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Construction law in 2017: a review of key legal and industry developments

By Mathias Cheung

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Mathias Cheung

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This commentary summarises some of the most important and interesting developments in construction law in 2017, both in the UK and abroad. The issues covered are of relevance to legal practitioners and construction professionals alike.

In the King's College Construction Law Association Annual Lecture delivered on 11 May 2017, Professor John Uff QC observed that the "construction industry has suffered from perennial difficulties for many decades" but "dispute avoidance has never been a viable answer for the problems of the construction industry". Indeed, one only has to consider the proliferation of construction law decisions from the Technology and Construction Court (TCC) in England and Wales and the courts of other common law jurisdictions to see that construction disputes are very much alive and kicking.

Like death and taxes, claims and disputes are a fact of life within the construction industry, and the legal and financial stakes are high. The recent collapse of Carillion Group in the UK is a cautionary tale (and a topic to which the author will return later in this review). It is therefore important for legal practitioners and industry stakeholders generally to have their fingers on the pulse of construction law, and this neatly encapsulates the primary purpose of this overview of the key legal and industry developments over the past year.

This review spans the common law jurisdictions of the UK, Australia, Singapore and Hong Kong, as well as the ever-growing international construction arbitration space in the Middle East. The analysis will end with a wider discussion of industry developments generally and topical issues to look out for in the year ahead.

"Smash and grab" adjudications

Validity of payment applications and pay less notices

The start of the year was kicked off by O'Farrell J's judgment in *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC), where the employer sought to resist the enforcement of an adjudication decision by, inter alia, challenging the validity of the contractor's payment application,

largely on the basis that the payment application was based on an arbitrary assessment with no breakdown or substantiation.

This followed a string of important decisions including *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] BLR 694, *Henia Investments Inc v Beck Interiors Ltd* [2015] BLR 704, and *Jawaby Property Investment Ltd v The Interiors Group Ltd and Another* [2016] BLR 328, in which the TCC emphasised that "an application for interim payment must be sufficiently clear and unambiguous in form and intent so that the parties have notice of the application made" and of the fact that the payment regime has been triggered. Those decisions are commonly cited by employers to illustrate the considerable hurdle which a party must overcome, in order to establish a "notified sum" which is payable under section 111(1) HGCRA.

In *Kersfield*, O'Farrell J adopted a sensible approach to the issue and held that the payment application was valid, given that it was clear in the context and "[t]here is no suggestion that Kersfield did not recognise it as such" (at para 38). This is a helpful reminder that the TCC is unlikely to be sympathetic to attempts by employers to sidestep the requirement of a payment or pay less notice by arguing that there was insufficient substantiation.

Effect of an interim payment valuation

This issue came before the courts in *Imperial Chemical Industries (ICI) Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC). There, it was argued by the contractor that an interim valuation (in the absence of a pay less notice) is "deemed to be the value of those works" by virtue of the *ISG* decision – it was of particular importance because the contract in *ICI* has been repudiated, and the contractor was seeking to freeze the value of the works at the amount previously paid (*ISG Construction Ltd v Seevic College* [2015] BLR 233, at para 25).

The *ICI* decision, which was part of a continuing trend in the TCC to row back from the effect of *ISG*, stopped short of saying that *ISG* was wrongly decided, and up to the end of 2017, it remained the law that a valuation of the works in an interim payment application cannot be challenged in the absence of a pay less notice. However, it would be remiss not to mention the recent decision of *Grove Developments Ltd v S&T (UK) Ltd* [2018] BLR 173, which was handed down whilst writing this review. In *Grove*, Coulson J undertook a detailed review of the line of authorities from *ISG* to *Harding*, and finally departed from *ISG*. Therefore, at the time of writing, the latest word is that an employer can now dispute the underlying valuation of an interim application despite the absence of a valid pay less notice. Many in the industry fear that this has sounded the death knell for "smash and grab" adjudications.

