWHC 2243 (TCC), in which he confirmed, pursuant to the new payment provisions under Section 111 of the Housing Grants, Construction and Regeneration Act 1996 (the Act), as amended by the Scheme for Construction Contracts, that a notice cannot act as both a payment notice and pay less notice.

Subject to the terms of any contract, the position therefore appears to be that a payment notice and pay less notice cannot be the same document, and must be viewed independently of one another. Moreover, a deficiency in one notice does not necessarily contaminate or invalidate the other.

Shepperton's other defences

Simon Lofthouse KC then turned to Shepperton's other defences. He first considered the argument that prior adjudications provided Shepperton with a substantive defence to the notified sum claim. This argument was rejected as having the same effect as a set off without the test outlined in *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC) being satisfied, namely: (i) whether both decisions are valid; (ii) that both decisions could be enforced or given effect to; (iii) that separate proceedings have been commenced to enforce both decisions and (iv) the court will have discretion as to how any set off may apply. Furthermore, paragraph 9.4.5 of the TCC guide, which permits set-off in certain circumstances where Part 8 proceedings are on foot with adjudication enforcement proceedings, did not assist in the current circumstances. Such an argument, if successful, would have undermined the “pay now, argue later” line of reasoning.

Shepperton's second argument was that a stay of execution should apply to any judgment given LOR's insolvency in light of the principles set out in *Wimbledon v Vago* [2005] EWHC 1086 (TCC). Shepperton's position was that “having regard to the true value of LOR's works and the sums due by reason of the other adjudications LOR in its words “has already had all of the money out of the building contract””.

Simon Lofthouse KC determined that the existence of a parent company guarantee (PCG) from Laing O'Rourke Corporation Ltd governed by English law displaced the entitlement to a stay under *Wimbledon*. The PCG “irrevocably and unconditionally” guaranteed LOR's obligations under the building contract and provided Shepperton with adequate protection.



Practical takeaways

This judgment is one that stakeholders in construction and engineering projects should pay close attention to because it:

1. Confirms how the courts will assess the payment notice requirements of the Act. It is important that parties get their notices right to ensure that technical arguments are not raised to gain a “windfall”. Parties should ensure all supporting documents are provided with their notices as an example.
2. Clarifies that technical arguments relating to the interplay between payment notices and pay less notices will not undermine a valid notice.
3. Importantly, reinforces the court’s robust approach to adjudication enforcement business. Arguments relating to insolvency or true valuation of works will likely find short shrift with the court.

Our expert construction and engineering lawyers regularly advise on the drafting of complex contracts alongside providing comprehensive project counsel support, and are well-versed in advising on matters of contract interpretation and dispute resolution.

Please contact us if you would like to discuss anything raised in this article.

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Thanks to Sammy El Dabba, trainee solicitor in the Construction & Engineering team in our Manchester office, for his contribution to this article.



FIDIC: “If X, then Y” – The Privy Council’s guidance on contractual issues

Sir Peter Coulson sitting in the Privy Council recently provided the leading judgment on behalf of the Board in *Uniform Building Contractors Ltd v Water and Sewerage Authority of Trinidad and Tobago* [2026] UKPC 2.

The appeal concerned the proper characterisation of alleged variations, the limits of an engineer’s authority and the operation of clause 20.1 as a condition precedent to entitlement under a 1999 *Fédération Internationale Des Ingénieurs-Conseils* (FIDIC) Yellow Book form of design and building construction contract.

The judgment is significant for those construction and engineering projects that are using the FIDIC form contract. We regularly see and advise on such projects across the globe and, particularly, in the Middle East. The key principles explored in this judgment also apply to other forms of contract.

A. Background and facts

The dispute arose out of a pipelaying contract dated 23 May 2007, made between the appellant, the Water and Sewerage Authority of Trinidad and Tobago (WASA), and the respondent, Uniform Building Contractors Ltd (UBC) (the “Contract”).

Pursuant to the contract, UBC agreed to design, supply and install a total of 28.43 km of pipeline from Rio Claro to Mayaro. The contract comprised two separate packages: package 1 relating to 14.4 km of pipeline in the sum of TT\$15,928,924, and package 2 relating to 14.03 km of pipeline in the sum of TT\$12,642,701.50.

Disputes arose between the parties, and the two packages were the subject of termination notices from WASA to UBC dated 28 May and 4 June 2009. UBC commenced proceedings against WASA in May 2013, almost at the end of the applicable four-year limitation period. WASA counterclaimed.

