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Construction and Engineering Matters

UK – Spring 2026

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This spring edition includes:

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Is Less Really More – Can a late Payment Notice Be a Pay Less Notice (and Other Creative Defences)?

Vision Construct Ltd v Gypcraft Drylining Contractors Ltd

The recent case of *Vision Construct Ltd v Gypcraft Drylining Contractors Ltd [2025] EWHC 2707 (TCC)* is yet another case dealing with contracts that have payment schedules that are later extended out by one of the parties, how dates are missed and the lengths a paying party will go to in order to avoid making payment.

Facts of the Case

Vision Construct Ltd (VCL) and Gypcraft Drylining Contractors Ltd (Gypcraft) entered into a subcontract dated 12 November 2020. This was on the 2016 standard form joint contracts tribunal design and build sub-contract conditions (JCT DBSub/C), and it also incorporated a bespoke schedule that covered the interim payment dates and was designed to give effect to clause 4 of the JCT. However, the schedule covered the period April 2020-February 2021, while Gypcraft's works were agreed to be between December 2020-January 2021, meaning that the schedule was broadly redundant by the date of the subcontract.

VCL therefore issued Gypcraft with updated schedules of further dates, provided as works progressed. These were in similar forms and used language that did not entirely align with the usual JCT language, which refers to Interim Valuation Dates and did not specifically mention interim payment applications:

(i) Sub-contractor submission valuation date

(ii) Due date (sic)

(iii) Accounts to issue payment notice by

(iv) Payless notice to be issued by

(v) Final date for payment

The schedules did however include a footnote four that "all applications for payments and invoices are to be issued to [email address] by end of business on the valuation date above". The JCT set out the usual specific requirements as to how Gypcraft could issue interim payment applications, and how VCL could in turn issue payment notices and pay less notices.

Gypcraft issued an interim application for payment #23 (IA23) in the sum of £342,385.52, and VCL responded after the payment notice deadline with a document entitled "Payment Notice" to say that they instead considered the sum due to be £125,437.77, which was what VCL then paid. They did not serve a separate pay less notice.

The parties went to adjudication over the payment, where the adjudicator found in favour of Gypcraft on the basis that:

- Gypcraft had served a valid IA23
- VCL had failed to serve either a valid payment notice or a pay less notice as required
- IA23 was payable in the amount applied for, in accordance with s.110B(4) of the Housing Grants, Regeneration and Construction Act 1996 (the Construction Act 1996)

The Claim

VCL issued a Part 8 claim in the TCC , and submitted the following (as it turned out, rather hopeful if not ingenious) cascading arguments:

- **Argument one** – The subcontract failed to identify a relevant "interim valuation date" for this payment cycle (number 23), which meant that the Scheme for Construction Contracts 1998 applied to modify clause four of the JCT to fix the relevant valuation periods. That in turn meant that Gypcraft therefore had no right to submit any interim application at all, so s.110B(4) of the Construction Act 1996 could not "bite", and there was essentially no notified sum payable, or alternatively that the application had to be submitted on the interim valuation date and not four days in advance.
- **Argument two** – A convention had arisen by course of conduct where Gypcraft had accepted late payment notices from VCL, meaning Gypcraft were "estopped by convention" from accepting the validity of VCL's late Payment Notice.
- **Argument three** – Even if VCL's response to IA23 was out of time as a Payment Notice, it was "nevertheless in time to serve as a Pay Less Notice".

The court firstly held that a Part 8 claim was usually only appropriate where the question being decided on is "unlikely to involve a substantial dispute of fact", and cited *ING Bank v Ros Roca SA [2012] 1 WLR 472*, which held that Part 8 proceedings "are wholly unsuitable for the trial of an issue of estoppel". Nevertheless, the court allowed the argument noting that it was "an unusual (albeit not impossible) argument to raise in the evidence free zone of Part 8".

Having regard to the Claim as set out in the left-hand column, the court dealt with the various arguments as follows.

Argument One – The Interim Valuation Dates Argument

The court initially observed that this was a very technical argument that would have had the practical effect of preventing the payment regime working as both the Construction Act 1996 and the subcontract itself had intended; this was not in line with Coulson LJ's observation in *Bennett Construction Ltd. v CIMC MBS Ltd. [2019] BLR 587* that, "the parties [should] adopt business common sense as to the arrangement for invoicing and payment".

VCL were attempting to rely on the fact that the schedule outlining the interim payment dates used the term "sub-contractor submission valuation date" rather than "interim valuation date", but the court gave this short shrift and held that it would be "perverse and uncommercial" to hold that the payment regime could not work as intended simply on this basis when it was clear from elsewhere in the subcontract what was meant (particularly at footnote four of the payment schedule).[1]

The court further held, on VCL's argument that this would have in turn prevented Gypcraft from submitting an interim payment application before the new date specified, that footnote four on its wording, did not actually require this at all given it used the words "by the end of the Valuation date above".

Argument one, in all its layering, was therefore rejected.

Argument Two – The Estoppel by Convention Argument

In determining this point, the court relied on the ingredients of an estoppel by convention as set out in *Mears Limited v Shoreline Housing Partnership Limited [2015] EWHC 1396 (TCC), 160 ConLR 157*. On this, the court held that the only representation was that previous net payments were as set out in the application itself; that was merely a statement of fact. Gypcraft did not impliedly represent that there were no other notified, but invoiced sums that had to be taken into account when assessing movement in the month. The issue here presumably being that Gypcraft had not invoiced the amount it applied for at the relevant time, so it was effectively tethered to this amount going forwards on their applications. The court commented that this seemed to be an "ingenious lawyer's gloss upon the facts, rather than a shared assumption".

It was also held that there was no evidence that the parties had entered into a convention whereby payment notices would be accepted if issued late just because the three prior ones had been – this, on its own, "does not give rise to a convention without more" and that "it is equally consistent with confusion, inefficiency or a number of other possible explanations".