The recent cases culminating in the decision in *Grove* have certainly put the correct position under the HGCRA in the spotlight. Given that Coulson J's decision in *Grove* is currently under appeal, the jury is still out on the final position. It seems unlikely that Coulson J's decision would be reversed, but given the conflicting authorities at the TCC level, the Court of Appeal's ruling would bring clarity by formally overruling *ISG*, and the industry should watch this space for the remainder of 2018. In the

meantime, Coulson J's decision is likely to be considered authoritative, but "smash and grab" adjudications will probably continue to be an important recourse for contractors, especially during the currency of a project.

Adjudication procedure and enforcement

The TCC has also seen another prolific year in terms of decisions relating to adjudication procedure and adjudication enforcement, which provide helpful guidance to the industry on the court's supervisory jurisdiction, particularly (1) Part 8 proceedings during adjudication; (2) Part 8 proceedings to resist enforcement; (3) challenges to enforcement; and (4) adjudicator's fees and adjudication costs.

Part 8 proceedings during adjudication

There has been increasing use of Part 8 claims to obtain an injunction against a party which has commenced an adjudication. The threshold that has to be met, however, should not be underestimated, as was made clear by a number of decisions in 2017. The judgment in *Jacobs UK Ltd (Formerly known as Jacobs Engineering UK Ltd) v Skanska Construction UK Ltd* [2017] BLR 619 was one such example.

In *Jacobs*, the referring party withdrew its reference to adjudication and served a fresh notice of adjudication on substantially the same dispute, after it had failed to obtain an extension of time for its reply (because its counsel had a timetable clash – something which would resonate with many a legal practitioner). The responding party sought an injunction against the second adjudication, even though it was well established that there is no express or implied restriction that precludes a party from withdrawing a referral, and there is no general principle of abuse of process in adjudication. O'Farrell J gave short shrift to the application and refused to grant any injunctive relief.

It is clear that Part 8 proceedings often provide a battleground for serial adjudications, and this can lead to some rather difficult cases. One of the hardest in 2017 was arguably *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] BLR 443. Here, Coulson J had to consider whether a previous adjudication determining Mailbox's entitlement to liquidated damages would preclude Galliford from commencing a subsequent adjudication regarding its entitlement to extensions of time.

After reviewing the relevant case law, Coulson J considered that the first adjudication decision on Mailbox's entitlement to liquidated damages was binding and could not be disturbed in any subsequent adjudication (unless and until the first decision was overturned by the court) (at paras 57 to 58). It followed that Galliford could not cherry-pick on claims to put forward as a defence and then pursue further extensions of time in any subsequent adjudication.

Part 8 proceedings are not to be seen as a panacea for contentious issues arising from adjudications. Whilst serial adjudications would often give rise to arguments regarding the scope of the respective disputes and merit the courts' intervention

(as in *Mailbox*), the position is different with attempts to short-circuit complex factual inquiries (as in *Merit*) or to argue some form of abuse of process (as in *Jacobs*), and parties should carefully consider the prospects before commencing Part 8 proceedings as a tactical manoeuvre in the middle of an adjudication.

Interpretation and rectification of construction contracts

Contractual interpretation and the implication of terms are perennial questions in construction disputes, be it adjudication, litigation or arbitration. Those within the industry would no doubt recall the landmark Supreme Court decision of *Arnold v Britton* [2015] UKSC 36, which is often considered to have reinforced a high threshold for the reliance on business common sense in interpretation. 2017 was particularly interesting in that a number of cases saw those exact principles in action.

Contractual interpretation

While the Supreme Court judgment in *Wood v Capita Insurance Services Ltd* [2018] Lloyd's Rep Plus 14 did not concern a construction dispute and instead examined the interpretation of a poorly drafted indemnity clause in a sale and purchase of shares, it is most interesting for its discussion of the principles of interpretation. Conscious of the commonly held view that *Arnold* emasculated the role of business common sense in interpretation, Lord Hodge emphatically stated that "[o]n the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing", and that the recent developments are "one of continuity rather than change" (*Wood*, at paras 14 to 15).