Before Kangaloo J, the trial judge in the High Court, both UBC’s claim and WASA’s counterclaim were dismissed. UBC appealed the trial judge’s decision. WASA did not appeal the dismissal of the counterclaim. The Trinidad and Tobago Court of Appeal allowed UBC’s appeal in the sum of TT\$13,915,215.46, together with interest and costs.

The claim before the Court of Appeal and therefore the Privy Council was limited to four items of work, which UBC said they were instructed to carry out by the engineer as variations, and which entitled them to additional payment under the Contract.

Those four items of work were: (i) laying pipework in the roadway, as opposed to the verges, which required the cutting of the asphalt surface; (ii) the removal of excavated material deemed to be unsuitable as backfill; and consequently (iii) the importation of suitable backfill and (iv) night work.

It was WASA’s case that: (i) these were not variations under the Contract; and that, even if they were, (ii) UBC failed to comply with the procedural requirements of the Contract (at least one of which was unarguably a condition precedent), so was not entitled to any additional sums in any event.



B. The judgment

(i) Were the four work items variations under the Contract?

Sir Peter Coulson rejected UBC's "bold" arguments that it should not be bound by the terms of the Contract, and discussed the Court of Appeal's failure to refer to the terms of the Contract when determining whether the four work items were variations under the Contract. In doing so, he stated:

"Whether or not an item of work is a variation is primarily a function of the contract terms, so the absence of contractual analysis was, with respect, a fundamental flaw in their reasoning".

In this context, Sir Peter Coulson explored the meaning of a variation under the Contract as defined in sub-clause 1.1.6.9 as: "any change to the Employer's Requirements, or the Works which is instructed or approved as a variation under clause 13"¹. In doing so, he assessed the provisions of the Contract as against each work item, which UBC alleged was a variation under the Contract.

The board's ultimate conclusion was that: "none of the four items were variations as defined". The reasoning being that:

1. The Contract was a lump sum contract pursuant to which UBC took on full construction and design responsibility for the works, and therefore the work items should have been included in UBC's lump sum price at the outset
2. The following:
 - a. **Item 1: Laying pipework in the roadway, as opposed to the verges, which required the cutting of the asphalt surface** – UBC's preliminary design indicated that the pipework should have been in the verges, and it was subsequently determined that the design would have to go in the roadway. This was a change between preliminary and final design, which was a UBC risk under the Contract. Furthermore, the specification and bill of quantities forming part of the Contract stated that the laying of pipework under the road, requiring the cutting of asphalt and excavation and reinstatement of the roadway was always required as part of UBC's scope.
 - b. **Item 2: Removal of excavated material deemed to be unsuitable as backfill and Item 3: The importation of suitable backfill** – Again, the board considered the specification and bill of quantities to envisage that "imported material may need to be imported for backfilling purposes and that material excavated from the tranches would not necessarily be suitable for backfill", so these activities were always part of UBC's scope.
 - c. **Item 4: Night work** – The Board did not agree with UBC's position for the following reasoning: (i) UBC indicated that the basis of the claims was that the Contract referenced "dayworks". It was held that this reference "has nothing to do with when the work is carried out", but rather refers to rates for "material, plant and labour", which was agreed in advance in the event of the urgent instruction or when other means of pricing was not possible; (ii) if the nightwork claim related to work items 1 to 3, as these were not variations, the night work claim could not be a variation itself; and, in any event, (iii) the Contract provided for nightwork so these cost would have always been a UBC risk.
 - d. The contemporaneous documents associated with the claims for items 1 to 4 as variations under the Contract were "unclear and tentative", which supported the view that the claims were "not seen at the time as being, legitimate claims for variations".

UBC's claim failed given the Board's finding on this point alone, however, the Board went on to consider other matters, which are important for practitioners and stakeholders in construction and engineering projects.

¹ Both "Employer's Requirements" and "Works" were defined terms in the Contract.

ii. Was clause 20.1 a condition precedent to UBC's entitlement?

Sir Peter Coulson discussed the variation procedure under the Contract contained in clauses 13.1 to 13.3, and explained that clause 13.3 indicates that, regardless of whether the alleged variation arose under clauses 13.1 or 13.2, the process envisaged a determination by the engineer under sub-clause 3.5. Furthermore, clause 3.6 indicated that a warning of future cost increases was required.