Next, the court held that there was no evidence of reliance (i.e. that VCL had "[fallen] into the habit of issuing their Payment Notices late because they were subject to some sort of convention").

The court therefore rejected VCL's second argument, noting again that to go into it further would require a full investigation of the facts, which would be "inherently unsuitable for a Part 8 claim".

1 that "all applications for payments and invoices are to be issued to [email address] by end of business on the Valuation date above"

Argument Three –
The "But It Was Really a Pay Less Notice" Argument

The court noted its view here that this was "an ambitious submission". The evidence showed that VCL's payment notice was referred to multiple times, in both the document itself and the covering email, as a payment notice, and that "any other reading of the document would be entirely artificial", citing the summary of the approach to contractual notices in *Advance JV v Enisca Ltd [2022] EWHC 1152 (TCC)*.

The court also cited *Grove Developments Limited v S&T (UK) Limited [2018] BLR 173* in confirming that it would "entirely undermine" the Construction Act 1996, and the subcontract if a document that was clearly intended to be a payment notice was retrospectively converted into a pay less notice.

Argument three was therefore also rejected.

Key Takeaways

Taking the court's view on each of VCL's arguments in turn, there are probably three key takeaways from the decision in this case:

- Firstly, the timing of notices is crucial, everyone knows this of course but, while these arguments might be applauded in one sense in their creativity, they were called out as such against the backdrop of the contract wording and the schedules given by VCL and, notably, given short shrift by the court.
- Secondly, there is a high bar to establish a convention by estoppel even if it is possible to get this through the "Part 8" gateway, merely relying on some recent past conduct/acquiescence is not enough.
- Finally, be clear with the labelling and content of your notices. One notice cannot really operate as both and be careful how you label and present it. The court will not allow one to be retrospectively converted into the other.

When you stand back, there is not a lot that would surprise readers by this judgment, but it is a further case that yet again underlines the court's attitude to challenges of an adjudicator's decision, and the importance of getting your dates and notices right or face the smash and grab consequences. Pay now, litigate later (but don't rely on Part 8 for fact sensitive defences) is the order of the day, but we all knew that already right?

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Thanks to Alex Bradbury, solicitor apprentice in the Construction & Engineering team in our Birmingham office, for his contribution to this article.

High Court Provides Guidance on When a Party in an Unincorporated Joint Venture Can Adjudicate

In the recent case of *Darchem Engineering Limited v Bouygues Travaux Publics & Anor [2026] EWHC 220 (TCC),* the High Court addressed a critical question for large-scale infrastructure projects: whether a single member of an unincorporated joint venture (JV) can independently commence and enforce adjudication proceedings.

Case Background

The case concerns a dispute that arose in connection with a New Engineering Contract (NEC) form subcontract at the Hinkley Point C nuclear power station project.

The claimant was Darchem Engineering Limited (Darchem), which was part of an unincorporated JV with Framatome Limited formerly known as Efinor Limited (Efinor). Darchem sought to enforce an adjudication decision in the amount of £23,944,012 (the "Decision") against the main contractor, which was also an unincorporated JV consisting of Bouygues Travaux Publics and Laing O'Rourke Delivery Limited formerly Laing O'Rourke Construction Limited.

Darchem brought three sets of adjudication proceedings on the basis that it was "acting jointly and severally as the subcontractor, in accordance with the agreement and clause 12.6 of the subcontract". The third adjudication was the subject of the enforcement proceedings in question.

In each adjudication, the respondents raised jurisdictional objections on the basis that Darchem was not a party to the subcontract and was not entitled to bring an adjudication pursuant to the relevant provisions of the subcontract.

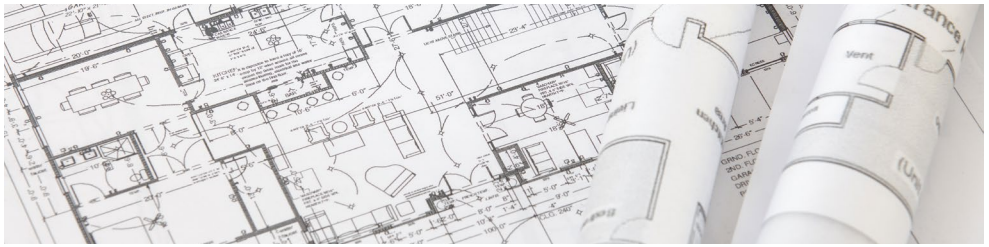
While the jurisdiction objection was rejected by the adjudicator, the objection was maintained during the enforcement proceedings and the question to be considered by the court was whether one entity in an unincorporated JV was entitled to bring adjudication proceedings in its own name, rather than together with the other company in the JV.

High Court Judgment

Constable J refused to enforce the Decision because he did not consider Darchem to constitute a "Party" for the purposes of clause 2.2 of Option W of the subcontract, and therefore it did not have a contractual right to adjudicate.

The reasons for his decision were that:

1. The various arguments made by Mr. Paul Buckingham KC did not assist Darchem because:
    a. The subcontract read as a whole indicated that the agreement was intended to be bilateral as opposed to multilateral [17]
    b. Unlike in clause 91.1 and 91.2 of the subcontract, which contained a deeming provision, the word "Party" in clause 2.2 of Option W was not a reference to one of the constituent parts of the JV, but to the JV itself [18-19]
    c. Clause X4.1A dealt specifically with the situation where, in the context of a parent company guarantee, a JV party is made up of two or more companies [20]
    d. The reference to "Parties" in the definitions of the subcontract, and in the execution block was not sufficient for Darchem to be considered a "Party" for the purposes of the subcontract when taken as a whole and considered in light of the wording of clause 11.2(11), which provided that "[t]he Parties are the contractor and the subcontractor" [21 to 27]
    e. Clause 12.6 of the subcontract did not permit Darchem to act jointly and severally on behalf of the JV and initiate adjudication proceedings under Option W, and instead the correct reading was that each "Party" of the JV was to be taken as acting with the other and their liability was joint and several [28 to 33]
    f. The reference to "pre-construction subcontracts" in the agreement did not alter the view that it made sense for the JVs to be viewed as "Parties", and the failure in the drafting to refer to Darchem and Efinor as "Parties" indicated they were not [34]
    g. As Darchem and Efinor were not parties, the reference to "any" before "Party" in clause 2.2 of Option W did not assist nor did the suggestion that as a matter of contractual and common law rights, any party to a contract is entitled to pursue a claim on its own behalf [35 to 37]
2. Allowing each party to an unincorporated JV to start adjudication proceedings could result in "chaos" as each member to the JV may each, separately, commence an adjudication against another contracting party, nominating a different adjudicator for each in relation to an identical issue leading to an undesirable situation where you may have multiple conflicting decisions dealing with the same point [39]