Whilst *Wood* was not technically laying down any new principles, it serves as a helpful reminder that interpretation is a "unitary exercise" which involves an "iterative process" balancing the different considerations (at para 12).

Although the dicta in *Wood* may have moderated the perceived effect of *Arnold,* it is not necessarily any easier to establish an interpretation largely based on business common sense and unsupported by the language used. As Lord Hodge observed, "[b]usiness common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended" (at para 28). The courts will be vigilant to any attempt by a party to escape what is effectively a bad bargain (as in *Wood*).

In contrast to the above, the Court of Appeal decision in *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2017] EWCA Civ 359 is an illuminating example of when business common sense could come to the rescue. Here, the question was whether the minimum acceptable performance levels (MAPs) or performance profit thresholds (PPTs) set out in an example table were in fact intended to be binding – an issue which the trial judge described as "finely balanced".

Jackson LJ concluded that both parties must have intended the contract to specify MAPs, and since the only MAPs in the contract were contained in the examples, "applying the approach mandated by the Supreme Court in *Rainy Sky* and *Arnold*, the contract properly construed must mean that the MAP figures set out in examples 1, 2 and 3 are the actual MAPs for the year 2013/2014, not hypothetical MAPs by way of illustration" (at para 53). The unworkability of the incentivisation and termination provisions in the absence of MAPs mobilised business common sense in favour of Sutton Housing's interpretation.

Implied terms in construction contracts

Due diligence and expedition

The Singapore Court of Appeal judgment in *CAA Technologies Pte Ltd and Newcon Builders Pte Ltd* [2017] SGCA 53 shows the hurdle that a party must overcome in order to imply a term into a building contract – in that case, the very familiar term of due diligence and expedition. Although some may say that this is a common (and arguably obvious term) to include expressly in many construction contracts, the implication of such a term is a wholly different question. Indeed, the fact that this is usually an express term militated against its implication.

Chong JA further took the view that "it would usually be unnecessary to imply a term of due diligence in construction contracts that already provide for a certain completion date of the main contractual obligation" (at para 79). Accordingly, the Singapore Court of Appeal held that there was no implied term of due diligence and expedition, following the earlier TCC decision in *Leander Construction Ltd v Mulalley and Company Ltd* [2012] BLR 152. The reasoning in these decisions is perfectly consistent with the general approach to the implication of terms, and it would likely be an ambitious task for any party seeking to argue otherwise.

Good faith

Coulson J grappled with the concept of duties of fairness and cooperation in *Costain Ltd v Tarmac Holdings Ltd* [2017] BLR 239, in the context of the express provision for mutual trust in a NEC3 contract. Whilst accepting that there is a duty not to improperly exploit or mislead the other party, Coulson J was "uneasy about a more general obligation to act 'fairly'; that is a difficult obligation to police because it is so subjective", and considered that mutual trust "does little more than say expressly what Vinelott J thought was implied into all construction contracts: see *Merton LBC v High Stanley Leach* [1986] 32 BLR 51" (*Costain*, at paras 123 to 124). It is clear that Coulson J was reluctant to give the express term too wide a compass, and did not consider that the provision was adding much value at all.

The above can be contrasted with the Australian decision in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151. Here, the New South Wales Court of Appeal readily assumed, in the context of a discretionary power to

grant an extension of time where there were acts of prevention, that there was an implied duty of good faith obliging the employer to exercise that contractual discretion. Given the approach of the English courts thus far, it seems unlikely that the reasoning in *Probuild* would be followed in the UK. Indeed, insofar as the prevention principle is sufficient to dispose of the issue (which is not without controversy), it is unclear that an implied duty of good faith would actually add anything, except for a convenient shorthand for the courts' value judgment.

Design liability

The scope and standard of a construction professional or a designer-builder's obligations are often the subject of heated disputes, as the technical issues and financial consequences associated with defective design are often substantial. This can be a mixed question of contract and tort, depending on the factual matrix and the parties' relationship. In 2017 the courts delivered a number of important decisions which are likely to have an impact on the extent of design liability within the industry.