An engineer's determination under clause 3.5 would be the basis for UBC's entitlement under the Contract. If no determination was provided by the engineer after UBC's clause 3.6 notice and request for determination was issued, UBC could then make a claim under clause 20.1.

Aside from the fact that UBC never provided a clause 3.6 notice, or a request for determination, the Board determined that UBC did not provide a claim under clause 20.1, which was "fatal" to its claim. The reasoning for this is outlined below:

"The language of clause 20.1 of the FIDIC conditions is in classic condition precedent form: "if the Contractor fails to give notice within 28 days of it becoming apparent that a claim had arisen...the Contractor shall not be entitled to additional payment and the Employer shall be discharged of any further liability..." (Emphasis added).

In reaching this conclusion, Sir Peter Coulson made the following notable observations relating to the interpretation of condition precedents:

1. Firstly, drawing on key judgments on condition precedents, which included:
 - a. His recent judgment in the England and Wales Court of Appeal of *Tata Consultancy Services Ltd v Disclosure and Barring Service* [2025] EWCA Civ 380; [2025] 4 WLR 42, at paragraph 26, which confirmed that "Clauses which require a specified provision to be fulfilled before a corresponding right or obligation arises are commonly construed as conditions precedent".²
 - b. *Y: Scottish Power UK plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm); [2016] 1 All ER (Comm) 536, paragraph 206, which provided "The link between the two contractual steps must usually be expressed in terms of obligation, that X must necessarily lead to".
2. Secondly, that clause 20.1 of other FIDIC form contracts including FIDIC 2017 Form is a condition precedent.
3. Thirdly, in considering the Board's judgment in *NH International (Caribbean) Ltd v National Insurance Property Development Co Ltd* [2015] UKPC 37; [2015] BLR 667, which concerned Employer's claims under clause 2.5 of the FIDIC 1999 Form (Red Book), that the wording of that clause was a condition precedent to entitlement and the language of that clause was similar to the language contained in clause 20.1.
4. Fourthly, when dismissing UBC's reliance on *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2, which concerned the requirement for written instructions. It was stated that the clause in this case did not have the "if X, then Y" formulation contained in clause 20.1.
5. Finally, in dismissing UBC's reliance on *Gordon Winter Co Ltd v NH International (Caribbean) Ltd* [2025] UKPC 52, which focussed on clause 12.3 of the FIDIC 1999 Form (Silver Book) and concerned an argument that the absence of a claim under clause 20.1 was not fatal to a claim for quantum meruit. It was confirmed that the *Gordon Winter* case concerned a remeasurement contract with the scheme for repayment different to a lump sum contract, and it was accepted by the parties in that case that there was a variation, and estoppel and waiver was made out.

² Also refer to *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109.



iii. The application of waiver, estoppel fairness

This element of UBC's claim, which found favour with the Court of Appeal, was that despite its failure to comply with the requirements of clause 20.1, it would be unfair or inequitable for the Employer to have the benefit of additional works without paying for them. Such an argument was based on the principle of waiver and estoppel.

The Board rejected this argument for the following reasons:

- 1. Need to plead** – UBC failed to plead this issue before the trial judge in the High Court and only raised this issue in the Court of Appeal which, at that stage was “much too late”. In drawing on Lord Sumption's Judgment in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119, the only way in which parties can avoid the impact of failing to comply with contractual provisions to entitlement is to plead an estoppel defence.
- 2. Limits on the engineer's authority** – clause 3.1 of the Contract states, the “engineer shall have no authority to amend the Contract”. The Board held that as a consequence, Mr. Paul, the engineer and not the employer “had no authority to vary or waive” the terms of the Contract, so there would be no basis for a waiver and estoppel based upon Mr. Paul's action or inaction.
- 3. Only parties can amend a Contract** – WASA had very limited involvement with the project. Mr. Paul's action or inaction could not have amended the Contract in WASA's absence.

C. Practical takeaways

This judgment identifies several key matters that parties involved in construction and engineering projects will regularly encounter and should be cognisant of on their projects. These are relevant to day-to-day contract administration and when matters become more contentious.

Parties should ensure that:

- 1.** They appreciate what their contract states in terms of design and construction responsibility, alongside how the mechanisms for entitlement under the contract operate. This includes an appreciation of the need for strict compliance with condition precedents to entitlement – beware of the “if X, then Y” formulation.
- 2.** The contract terms and the commercial or technical documents, such as any specification or bill of quantities, are consulted to determine whether a claim may have merit.
- 3.** Any project documentation, correspondence and other contemporaneous documents clearly record the nature, extent and scope of claims and the reason for the same. This should clearly include any arguments relating to estoppel and waiver.
- 4.** When engaging with third parties such an engineer, project manager or employer's agent, care is taken if the contract differentiates between their determinations, action or inaction and those of the Employer.