Practical Takeaways

While the judgment is specific to the particular contract and drafting in question, it does raise some wider principles that stakeholders to construction contracts should ensure they consider at the outset of their projects, or when seeking to exercise rights under their contract framework:

1. **Precision of drafting** – Stakeholders should ensure that their contracts are clear on key issues such as dispute resolution, payment, liability and termination, as well as how these issues are managed in the context of unincorporated JVs.
2. **Determine scope of contractual rights and obligations** – Before seeking to exercise a right under a contract, parties should ensure that they are certain the contract confers that right. A failure to do so may result in wasted costs, or the unintentional repudiation of a contract with a potential exposure to damages and other unintended consequences.
3. **Early conversations** – JVs are common in large infrastructure projects as a means of stakeholders spreading potential liability and mitigating risk. Early conversations regarding the allocation of risk and the potential need to exercise contractual rights are essential to ensure that all parties are aligned from the outset.

Our expert construction and engineering lawyers regularly advise on the drafting of complex contracts alongside providing comprehensive project 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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Adjudication's Expanding Empire?

The courts have been active as of late in handing down judgments concerning when stakeholders in construction projects may have a right to adjudicate.

From whether a beneficiary can adjudicate under a collateral warranty (the answer being no in the absence of an express provision permitting this)[1], to whether one entity in an unincorporated joint venture (JV) is entitled to bring adjudication proceedings in its own name, rather than together with the other company in the JV (again the answer being no).[2]

Furthermore, In the recent judgment of *Paragon Group Limited (Paragon) v FK Facades Limited (FK) [2026] EWCH 78 (TCC) [2026] 1 WLUK 208*, His Honour Judge (HHJ) Stephen Davies grappled with the "finely balanced" point of whether an assignee of a construction contract enjoys the right to refer disputes to adjudication.

In doing so, he set legal precedent in establishing that subject to an express provision to the contrary, an assignee could have a right to refer disputes to adjudication. Permission to appeal to the Court of Appeal has been granted in favour of FK, however, given its insolvency, it is unclear whether the appeal will now be heard.

Background

On 17 October 2018, Office Depot International (UK) Limited (ODI) engaged FK under an amended standard form JCT Minor Works Building Contract 2016 for the completion of roof remedial works at a commercial property in Greater Manchester (the "Contract"). In 2021, ODI assigned its benefits under the Contract to OT Group Ltd, who in turn made a further assignment in 2024 to Paragon.

In April 2025, Paragon terminated the Contract after alleging that FK was culpable for delay, and initiated an adjudication against FK in connection with FK's delay, as well as Paragon's consequential entitlement to liquidated damages under the Contract.

During the adjudication, FK raised jurisdictional challenges given, among other things, Paragon had no right to adjudicate under the Contract in light of its status as assignee. The adjudicator made a nonbinding ruling that he had jurisdiction and proceeded to award Paragon £80,500, and directed that FK should pay or reimburse his fees of £17,787 (the "Decision").

FK refused to make the payment of the award to Paragon or the adjudicator's fees. Paragon therefore sought to enforce the Decision.

Decision of the High Court

Paragon's position is summarised as follows:

i. A proper interpretation of the Contract, and when read with an understanding of the general law in relation to assignments, showed clearly that a party included any statutory assignee of the original employer or contractor who, thus, also had the right to refer disputes to adjudication

ii. It also followed that a dispute arising under the contract was plainly apt to include a claim arising under the contract even where referred by an assignee

iii. The position in arbitration supported this position[3]

FK's position is summarised as follows:

i. It is plain from the literal wording of the contract, of which the most important part was the incorporated provisions of Part 1 of the Scheme for Construction Contracts (Scheme), that only a party to the construction contract can refer a dispute to adjudication

ii. It is plain from the clear words used in the Scheme that an assignee does not become a party to the construction contract.

iii. Even if that was wrong, since the right to adjudicate only extends to disputes or differences arising "under the contract", a dispute by an assignee is not a dispute arising under the contract, since it arises under the assignment

iv. Insofar as is relevant, commercial commonsense supports this conclusion, when one considers the difficulties and complications that may arise from allowing an assignee to refer a dispute to adjudication[4]

HHJ Davies favoured Paragon's analysis and decided the matter in its favour. His reasoning is summarised below:

i. There was nothing precluding the reference to "party" under the terms of the Contract or the Scheme (as incorporated by the Contract) to extend to include an assignee in the context of a right to adjudicate [55 to 63]

ii. The argument that the dispute is not arising under the contract lacked merit if an assignee is deemed to be a party to the Contract, and they then bring a claim under the contract [79]

1 *Abbey Healthcare (Mill Hill) Ltd (Respondent) v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) (Appellant) [2024] UKSC 23.*
2 *Darchem Engineering Limited v Bouygues Travaux Publics & Anor [2026] EWHC 220 (TCC).* Please refer to our previous article discussing this Judgment.
3 Refer to paragraphs 41 and 42 of the Judgment.
4 Refer to paragraph 40 of the Judgment.