Assumption of responsibility

In the much-discussed judgment in *Lejonvarn v Burgess and Another* [2017] BLR 277, the Court of Appeal considered whether Mrs Lejonvarn, who assisted a friend and former neighbour with designing and supervising landscaping works, owed a duty of care in tort in respect of defects in the works. At first instance, DHCJ Nissen QC held that there was clearly no contractual relationship, but it was fair, just and reasonable to impose a tortious duty.

On appeal, Hamblen LJ considered the well-established case law in relation to assumption of responsibility in some detail, and similarly held that Mrs Lejonvarn owed a duty of care to Mr and Mrs Burgess to exercise reasonable skill and care, to the extent that she did provide professional services acting as an architect and project manager (although there was no duty or obligation as such to provide those services).

Although it is easy to misread this case as a general imposition of liability on ad hoc advice provided to a friend, the facts went well beyond that. Mrs Lejonvarn provided considerable professional input over a significant period of time in what was a very involved project, and expected to be paid for future services down the line. Therefore, this case serves as a helpful reminder for all construction professionals that what may at first sight be informal can readily evolve into an assumption of responsibility, and if that is not the desired outcome, then express caveats that professional advice should be independently sought would be wise.

Fitness for purpose

Rarely does a construction case reach the highest court of the land, but in 2017, the much-awaited decision in *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and Another* [2017] BLR 477 was handed down by the Supreme Court. The

court had to grapple with various provisions in the contract which could be construed as inconsistent and conflicting. The dispute arose from the design, fabrication and installation of 60 offshore wind turbines – the Technical Requirements provided that the turbines "shall ensure a lifetime of 20 years in every aspect without planned replacement", but also required the turbines to comply with the J101 standards which (due to an error) would not have provided a design life of 20 years.

Notably, the Supreme Court was unimpressed by the argument that the Technical Requirements were "too slender a thread" on which to hang a much more onerous fitness for purpose obligation. Lord Neuberger observed that the Technical Requirements were squarely part of the contract, and said: "I do not see why that can be said to be an 'improbable [or] unbusinesslike' interpretation, especially as it is the natural meaning of the words used and is unsurprising in the light of the references in the TR to the design life of the Works being 20 years" (at paras 48 to 49). Lord Neuberger also emphasised that it is "very difficult, to argue that a contractual provision should not be given its natural meaning, and should instead be given no meaning or a meaning which renders it redundant" (at para 50).

This case will no doubt be seen as an example of the courts' continuing emphasis on the language used by the parties, even after the decision of *Wood*. It demonstrates the point made above that business common sense is unlikely to avail a party except in extreme cases of absurdity or impossibility, and any attempt to read down a contractual provision is likely to be an uphill struggle. Parties should take this as a timely reminder to check their contracts carefully and include express, overriding provisions which clarify the overall design obligations, be it reasonable skill and care or fitness for purpose.

Delay and prevention principle

It is virtually impossible to complete any building or engineering project without rubbing shoulders with delay, extensions of time, and the prevention principle. The significance of these issues (and the factual and analytical complexity which usually entails) is one of the key drivers behind the *SCL Delay and Disruption Protocol 2nd Edition* (SCL Protocol), which was finally published in February 2017 after extensive consultation and deliberation. In addition to the new SCL Protocol, there were a number of interesting cases on delay analysis and the prevention principle over the course of last year.

A cautionary tale on time-distant delay claims can be found in *Carillion Construction Ltd v Emcor Engineering Services Ltd and Another* [2017] BLR 203. That case concerned the redevelopment of the Rolls Building, and the claim downstream by the main contractor, Carillion, against inter alia its mechanical and electrical services subcontractor, Emcor, for prolongation costs arising from delay. Carillion's position was that Emcor was responsible for the critical delay, but Emcor alleged late variations at multiple points in the months leading up to actual completion – the difficulties with a time-distant delay analysis in those circumstances were immediately clear.