Our expert construction and engineering lawyers regularly advise on the drafting of complex contracts alongside providing comprehensive project counsel support, and are well-versed in advising on matters of contract interpretation and dispute resolution.

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In the spotlight: Contract interpretation and extensions of time under the JCT: Lessons from *Mace v Baltic*

The recent judgment of Adrian Williamson KC sitting as a deputy judge of the High Court in the Technology and Construction Court in *Mace Construct Ltd v Baltic Investment Holdings Ltd* [2026] EWHC 976 (TCC) is one that provides further guidance on how contracts should be interpreted, but also raises an important point concerning how an adjudicator or court should assess the validity of a previously awarded extension of time.

Background

Baltic Investment Holdings Limited (Baltic) engaged Mace Construct Limited (Mace) under an amended Joint Contracts Tribunal (JCT) design and build contract 2016 form dated 15 December 2023 (the Contract).

The employer's agent granted an extension of time under the Contract of seven weeks and five days. Baltic successfully challenged this extension of time in an adjudication, and the adjudicator, Mr. Nigel Davies, determined Mace was not entitled to an extension of time.

Mace issued Part 8 proceedings seeking seven declarations, which went to issues between the parties.

The judgment

Adrian Williamson KC in his judgment dealt with Mace's various declarations in turn, however for the purposes of this article, we focus on the declarations set out below.

Contractual interpretation

The courts have recently dealt with a number of cases that have concerned how commercial documents, including schedules of clarification in the context of existing structures and responsibility for the same, and specifications and bills of quantities in the context of assessing variations under a contract (*Privy Council in Uniform Building Contractors Ltd v Water and Sewerage Authority of Trinidad and Tobago* [2026] UKPC 2), should be viewed and interpreted as part of the wider contractual matrix.

Mace's declarations related to the relevance of tender clarifications and a schedule of derogations in the context of Mace's design responsibility and obligations in the context of planning. In assessing these declarations, Adrian Williamson KC explored the relevant principles of contractual interpretation, which were that:

1. The meaning of the contract is to be determined at the time of contract
2. Interpretation in this context is a matter of ascertaining the meaning of the language used, and the objective intention of the parties as a matter of the construction of the contract as a whole, which is a unitary exercise and an iterative process: see e.g. *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [10]-[12] (Lord Hodge)
3. The court should give effect to all parts of the contract where possible, with no part being treated as inoperative or surplus: see Sir Kim Lewison's *Interpretation of Contracts* (8th ed), Chapter 7, Section 3
4. The exercise starts from the presumption, given that the parties have included in an operative part of a formal agreement a provision or provisions, that they intended what was incorporated to have some effect on the parties' rights and obligations: see *Dwr Cymru Cyfyngedig v Corus UK Ltd* [2007] EWCA Civ 285 at [13] (Moore-Bick LJ); and *PBS Energo AS v Bester Generacion UK Ltd* [2020] EWHC 223 (TCC) at [99]-[104] (Cockerill J)
5. The court should give greater weight to special conditions than to standard form provisions: see *Interpretation of Contracts*, Chapter 7, Section 4

The judge went on to outline the following from Sir Kim Lewison:

"The interpretation of a document as a whole necessarily involves giving effect to each part of it in relation to all other parts of it. Accordingly, as a corollary of the principle that a document must be interpreted as a whole, effect must be given to each part of the document. This in turn means that in general each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the document".

In applying these principles, Adrian Williamson KC determined that, taken in the round, "effect should be given to the whole of the Contract, including all the provisions of the Schedule of Derogations ...". The effect was that Mace's design responsibility should be considered against the relevant limitations contained in that document, but Adrian Williamson KC stopped short of granting Mace's declaration in respect of planning.

Revisions of extensions of time

This point was described as “novel” by the judge. Namely, since an extension of time assessment exercise to be performed under clause 2.25.1 is prospective, did an adjudicator and/or the court have the power to fix a completion date which was earlier than that which had previously been fixed by the employer’s agent?