Practical Takeaways

While the judgment is specific to the particular contract and drafting in question, it does raise some wider principles that stakeholders to construction contracts should ensure they consider at the outset of their projects, or when seeking to exercise rights under their contract framework:

1. **Control of entities with adjudication rights** – In light of the increasing use of adjudication proceedings (and associated satellite litigation) by a wider pool of stakeholders, parties should ensure that their contracts adequately anticipate and proactively deal with the question of what class of entities can bring claims via adjudication under or connection with their contracts.
2. **Additional options for stakeholders** – Given that, in the absence of an express clause, there is no right to adjudicate under collateral warranties, beneficiaries including funders, tenants and landlords should consider including unconditional assignment provisions in construction contracts on the projects they have an interest in. This may prove a useful tool to enforce rights in a time and cost-effective manner.
3. **Consider your contracts and asses your risk profile** – Undertake an audit of your current contracts to understand any potential exposure to a potentially increased pool of claimants. This is essential from a risk and governance perspective.

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Non-party Costs Orders and Construction Litigation Funding

Lessons from Thomas Barnes & Sons PLC (in administration) v Blackburn with Darwen Borough Council

The judgement in *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (Technology and Construction Court (TCC)) will be familiar to many in the construction industry. That case concerned the construction of Blackburn Bus Station, and Thomas Barnes & Sons PLC's (Barnes) claim for damages (initially in excess of £3 million) against Blackburn with Darwen Borough Council (BBC) for alleged wrongful termination by BBC of the construction contract. In dismissing Barnes' claim following an 11-day trial in 2022, HHJ Stephen Davies, among other things, considered issues relating to the treatment of concurrent delays, which has been the subject of extensive commentary from solicitors and contracting parties alike.

Background to the Recent Decision

In 2025, BBC made an application for a non-party costs order (NPCO) against the respondents pursuant to Section 51 of the Senior Courts Acts 1981, in relation to unsecured costs of the substantive dispute on the basis that the respondents had a direct financial interest in the case, controlled the case (to some extent) and in substance were the real parties to the litigation. The respondents in the instant application were Thomas Barnes, the first respondent (Thomas) and Brian Barnes (Brian). Brian died in 2015 and is survived by his wife, the second respondent (Pamela) and their two sons, the third and fourth respondents (Craig and Scott), who are the executors of his estate (and were joined as respondents solely on that basis).

In 1997, Barnes had given a debenture to Thomas, Pamela and Brian as security for lending provided by the family through a family bank account. There was an informal understanding between Thomas and Brian that Barnes should be supported through its own resources, and profits and losses would be divided.

At the time of the termination of the contract by BBC, Barnes was in severe financial difficulty, and, in November 2015, administrators were appointed by the debenture holders.

Thomas believed that BBC and its advisers were responsible for the problems, which led to termination of the building contract. As a result, Thomas was determined to seek financial recovery against BBC and persuaded Pamela, Craig and Scott to instruct a solicitor to advise on a claim against BBC.

In 2016, Mr Dean Watson replaced one of the previous administrators and became the main administrator involved in the litigation. Mr Watson instructed a consultancy to make a claim against BBC for recovery of monies due to Barnes. In December 2016, BBC's solicitors wrote to the consultancy seeking security for costs, and asking who would fund the claim against BBC in the context of a potential NPCO.

At the time, Mr Watson was advised by both the solicitors and counsel that the claim against BBC had good prospects of success, but that there were insufficient funds to enable Barnes to fund the costs of litigation. However, Thomas promised that funding would be provided as required by him, Brian's estate and Pamela.

Mr Watson stated that Thomas was heavily involved in the litigation, liaising with Mr Watson and the solicitors and providing necessary information as he had knowledge of the building contract and dispute details.

However, Thomas disputed that he had controlled the litigation and said that, as a Barnes director, he was obliged to assist the administrators and had also claimed that the decision to pursue the claim had been made by the administrators, and not by him.

This argument was rejected by the court on the basis that Thomas and his family members had a substantial interest in the litigation and were funding it. They were also prepared to provide substantial security for costs to ensure the litigation continued, and held strong views about the way in which BBC and their advisers had conducted themselves, which led to the building contract being terminated.

Critically, in the court's view, the litigation could not have continued, but for Thomas' willingness to provide significant input in relation to the substance of the claim both as to liability and quantum, and for the respondents' willingness to finance the legal fees and to provide security for BBC's costs.

BBC argued that the respondents had funded litigation, stood to benefit substantially from its outcome, and exercised control over the conduct of the proceedings. The court accepted these submissions, finding that the respondents were indeed the litigation's real parties in critical respects. As such, they were ordered to contribute to the council's recoverable costs beyond the security for costs already provided.

Relevant Legal Principles

In coming to his decision, HHJ Stephen Davies had significant regard to the legal principles set out in *Deutsche Bank v Sebastian Holdings1,* and the decision of the Privy Council in *Dymocks.*2 While the principles are well settled, the court recited, and we repeat here, the essential principles summarised in the White Book:

1. Although costs orders against non-parties are "exceptional", exceptional means only that the case is outside the ordinary run of cases that parties pursue or defend for their own benefit and at their own expense. The ultimate question in any such exceptional case is whether, in all the circumstances, it is just to make the order. Inevitably, this will be fact specific to some extent.
2. Generally the discretion will not be exercised against pure funders; that is, those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. The public interest in the funded party getting access to justice will generally outweigh the recovery of costs by the successful unfunded party.
3. If, however, the non-party not only funds, but controls or benefits from the proceedings, justice will ordinarily require that they will pay the successful party's costs if the funded party fails. The non-party is not so much facilitating access to justice as themself gaining access to justice for their own purposes and is themself a real party to the litigation.
4. The most difficult cases are those in which a non-party funds a receiver, a liquidator or a financially insecure company with a view to advancing the funder's own financial interests. Generally, a non-party funding proceedings by an insolvent company solely or substantially for their own financial benefit should be liable for the costs in the event of failure. But non-party costs orders will not invariably be made in such cases, particularly where the funder is a director or liquidator acting in the interests of the company rather than their own.
5. A non-party should not ordinarily be liable for costs that would in any event have been incurred without the non-party's involvement in the proceedings, although the position may be different where a number of non-parties have acted in concert.