In the preliminary issue proceedings, Carillion argued that any extension of time for extra works instructed after the planned completion date should be non-contiguous and applied to the actual period when the delay impact was felt, instead of adding a contiguous extension to the planned completion date. This was rejected in the TCC, and in 2017, the appeal was again dismissed unanimously.

The *Carillion* judgment does provide some certainty as to the general position for extensions of time – they are normally contiguous in the sense that they start on what was previously the due date for completion. It would, of course, depend on the wording of the particular contract in question, but this seems to be the consistent approach adopted throughout the industry, as Jackson LJ observed. The difficulties encountered in the *Carillion* case should incentivise parties to try and resolve issues of extensions of time and loss and expense contemporaneously, rather than some years down the line – particularly where there are various contractors and subcontractors involved, all of which may be partly or wholly liable for delays in the project.

Prevention principle and concurrency

The so-called "prevention principle" often goes hand in hand with arguments of "time at large". The relevant principles have been considered extensively in an earlier and very well-known judgment in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] BLR 195, and back in April 2012, Sir Vivian Ramsey even gave a lecture to the Society of Construction Law in London doubting the foundation and application of these principles. Nowadays, given that most contracts contain adequate provisions for extension of time, those principles are not as frequently invoked in court, and even less often succeed.

It is therefore interesting to see the prevention principle and "time at large" discussed in the recent case of *North Midland Building Ltd v Cyden Homes Ltd* [2017] BLR 605, in the context of a dispute over the implications of concurrent delay. The contractor relied on the prevention principle to argue that, in circumstances where there was concurrent delay, it should nonetheless be entitled to an extension of time, effectively circumventing the bespoke contractual provision that "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account".

Fraser J adopted John Marrin QC's definition of concurrent delay ie delay caused by two or more different events which are of "equal causative potency" (at para 12). Ultimately, Fraser J decided the Part 8 claim on the basis that the contractual provision was "crystal clear", and there was no authority for the proposition that the prevention principle would prevent parties from agreeing to deal with concurrent delays in a particular way (at paras 18 to 19). However, Fraser J then went on to make a further obiter observation on the effect of concurrency. There has been no shortage of academic debate concerning the applicability of the prevention principle in the event of concurrent delay for which the contractor is partly responsible, although various dicta in recent authorities tend to suggest that the principle would not be applicable. Fraser J firmly came down in favour of the position expressed in those dicta.

It is noteworthy that the prevention principle was also invoked in Singapore last year in a rather novel context. In *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62, the contractor argued that the employer's termination of a construction contract was a "total act of prevention" amounting to a repudiatory breach of the contract, in an attempt to recover loss of profits as a result of the termination. Loh J roundly rejected that argument, on the basis that "[i]n terminating the Contractor's employment under clause 31.4(1), the Employer is exercising a contractual right. The mere exercise of a contractual right cannot constitute a breach of contract, let alone a repudiation of the contract" (at para 39). It is clear that the courts generally have little sympathy with attempts to apply the prevention principle in unprecedented ways.

Liquidated damages

The construction industry is probably still coming to terms with the new legal test for penalty clauses as laid down by the Supreme Court in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] BLR 1, ie "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation" (at para 32). So far, there has been no TCC decision considering the application of the new test to a construction contract, although a number of other commercial decisions have shed light on the mechanics of the *Makdessi* test.

It is worth bearing in mind that even if a liquidated damages clause crosses the hurdle of the doctrine of penalties (as it often does), issues may nonetheless arise as to its certainty and enforceability where there is inadequate provision for sectional completion. Such was the nature of the issues faced by the court in *Vinci Construction UK Ltd v Beumer Group UK Ltd* [2017] BLR 547, which involved the development works at the South Terminal of Gatwick Airport. Vinci engaged Beumer as a subcontractor to complete the new baggage handling system, which was divided into sections with different completion dates, and different rates of liquidated damages for Section 5 "Baggage" and Section 6 "Remaining Works". Beumer argued that the liquidated damages clause was void for uncertainty because it was unclear whether disconnection of the existing equipment was within section 6.