Adrian Williamson KC determined that *“The Adjudicator can **open up, revise and review** the extension of time granted under clause 2.25.1, but, in so doing, he is to carry out the task which that clause requires, i.e. **a prospective assessment in response to the notice and particulars submitted under clause 2.24.**”* (Emphasis added).

This decision sits interestingly alongside the Northern Irish case of *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017] NIQB 43*, which confirmed a retrospective approach should be adopted in respect of assessing compensation events under New Engineering Contract (NEC) form contracts.

Time will tell as to how this Judgment impacts the approach adopted to delay analysis under the JCT.

Practical takeaways

This judgment identifies several key matters that parties involved in construction and engineering projects will regularly encounter and should be cognisant of on their projects.

Parties should:

1. Ensure that they review and consider the contract terms, including any commercial and technical documents as a whole, including schedules of derogations, to determine the scope of each other’s obligations.
2. Be alive to the fact that if an extension of time is granted on an interim basis, this does not mean the parties are bound by that assessment. A party may challenge that assessment, however, the approach any court or adjudicator may adopt in assessing entitlement will likely be subject to further analysis in the future.
3. Ensure that, as an extension of time may be subject to scrutiny in the future, they maintain comprehensive contemporaneous project records to support their position if challenged in the future.



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Thanks to Madihah Shah, paralegal in the Construction & Engineering team in our Manchester office, for her contribution to this article.

Costs penalty in the context of a refusal to mediate: a consideration of reasonableness in *MJS Projects v RPS Consulting*

The recent judgment of Her Honour Judge Kelly sitting in the Technology and Construction Court (TCC) in *MJS Projects (March) Limited v RPS Consulting Services Limited* [2026] EWHC 884 (TCC) considered when it may be appropriate to depart from the usual costs order (i.e., costs follow the event) following litigation in the context of a party refusing to mediate and last-minute change of expert evidence. The Court also considers indemnity costs in this same context.

The TCC held that neither a successful defendant's refusal to mediate nor a last-minute change in its expert's evidence warranted an exception from the usual costs order (i.e., costs follow the event).

Background

MJS (the Claimant) alleged professional negligence for the design and construction of a container park that resulted in cracking on site. RPS (the Defendant) denied this, arguing that damage was caused by defective workmanship.

This claim failed primarily due to the Court's criticism of and lack of confidence in MJS's expert evidence.

The recent judgment dealt with costs and consequential issues. MJS submitted that although the usual position is that there should be no such order in this circumstance for two reasons:

1. RPS' unreasonable refusal to mediate; and
2. A last-minute change in RPS' expert's evidence in relation to a particular element of the design at issue, which was material to the outcome of the case.

RPS argued there is no reason to depart from the usual order and sought further indemnity costs in respect of the expert evidence phase.

The Judgment

The Court held the usual costs order was appropriate for this case (i.e., costs follow the event), and subsequently MJS should pay RPS' costs subject to detailed assessment.

Refusal to mediate

MJS argued that this was a case where mediation would have been not only suitable but would have resulted in the high likelihood of a settlement as this case did not concern a substantial legal or factual dispute and the parties were not overly adverse and therefore unwilling to settle.

MJS pointed to pre action and post action correspondence to show RPS's failure to meaningfully engage with the mediation process by way of non-response or asserting conditions for settlement attempts that constantly shifted (for example, insisting on the presence of experts who were not available at the time).

The Court accepted that RPS had not agreed to the various attempts at mediation but that alone was an oversimplification of the context between these parties.

Referring to *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 5761, Judge Kelly noted that mediation is not the only, nor the preferred, method for parties engaging in alternative dispute resolution (ADR). This case sets out a non-exhaustive list of factors relevant to whether a party has unreasonably failed to engage in ADR. These include:

- i. the nature of the dispute;
- ii. the merits of the case;
- iii. the extent to which other settlement methods have been attempted;
- iv. whether the costs of ADR would be disproportionately high;
- v. whether any delay in setting up and attending the ADR would have been prejudicial; and
- vi. whether the ADR had any reasonable prospect of success.

On an assessment of reasonableness, Judge Kelly highlights the timeline of mediation attempts and the behaviour of the parties. She found it was not unreasonable for RPS to decline a mediation attempt before proceedings were issued. RPS also raised several workmanship issues which MJS had not engaged with alongside its failure to provide expert evidence on a without prejudice basis.

The Court held *"having actively engaged, provided calculations and justification as to why the Defendant asserted it was not negligent, it was not unreasonable (for RPS) to require a meaningful response to the points made before mediation"*.