1 [2016] EWCA Civ 23.
2 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39.

Reasoning of the Court

The court considered that the matters at the heart of the question for determination were:

(a) Barnes brought a very substantial and complex claim against BBC, which BBC successfully defended at great expense all the way down to and at trial.

(b) In so doing, BBC incurred costs of, at least, the amount of the incurred and approved budgeted costs of around £995,000.

(c) BBC has so far received payment of no more than the £583,000 that it obtained by way of security, thus leaving a shortfall of at least around £412,000 by reference to its budgeted costs.

(d) The claim could not have been taken to trial without the financial support of the respondents.

(e) The respondents have already invested and lost very substantial sums, i.e. the amount they have had to pay to fund the legal costs and disbursements (including expert evidence) of pursuing the claim, and the amount already paid out by way of security.

(f) Initially, the respondents funded the proceedings because they hoped to obtain £684,714.66, being the indebtedness owed to the debenture holders at the time of the appointment of the administrators.

(g) By the time of trial, that had reduced to around £357,000, but they were still prepared to fund the claim on that reduced-recovery basis at a lengthy and expensive trial.

Ultimately, the court found that Thomas exercised a "real degree of control" over the proceedings, and that while the other respondents in effect left it to Thomas, the administrators and lawyers to resolve, they were willing to continue funding the claim. The respondents all stood to benefit personally from the success of the claim, albeit the potential benefit to and the potential liability of Craig and Scott was limited to the benefit to and liability of Brian's estate. This was particularly so in circumstances where there was only a modest amount due to preferential creditors in the amount of £31,665.70.

Accordingly, and in circumstances where there were warnings and where substantial security had already been provided, the respondents could be treated as the real parties in important and critical respects.

As the case was not one where the public interest strongly suggested that an NPCO should not be made, the court found that there should be an NPCO against the respondents in relation to the outstanding balance of any costs found due to BBC on detailed assessment if not agreed.

Key Takeaways

In an industry fraught with insolvency issues, the TCC's recent decision highlights the not insignificant risks to non-party funders when they exert substantial influence on legal proceedings. In doing so, the court has signalled that it will look beyond party designations to identify who truly benefits and controls the litigation.

In light of this decision, funders must carefully consider two questions: how much control they are exercising over the proceedings, and whether they stand to benefit if a successful outcome is achieved. If the answer to both questions is yes, there is a real risk of funders being treated as the real party to the proceedings and exposing themselves to an adverse costs order, and potentially making them personally liable for the winning party's costs.

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The Lesser of Two Evils: Finality on Termination Provisions – *Providence Building Services Limited (Respondent) v. Hexagon Housing Association Limited (Appellant)*

This article follows on from our previous articles, most recently on the Court of Appeal decision in *Providence Building Services Limited v. Hexagon Housing Association Limited* [2024] EWCA Civ 962 in our Summer 2025 Construction and Engineering Matters.

In a decision bringing much needed finality and closure to the interpretation of certain termination provisions within the widely used JCT standard form of contract,[1] the Supreme Court has overturned the decision of the Court of Appeal.[2]

By way of brief background, the dispute concerned the correct interpretation of the following clauses of the JCT Design and Build Contract 2016 (as amended by the parties):

> **"Default by Employer**
>
> **8.9.3** If a specified default or a specified suspension event continues for ~~14 days~~ [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 ~~14 day~~ [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; or
>
> …
>
> then, upon or within ~~a reasonable time~~ [28 days] after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

In the Court of Appeal, the contractor, Providence, was successful in obtaining judgement that it could rely on Clause 8.9.4 to terminate its contract with Hexagon without first having accrued a right to terminate under Clause 8.9.3. In the Court of Appeal's view, the words "for any reason" in Clause 8.9.4 were broad enough to capture circumstances where there was no accrued right to give notice under Clause 8.9.3. Therefore, Providence could rely on a repeated specified default, in this case late payment by Hexagon, even if the original default was remedied within the contractual 28-day cure period.

Having been successful in prior adjudication proceedings and at first instance before the Technology and Construction Court, Hexagon appealed the Court of Appeal's decision to the Supreme Court.

The sole issue of contractual interpretation for the Supreme Court's determination on appeal was:

> "Can the contractor terminate its employment under clause 8.9.4 of the JCT 2016 Design and Build Form, in a case where a right to give the further notice referred to in clause 8.9.3 has never previously accrued?"

In short, the decision of Lord Burrows (with whom Lord Reed, Lord Briggs, Lord Stephens and Lord Richards agreed), categorically confirms that the answer to the question for determination is "No".

The Supreme Court's Decision

In allowing the appeal, the Supreme Court found that:

1. In the context of Clause 8.9, Clause 8.9.4 appears to be parasitic on Clause 8.9.3 rather than being independent of it. In other words, if Clause 8.9.4 were independent there would be no need for the opening words of Clause 8.9.4, i.e. "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) …".
2. Clause 8.9.3 is the "gateway" to Clause 8.9.4 in that the contractor must have had an accrued right to terminate under Clause 8.9.3 before Clause 8.9.4 could operate.
3. The above approach produces a natural and less extreme outcome than that contended by Providence. That is, for example, if the employer made two late payments, each being made one day late, the contractor, on Providence's interpretation, would be entitled to serve a notice terminating the contract and, by extension, be entitled to lost profits. In the Supreme Court's view, "[t]hat might provide a sledgehammer to crack a nut".

1 While the dispute concerned the JCT 2016 Design and Build Form, the relevant provisions are the same across both the 2016 and 2024 standard form versions.
2 Full details of both the first instance decision and the Court of Appeal judgement can be found in our previous articles.