Public procurement

In *Nuclear Decommissioning Authority (NDA) v Energy Solutions EU Ltd (Now Called ATK Energy EU Ltd)* [2017] BLR 351 the Supreme Court had to consider, as a matter of principle, the applicability of the three *Francovich* conditions under EU jurisprudence to the claim for damages, particularly the need for the breach to be "sufficiently serious". Lord Mance held that the *Francovich* conditions applied to liability under the EU Remedies Directive for breach of the EU Public Procurement Directive, and also breaches of the UK Public Procurement Regulations.

It is unclear how exactly the Supreme Court's latest ruling would pan out post-Brexit (or at any rate after the transition period) – will claims under the UK Public Procurement Regulations still be seen as "based on EU law" or purely domestic under the EU Withdrawal Bill, and how if at all will the *Francovich* principles which flow from the EU case law continue to apply? If Parliament does not resolve these issues under the EU Withdrawal Bill or otherwise, then the same issue may well come before the Supreme Court again in the not-so-distant future.

Another important decision in 2017, which is likely to have a much more lasting effect on proceedings relating to public procurement, was *Joseph Gleave & Son Ltd v Secretary of State for Defence* [2017] BLR 264. The case involved a military hardware procurement dispute with what was described as a "chequered history". The claimant sought to expedite the trial so that judgment could be delivered before the contract was awarded, but Coulson J rejected the request because the belated request was inconsistent with the "rather leisurely process" which had gone before (at para 29), and there would be an impossible timetable in the light of the complexity of the matter which would compromise the quality of the investigation and the decision (at paras 31 to 34). Instead, Coulson J granted a stay of proceedings until the contract was awarded, as there were clear benefits to the contracting authority and other users of the TCC and no real detriment to the claimant (at paras 53 to 57).

International trends in construction arbitration

Hong Kong

In Hong Kong, the talk of the town in 2017 was certainly the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in June 2017, after a consultation process which started back in 2013. This introduced a new Part 10A into the Arbitration Ordinance (Cap. 609) and a new section 7A into the Mediation Ordinance (Cap. 620), which carved out third-party funders in relation to arbitrations (and related court proceedings and mediations) from the common law prohibition of champerty and maintenance. Interestingly, unlike in Singapore, the definition of third-party funders in Hong Kong is very broad and includes both professional funders and lawyer-funders.

Singapore

Two Singaporean decisions in 2017 would be of interest to those contemplating a construction arbitration in Singapore or looking to enforce an arbitral award there. In *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 Lloyd's Rep 104, the Singapore Court of Appeal expressly confirmed that the responding party's unilateral option to arbitrate is valid and enforceable, but dismissed the referring party's stay application because the arbitration agreement would only come into existence upon an election to arbitrate, such that the responding party was entitled to elect to litigate instead in those circumstances. In *Prometheus Marine Pte Ltd v King* [2017] SGCA 61, the Singapore Court of Appeal considered an application to

set aside an arbitral award under section 24 of the International Arbitration Act (Cap 143A) and section 48(1) of the Singapore Arbitration Act (Cap 10), on the various bases that the High Court judge was tainted by apparent bias; that the award was induced by fraud and corruption; that the arbitrator acted in excess of jurisdiction and in breach of natural justice; and that the arbitration agreement was not made between the parties in the arbitration. The court roundly rejected all of those grounds, particularly criticising the unsubstantiated allegations of fraud, corruption and bias.

UAE

The most exciting development in the UAE has no doubt been the entry into operation of the Technology and Construction Division (TCD) of the Dubai International Financial Centre (DIFC) Courts in October 2017, with specialist judges and industry-specific rules to speed up and streamline the dispute resolution process. Led by Sir Richard Field, who was previously in charge of the Commercial Court in London, this is likely to be a popular choice for the substantial construction sector in the Middle East, particularly where the dispute involves complex and technical issues but not necessarily a high monetary value.