The potential cost of mediation was deemed a significant sum by the Court especially where information that was *"reasonably requested"* was not made available. Once the expert evidence was made available, MJS' mediation attempt was weeks before the trial and was potentially to their detriment at that stage. RPS was found to have engaged fully in ADR including various settlement offers and a final offer before trial, a figure deemed commercially *"generous"* by the Judge. It was for these reasons that RPS' rejection of one mediation was found to be reasonable.

As the legal issues were clear and largely agreed between the parties, the case depended on the Court's assessment of expert evidence, therefore the Court did not accept that even if mediation had taken place, it would have been successful.

Last-minute change in expert evidence

The Court rejected MJS' assertion that the late change of evidence supported a decision that costs were no longer payable. Although the Judge did find RPS' expert was mistaken in asserting that a mass concrete taper was part of RPS' design, this point was never material in MJS' case and found to not have had a substantial bearing on the outcome of the litigation.

The Judge noted that the need for a mass concrete taper was first raised shortly before trial in the experts' joint statement and would only arise if adequate compaction could not be achieved. As the Court found that adequate compaction was achievable, the issue was not determinative.

MJS also relied on additional calculations served by RPS' expert shortly before trial. Judge Kelly summarised the last-minute expert evidence as *"classically an example of...final sense check testing"*, agreeing with RPS' submission that this was *"simply part of the usual cut and thrust of a professional negligence trial"*. The Court did not find that any additional costs were caused by the last-minute change in evidence.

Indemnity costs

The Court considered whether there was something in the conduct of the action or the circumstances of the case which took the case out of the norm to justify an order for indemnity costs. RPS alleged that MJS conducted itself abnormally through the litigation by refusing to meaningfully engage with the alleged workmanship defects that RPS thought to be critical in this case during pre-action correspondence and by failing to instruct its expert correctly to consider all of the issues raised in this phase, namely the same workmanship defects. It was on this basis that RPS criticised the methodology of the expert.

The Judge found that the expert did not properly understand their duties to the court, did not adequately deal with the issues raised by RPS, relied on outdated materials and carried out tests and analysis without informing on his actions or results. However, MJS' solicitors had instructed the expert correctly as written in his report. The Judge considered that although further questions could have been asked of the expert, the decision to not address various issues was a tactical one, albeit unsuccessful, and therefore this was not enough to meet the threshold of out of the norm conduct required for indemnity costs.

Practical takeaways

This Judgment provides guidance that a reasonable and well documented refusal to mediate will not automatically result in a costs sanction. The Court has shown a willingness to assess conduct holistically, considering factors such as other methods of ADR, pre-action engagement and reasonable bars to settlement discussions.

The Judgment also emphasises the importance of expert instruction. Parties should take note of and understand the risks of providing unclear or inadequate instructions, poor methodology, or changes to analysis or evidence without communicating the same to the Court and parties.

Our expert construction and engineering lawyers regularly advise on complex legal disputes which necessarily extend to advising on issues of costs.

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Thanks to Sabiha Chowdhury in the Construction & Engineering team in our Manchester office, for her contribution to this article.

Pre-construction services agreement breaches and liabilities: Where do they go?

Belong (Construction) Limited v. Seddon Construction Limited [2026] EWHC 1275 (TCC)

Background

Seddon Construction Limited (Seddon) took over work started on a site by a previous contractor, which had become insolvent. Initially, Seddon entered into a pre-construction services agreement (PCSA) with Belong (Construction) Limited (Belong) dated 27 May 2020, which contained an obligation for Seddon to open up and test the previous contractor's air sealing works. That agreement contained the then draft of the proposed Joint Contracts Tribunal (JCT) building contract.

Seddon failed to undertake the opening up and testing works for reasons unknown. The parties then entered into the final JCT contract on 18 December 2020.

The Technology and Construction Court (TCC) considered whether Seddon remained liable for failing to comply with the stated PCSA obligation after the parties entered into the JCT Standard Building Contract 2016 with amendments, but which contract was divergent from the draft appended to the PCSA, including that it did not contain such an obligation to open up and test the relevant work.

Extension of time (EOT) application and adjudication

What then transpired was that after the JCT construction contract was entered into, and during the course of the works, issues with the air sealing did come to light giving rise to a requirement to inspect and test and, ultimately, Seddon was instructed to carry out corrective works.