While counsel for Providence contended that the employer could invoke Clause 8.2.1, requiring that the termination should not be given unreasonably or vexatiously, as the Supreme Court noted, this would lead to uncertainty with the employer then having the arduous task of showing the notice was given unreasonably or vexatiously, something that is sure to be strongly disputed by the contractor. Of course, on the other hand, it is reasonably foreseeable that an employer may repeatedly take advantage of "extra" time to make payment after the date for payment but before the right to terminate accrues pursuant to Clause 8.9.3, without fear of the costly consequences of termination (albeit in these circumstances, the employer would be exposed to possible "smash and grab" adjudication proceedings). However, in circumstances where the contractor retains the right to suspend for employer defaults and to interest for late payment, the suggestion of the Supreme Court seems to be that this interpretation is the lesser of two evils.

4. The Court of Appeal's reliance on Clause 8.4 (being the reciprocal provision for the employer's right to issue a notice of termination for the contractor's default) to aid the interpretation of Clause 8.9 was misplaced for three reasons:

   a. First, there is no reason why the contractor's and the employer's rights to terminate should be symmetrical, particularly given the relevant provisions are so different.

   b. Second, clauses 8.9 and 8.4 were plainly asymmetrical because the time periods specified were different (28 days, and 14 days and "within a reasonable time after such repetition" respectively).

   c. Third, different words were used by the drafter of the JCT standard form in clauses 8.9.4 and 8.4.3. Given the JCT is prepared by experienced construction professionals and specialist lawyers, it suggests that the clauses have different meanings.

Somewhat surprisingly, the Supreme Court also gave short shrift to the helpfulness of the JCT's *Design and Build Contract Guide 2016* and previous versions of the JCT form or past judicial decisions on those previous versions. In respect of the latter, it is notable that the construction of the corresponding provisions within the 1998 JCT version,[3] although differently worded, had the same effect contended for by Providence and was indeed accepted by the Court of Appeal in the present matter. However, and notwithstanding Providence's continued submissions in this regard, the Supreme Court did not derive any help from archaeological digging by the parties into past editions of the JCT contract.

Finally, in coming to its decision, the Supreme Court provided a useful summary of the relevant law on the interpretation of contracts, including industry-wide standard-form contracts such as the JCT contract. Ultimately, the Supreme Court confirmed that the correct approach is:

> "that an industry-wide standard-form contract should usually be interpreted consistently for all contracting parties using that form and subject to bespoke amendments, that interpretation is unlikely to be contradicted by the objective intentions of the particular contracting parties."

Although the approach should be largely uncontroversial, it serves as a useful reminder to those in industries including construction, shipping and beyond, which are heavily reliant on the use of standard-form contracts, as to how courts will generally interpret those contracts.

3 The wording of the provisions was subsequently amended in the 2005 version.

Key Takeaways

While the appeal concerns a short point of contractual interpretation, the Supreme Court's judgement potentially has far-reaching consequences for how contractors and employers up and down the country using the JCT standard form of contract will draft and operate their contracts.

In one sense, the Supreme Court's decision reaffirms the industry status quo prior to the flurry of judicial input sought by Providence and Hexagon. It is notable that in the several years between the publication of the JCT Design and Build Contract 2016 and Providence commencing court proceedings, there was a dearth of authority and commentary on the interpretation of the termination provisions in question. The explanation for this lacuna may simply be that contracting parties generally understood the meaning of these clauses. Alternatively, it may be that termination is such a high stakes game, contracting parties have not wanted to risk relying on Clause 8.9.4 to terminate, where losing for the contractor would adversely impact its supply chain relationships, and be costly – potentially meaning its having to pay many of them before the contractor was paid by the employer (assuming a contested termination was found in the contractor's favour many months after the event).

However, it remains to be seen whether, given the publicity of the Supreme Court's recent decision, parties will now revisit the terms of the standard JCT contract and seek to reallocate the risk that for many years had seemingly been "baked in" to those provisions. That is, contractors may now fear that recourse to rights of suspension, interest for late payment and adjudication are insufficient remedies for repeated employer defaults.

These remedies take time and money, and the very basis of the Housing Grants, Construction and Regeneration Act 1996 as amended could be called into question (cash flow being at the heart of the legislation) because a repeat offender employer, who pays one day before the cure period ends on every payment over a 24 month contract period, could cost the contractor dearly over the period – such an outcome seemingly does not match the intention of the act from a policy perspective. This is particularly so where repeated late payments are likely to have adverse impacts on supply chains, cashflow and lines of credit (for which the Supreme Court had little regard when interpreting the disputed clauses). Accordingly, and notwithstanding the possible imbalances of negotiating power, contractors may now seek more significant amendments to the termination provisions; for example, to expressly include a right for the contractor to terminate the contract following a certain number of instances of late payments by the employer.

Ironically, the reversion to understood contractual norms may inadvertently result, at least initially, in some uncertainty and a more considered approach to the termination provisions of the JCT (and perhaps other standard forms) suite of contracts.

What remains clear though is that parties should have careful consideration of any termination provisions to ensure that all necessary prerequisites have accrued prior to issuing a notice of termination.

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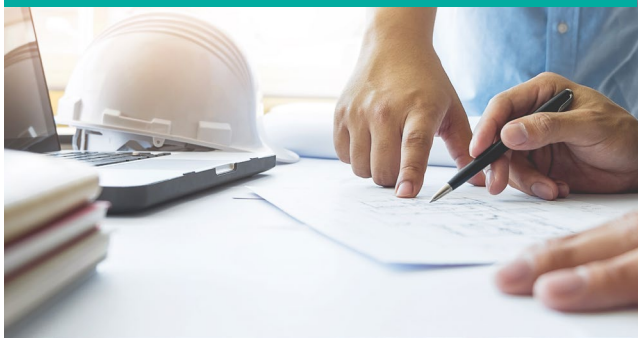
Expert Corner

The Dark Arts of Delay Analysis: Insights from an Industry Expert

Delay analysis is often called the "dark arts" of construction disputes. This description reflects the grey area the discipline sits in, somewhere between technical scheduling, reconstructing what happened on a project and reviewing contractual positions. When done well, delay analysis helps explain complex project histories clearly. When done poorly, it can seem confusing, subjective or designed to reach a particular outcome.