Insolvency in construction

In *Multiplex Construction Europe Ltd (Formerly Brookfield Multiplex Construction Europe Ltd) v Dunne* [2018] BLR 36, Multiplex entered into an Advance Payment Deed with Mr Dunne and his company due to the latter's financial difficulties. Mr Dunne's company went into administration, and Multiplex sought to enforce (by summary judgment) a guarantee against Mr Dunne which provided that "should the Sub-Contractor suffer an event of insolvency [...] the Guarantor shall immediately be liable to the Contractor for the payment of the Advance Payment". Fraser J held that the heading "guarantee" was not determinative, and the use of the word "immediately" indicated that there was no possibility of an accounting process – as such, Mr Dunne owed a primary obligation to Multiplex (at paras 39 to 45). Fraser J refused to apply the principle of contra proferentem, and simply focused on "the words actually chosen, and what they mean" (paras 26 to 34), providing a glimmer of clarity amid the uncertainties of insolvency.

Issues of termination and enforcement of performance bonds will be crucial in the event of the insolvency of a contractor. In *Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc* [2018] BLR 98, the TCC had to consider whether there was a valid call on the performance bond, and whether there was a valid termination after the contractor became subject to a Company Voluntary Arrangement. Coulson J considered that there was a valid call on the bond based on an unpaid debt ascertained after insolvency, and it cannot be argued that there was no breach of contract – "insolvency would lead to a breach (and thus a claim under the bond) if the employer had followed the provisions of the contract and established a debt due, and the debt remained unpaid by the contractor" (at para 27).

Concluding observations

The aftermath of Carillion's insolvency is likely to be in the spotlight in the year ahead. Of particular importance is the joint inquiry into the management and governance of Carillion, its sponsorship of its pension funds, and the implications for company and pension scheme law, regulation and policy. This investigation will hopefully shed light on how Carillion collapsed from a going concern in 2017 into a mountain of debt.

At the same time, the related inquiry by the Public Administration and Constitutional Affairs Committee into sourcing public services will very likely inform the government's reconsideration of the viability of ongoing PFI and PF2 projects and the future procurement of such projects, particularly the complex contractual frameworks and the public authorities' approach to operating these contracts, which more often than not carry precarious risk allocations in terms of payment deductions and termination for performance failures.

Of equal importance are the two ongoing inquiries arising from the Grenfell Tower incident. The first, led by Dame Judith Hackitt, is an independent review of building regulations and fire safety in general, with a particular focus on their application to high-rise residential buildings. The review is now in its second phase, and a final report is expected to be published in spring 2018, focusing on: regulation and guidance; roles and responsibility; raising levels of competence; process and enforcement; effective recourse for residents' concerns; and quality assurance of products.

The other inquiry, led by Sir Martin Moore-Bick, has received the most media attention since it opened in September 2017. It is more specifically directed at the Grenfell Tower incident, and its primary focus will obviously be on the public authorities' obligations to ensure that buildings are maintained in line with health and safety standards.

More generally, the industry is no doubt aware of the new suite of FIDIC contracts published just before the end of 2017. There will inevitably be interesting debates and commentary on these latest amendments, as parties begin to adopt the contracts and put the amendments to use.

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Appendix:

Judgments analysed in this article:

Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735; [2018] BLR 1
AECOM Design Build Ltd v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC); [2017] BLR 329
Bell Building Projects Ltd v Arnold Clark Automobiles Ltd [2017] CSOH 55
Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd [2017] EWHC 239 (TCC); [2017] BLR 216
CAA Technologies Pte Ltd and Newcon Builders Pte Ltd [2017] SGCA 53
Carillion Construction Ltd v Emcor Engineering Services Ltd and Another [2017] EWCA Civ 65; [2017] BLR 203
Chan Chi Lam trading as Hoi Fat Construction Company v Lam Woo & Co Ltd and Others HCCT 52/2014
Christopher Linnett Ltd and Another v Matthew J Harding (trading as M J Harding Contractors) [2017] EWHC 1781 (TCC); [2017] BLR 498
Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC); [2017] BLR 239
Dawnus Construction Holdings v Amey LG Ltd [2017] EWHC B13 (TCC)
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