Such works appear to have caused delay. Seddon, therefore, sought a 10-week EOT under the building contract provisions to compensate for the failure of the air sealing and its rectification.

The contract administrator (CA) refused the EOT application on the basis that the need for the air sealing rectification work was due to Seddon's failure, in breach of the earlier PCSA requirements, to open up and test the existing air sealing works.

Seddon denied that it was under any such contractual obligation to open up and test the air sealing works under the JCT contract on the basis that:

- a. While the obligation referred to was contained in the PCSA, which incorporated the then draft JCT contract referred to in the PCSA as the proposed contract documents (PCDs), such obligation was not in the final signed version of the JCT contract.
- b. Under the PCSA, the parties' respective rights and liabilities were to be subsumed into, and be subject to, the final signed JCT contract.

Seddon, therefore, referred the dispute to adjudication. The adjudicator agreed with Seddon on the grounds that Seddon was not under any obligation to open up and test the air sealing works in the final signed JCT contract.

Belong subsequently, therefore, brought a Part 8 claim in the TCC to obtain a final determination of the dispute from the court and sought various declarations.



TCC judgment

HHJ Stephen Davies was the presiding judge who considered the adjudicator's decision to be wrong and agreed with Belong.

Critically, he held that insofar as Belong had a valid contractual right to complain about Seddon's failure to comply with the opening up and testing obligation as contained in the PCSA during the currency of the PCSA, it had not lost that right as a result of its subsequent entry into the JCT contract. Accordingly, Seddon was not entitled to an EOT related to the air sealing works.

Reasoning

In reaching his decision, the judge considered the relevant principles of contract interpretation together with key clause 2 of the PCSA.

Clause 2 of the PCSA provided as follows:

"Duration and Effect of this Agreement

- 2.1.** The parties' obligations under this agreement start on the date of this agreement ...
- 2.2.** Before execution and completion of the Contract, the rights and obligations of the Employer and Contractor in relation to the Works shall be governed by the provisions of this agreement supplemented by the Proposed Contract Documents. If there is any conflict or difference between this agreement and the Proposed Contract Documents, the Proposed Contract Documents will prevail.
- 2.3.** On the execution and completion of the Contract, the parties' respective rights and liabilities in respect of all matters with which this agreement is concerned ... shall be subsumed into and be subject to the Contract."

The judge highlighted that each subclause made a reference to one or more of "rights", "obligations" and "liabilities", and that the difference in wording appeared to be intentional.

That was because "once the JCT Contract has been entered into: (a) there are no continuing obligations under the PCSA or continuing rights or obligations under the PCSA in relation to Works; whereas (b) there may be continuing rights and obligations in respect of the subject matter of the PCSA, including work carried out under the PCSA, which are to be 'subsumed into and be subject to the [JCT] contract'."

In the judge's view, on first impression, the obvious meaning of "liabilities", when contrasted with obligations, meant "continuing liabilities for pre-existing breaches of obligations committed during the period before entry into the JCT Contract". And, furthermore, "It is these continuing liabilities for pre-existing breaches that are to be subsumed into, and be subject to the JCT Contract."

Plainly, Seddon had not complied with its obligation to open up and test the air sealing works done by the preceding contractors and this was in breach of the PCSA.

Because no such investigation was undertaken at all as required by the PCSA, the liability for that failure followed Seddon into the JCT contract as a pre-existing liability.

Key question

The judge noted that the question then was, "what is meant by, and what is the effect of, these liabilities being subsumed into and being subject to the JCT Contract?"

Seddon submitted that the judge's first impression and analysis were wrong. Seddon argued that there was no difference between "obligations" and "liabilities", and that they were, in effect, interchangeable.

The judge rejected this submission. In essence, while obligations and liabilities might have the same meaning in some contexts, they did not do so in relation to contractual breaches.

"Liability" could be equated with being under a secondary obligation. That is to say the secondary obligation was an obligation to pay damages as a result of the breach of a primary obligation.

As Belong's lawyers had drafted the PCSA, the differing choice of wording was considered deliberate and aided the finding that while primary obligations under the PCSA were not carried over/subsumed into the JCT contract, liabilities (or secondary obligations) were.

The judge clearly formulated his logic as follows:

"... once the JCT Contract has been entered into, since clauses 2.1 and 2.2 make clear the parties' obligations under the PCSA come to an end and their obligations are governed by the JCT Contract, it is obvious that all that can be left under the PCSA are substituted or secondary obligations on the part of the party in default, which in my judgment are most obviously to be equated with the liabilities referred to in clause 2.3."