As a delay expert, I have witnessed the complexities, successes and occasional controversies that arise when projects fail to meet their deadlines. While the aim of delay analysis is straightforward, identifying why a project was delayed and who is responsible, the execution can be anything but simple.



Foreword

Our firm is pleased to have Anel Idriz of Alternative Logic contribute to this edition of Construction and Engineering Matters as a guest editor.

In this article, Anel provides his views on delay analysis. The views expressed in this article should not be construed as forming any advice or opinion (legal or otherwise) provided or endorsed by our firm or Alternative Logic.

Lack of Universal Standards

A key reason delay analysis is often labelled the "dark arts" is the absence of universally binding or mandatory standards governing how such analyses must be performed. Instead, practitioners rely on guidance documents, such as the Society of Construction Law (SCL) Delay and Disruption Protocol (2nd Edition)[1] and the Association for the Advancement of Cost Engineering International (AACEI) Recommended Practice No. 29R-03[2](the "Protocol(s)"), both of which expressly state that they are nonprescriptive guidance documents rather than rigid standards.

The SCL Delay and Disruption Protocol (2nd Edition), published in February 2017, explains that its purpose is to "provide useful guidance on some of the common delay and disruption issues that arise on construction contracts",[3] and to assist parties in resolving delay-related matters efficiently. Crucially, the Protocol cautions that its recommendations should be applied with "common sense", and recognises that the choice of delay analysis methodology is ultimately a matter of professional judgement. Rather than mandating a single approach, the Protocol outlines circumstances in which different methodologies may be appropriate, reflecting the varied nature of project records, contractual provisions and dispute contexts.

The Association for the Advancement of Cost Engineering's (AACEI's) Recommended Practice 29R-03 adopts a similar position. It states that its purpose is to "provide a unifying reference of basic technical principles and guidelines for the application of critical path method (CPM) scheduling in forensic schedule analysis",[4] while expressly confirming that it is "not intended to establish a standard of practice, nor is it intended to be a prescriptive document applied without exception".[5] The recommended practice further acknowledges that forensic schedule analysis is "both a science and an art",[6] relying on expert opinion and subjective decision-making, particularly where project data is incomplete or imperfect.

1 Society of Construction Law, "Delay and Disruption Protocol", 2nd ed. (2017).
2 AACE International, "Recommended Practice No. 29R 03: Forensic Schedule Analysis" (2011).
3 Society of Construction Law, "Delay and Disruption Protocol", 2nd ed. (2017), Introduction.
4 AACE International, "Recommended Practice No. 29R-03: Forensic Schedule Analysis" (April 25, 2011), §1.1.
5 AACE International, "Recommended Practice No. 29R-03: Forensic Schedule Analysis" (April 25, 2011), §1.1.
6 AACE International, "Recommended Practice No. 29R-03: Forensic Schedule Analysis" (April 25, 2011), §1.1.

This deliberate flexibility is both necessary and problematic. It allows delay analysis to be adapted to the realities of complex projects and international disputes, but it also creates space for disagreement between experts over methodology selection, data treatment, concurrency assessment and causation. When different experts apply different, yet ostensibly compliant, approaches to the same project and reach materially different conclusions, the discipline can appear opaque or outcome-driven, fuelling the perception of delay analysis as a "dark art."

In this context, the Protocols make clear that credibility does not lie in rigid adherence to any single methodology, but in transparent reasoning, clear articulation of assumptions and a well-justified explanation of why a chosen approach is appropriate in the circumstances. When professional judgement is exercised openly and with sound methodology, the "dark arts" label becomes less a criticism of the discipline, and more a reflection of its inherent complexity.

Multiple Methodologies, Multiple Outcomes

One of the principal reasons for the perceived complexity is that the same set of project facts can legitimately lead to different conclusions. Multiple recognised methodologies exist, and when applied to identical records, these methodologies can produce materially different delay outcomes. To those unfamiliar with the nuances, this variability can appear inconsistent or even manipulative.

One of the most frequent points of contention I encounter as a delay expert is the question of which delay analysis method is "preferred" or "best". Stakeholders in construction disputes including contractors, employers and even judges often ask:

- Which delay analysis method should we use for this project
- Why is one method better than another
- Can a single method provide the full picture of delay causation and responsibility

1. The answer to these questions depends on the specific circumstances of the project, the available data and the type of dispute. Is there a "preferred" delay analysis method?

There is no universally preferred method that applies to all projects. The choice of method depends on several factors, including:

- The type and complexity of the project
- The quality and availability of project data
- The purpose of the analysis: Where forensic delay analysis is to go before a judge or be used in litigation, more robust and defensible methodologies are often required

While certain methods are more robust than others, no single methodology can provide a complete picture of delay causation and responsibility. In practice, a combination of techniques is used to cross validate findings and provide a comprehensive analysis. This multimethod approach allows the limitations of individual methods to be addressed and deliver a more balanced and transparent analysis.

2. How does the choice of method affect the credibility of the analysis?

The choice of method significantly impacts the credibility of delay analysis, particularly in disputes. Decision-makers often favour analyses that:

- **Are transparent** – The methodology should be clearly explained and supported by evidence, structured and reasoned.
- **Are structured and reasoned** – Methodical, proportionate and well-explained analyses are preferred over opaque or overly simplistic approaches.
- **Are consistent** – The same approach should be applied to all delay events, without bias or selective application.
- **Account for the project's complexity** – Simple methods may be deemed insufficient for complex projects.