“Subsumed into and subject to”

In looking at this phrasing, HHJ Stephen Davies used the dictionary definition of the word “subsumed”, which meant something is taken up in or included in something else.

This did not mean that the PCSA lost its independent existence or that the PCSA no longer remained in existence as regards enforcing any respective rights and liabilities following the entry into the JCT contract. Two points were cited in support of that proposition:

1. The PCSA provided for a limitation period of 12 years after the practical completion of all of the works under the JCT contract.
2. The PCSA was a contract document.

As regards the real meaning of “subsumed into and subject to” the JCT contract, the judge explained:

“These words do not have the effect that liabilities for pre-existing breaches of obligations are brought to an end by the JCT Contract, or that they survive only insofar as they would also have been liabilities for breaches of obligations under the JCT Contract, had the JCT Contract been in existence at the time of the alleged breach. The liabilities remain in existence as liabilities, but from the date of the JCT Contract, they are included in the JCT Contract and made subject to it.”

Finally, the judge noted that the adjudicator was influenced by the amended version of clause 1.3 of the JCT contract, which provided:

“Following execution and completion of this agreement (incorporating the Schedule of Amendments) by the Parties, nothing contained in ... the pre-construction agreement ... shall override or modify the Schedule of Amendments, the Agreement or these conditions.”

The judge did not consider that clause 1.3 affected the interpretation of clause 2.3 of the PCSA, which did not override or modify the JCT contract. The judge observed that clause 1.3 simply preserved any liability for pre-existing breaches of obligations imposed by the PCSA, but also required that any liability should be subject to, and in accordance with, the JCT contract.

While the adjudicator concluded, “Seddon’s liabilities under the JCT Contract have superseded, replaced and discharged Seddon’s liabilities under the PCSA (to the extent that latter are different),” the judge “respectfully disagree[d].”

The judge also considered the adjudicator’s decision that:

“references to error, omission, negligence or default in Clauses 2.28.6.5 and 4.20.3 of the Contract etc. refer to Seddon’s obligations only under the Contract not to obligations under the PCSA.”

The adjudicator had applied too narrow an interpretation because the clauses did not use the words “breach of the terms of this Contract”, but referred widely to errors, omissions negligence or defaults, and not specifically to a breach of a legal obligation owed under the JCT contract.



Part 8 claim results

Belong was the successful party and, as such, was entitled to all five of its requested declarations. They were, in brief, that:

1. The CA's determination that Seddon was not entitled to an EOT regarding the air sealing works was correct
2. The adjudicator's decision was wrong
3. The final certificate was to be reopened and the statement of final account was to be amended to remove the stated entitlement to EOT 3 and any associated preliminaries.

Therefore, by reference to the matters the subject of declarations (1) to (3):

4. Seddon was not entitled to any EOT regarding the air sealing works
5. Belong was entitled to levy liquidated damages as per the JCT contract.



Takeaways

1. Precision of drafting

- a. "Obligations" and "liabilities" may be interpreted as having different meanings in PCSAs. Therefore, how these terms are used should be considered very carefully.
- b. When considering the duration and effect of PCSAs, stakeholders should clearly outline what they want to remain enforceable after the JCT contract is entered into and define "liabilities" and "obligations" separately in the PCSA if both concepts need different treatment on subsumption.

2. Identifying services forming the PCSA's subject matter and JCT contract's subject matter

- a. It is possible that the decision would have been more finely balanced had the PCSA and final JCT contract referred to substantively the same works and services, rather than two effectively separate stages of the project.

3. Clarifying what elements of the PCSA will remain enforceable, and on what basis

- a. Stakeholders may wish to consider specific provisions in their JCT contract stipulating what terms of (and in what circumstances) the PCSA can be enforced post-JCT contract entry.
- b. Add an express release/waiver clause if extinguishment of PCSA liability is intended on execution of the main contract.
- c. If liabilities are meant to survive, specify which JCT mechanisms apply to them (e.g. notice provisions, time bars and dispute resolution) rather than leaving "subject to" to imply this.
- d. Where survey/testing obligations are central to risk allocation (e.g., on post-insolvency takeovers), replicate them in the main contract rather than relying on the earlier agreement to "cover" the gap.
- e. Cross-check limitation clauses, EOT exclusions and default/negligence carve-outs for consistency with the transitional intent.

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