The Role of Professional Judgement

Delay analysis also relies heavily on professional judgement. Decisions must be made about which baseline programme is appropriate, how logic links should be treated, how concurrency is addressed and which contemporaneous records are reliable. These decisions are rarely governed by strict rules and are instead informed by experience and industry practice. While this judgement is unavoidable, it can be difficult for non-specialists to follow or challenge, reinforcing the perception of mystery.

Advocacy Versus Independence

The adversarial context of disputes further compounds the issue. In some cases, methodology selection appears driven less by the characteristics of the project and more by the position it supports. Even where recognised methods are used, selective application or unexplained assumptions can blur the line between independent analysis and advocacy. This contributes to scepticism, particularly when opposing experts adopt different approaches with confidence.

The Challenge of Incomplete Project Records

Compounding these challenges is the quality of project records themselves. Many projects suffer from incomplete or retrospectively updated programmes, inconsistent progress reporting and gaps in contemporaneous documentation. Delay analysts are often required to reconstruct events after the fact, make assumptions and reconcile conflicting records. While this reconstruction is grounded in evidence and experience, it can appear speculative to those removed from the process.

In recent years, advancements in technology have transformed the field of delay analysis, making it more transparent and data driven. Below are some examples of how these innovations are being applied:

1. **Building Information Modelling (BIM)** – BIM enhances delay analysis by linking schedules to 3D models, enabling clear visualisation of delay impacts and improving stakeholder understanding of their consequences.
2. **Artificial Intelligence (AI) and machine learning** – AI is increasingly being applied to delay analysis to identify patterns, forecast risks and predict potential delays through the analysis of large project datasets.

   While AI is still in its early stages in delay analysis, its potential is immense. By automating data analysis and forecasting, AI can reduce reliance on manual processes and improve the accuracy of delay assessments.
3. **Data analytics and visualisation tools** – Advanced analytics platforms are transforming the processing and presentation of delay data by enabling clear visualisation of trends, identification of recurring issues and real-time data interrogation.
4. **Drones and Internet of Things (IoT) sensors** – Drones and IoT sensors enable the collection of real-time site data, supporting objective comparison of actual progress against planned schedules. By providing accurate, timely and data-rich inputs, these technologies significantly enhance the precision and reliability of delay analysis.

While technology is a powerful enabler in delay analysis, the credibility of the analysis ultimately depends on transparency, methodological rigor and adherence to recognised best practices. Sophisticated scheduling software and analytical tools cannot compensate for unclear assumptions, selective application of methods or unsupported conclusions.

Complexity and Scrutiny by Decision-makers

Finally, the technical complexity of delay analyses makes them difficult to independently test. Large programmes, complex logic networks and specialised software can be challenging for tribunals, lawyers and clients to interrogate in detail. As a result, decision-makers often place significant weight on the credibility and transparency of the expert rather than the mechanics of the analysis itself.

Conclusion "Demystifying the Discipline"

In reality, delay analysis is not inherently a "dark art". Its reputation stems less from the discipline itself, and more from how it is sometimes applied. Both the Protocols demonstrate that delay analysis is a structured, principled exercise when undertaken in accordance with recognised guidance and sound professional judgement. When methodologies are selected with care, assumptions are clearly explained with sound reasoning, limitations acknowledged and conclusions presented transparently, delay analysis becomes a powerful and credible means of understanding what truly happened on a project.

There is no single "best" delay analysis method endorsed by either the SCL or AACEI. The appropriate approach depends on the project's complexity, the quality and availability of contemporaneous records and the nature of the dispute. What ultimately matters is not the label attached to the methodology; whether prospective or retrospective, observational or modelled, but the rigor and integrity with which it is applied.

Credible delay analysis demands transparency, consistency and an evidence-based assessment of cause and effect. When these principles are followed, the analysis serves its intended purpose: identifying the root causes of delay and supporting fair and equitable resolution of disputes. The so-called "dark arts" reflect the complexity of modern construction projects and the inherently adversarial environment that delay claims are assessed in. Yet, through improved record-keeping, evolving analytical tools and adherence to recognised best practice as articulated in both Protocols, the discipline is steadily being demystified.

In practice, credible delay analysis is achieved through objective reasoning, tailoring the analysis to project specific circumstances and engaging constructively with opposing experts to clarify and narrow areas of dispute. When undertaken with integrity, delay analysis does not obscure the truth, it reveals it and in doing so assists tribunals in reaching sound and well-reasoned determinations.

About the Author

Anel Idriz
Director and Founder of Alternative Logic
Programming and Delay Expert

Anel Idriz is a programming and delay expert specialising in the forensic analysis of delay and disruption in international construction and engineering disputes. He advises on complex arbitration matters involving programme analysis, causation, concurrency and time related impacts across a range of construction sectors. His expertise is grounded in international engineering and project management experience, enabling robust, technically defensible opinions.

He is often described as "a rare delay expert who combines good judgement with thorough preparation and articulacy in presentation", and an expert who brings "a proactive 'hands-on' approach to digging down into issues with an ability to get complex situations isolated and presented with clarity".

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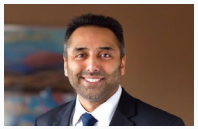

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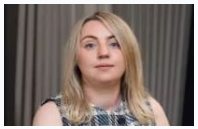

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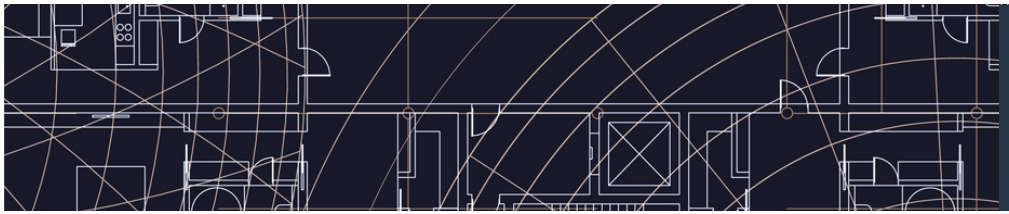

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