AGGREGATE

EDITION #3 DECEMBER 21

ARCHOR

Welcome to the last Aggregate of the year...

...and it's a special festive(ish) edition!

As everyone in construction knows, the best thing to do over Christmas is take two weeks off! So to provide some reading material for those long days when you're missing work, we've compiled an end of year review with an article for each month.

Rather than spoil the surprise by setting out what's included in this month's edition, I'd urge you to have a flick through and see what jogs your memory. Let us know what your favourite development of 2021 was (in the construction world!) – and in particular, let us know if we've missed something really interesting!

It's been a busy year (although when isn't it?). It started in lockdown, and ends with groundhog day-like discussions of new variants and new restrictions. But in between some great projects have come to fruition, there have been some positive developments in the law – and of course, we've had the launch of Archor!'

So before you embark on a trip down the 2021 construction memory lane, we'd like to say once again a huge thank you to our clients, contacts and friends for everything you've done for us this year. We don't take it for granted, and we know we're lucky to have such a brilliant band of supporters.

Happy Christmas – and we look forward to 2022.

Oli, Editor-in-Chief

January

When you just HAVE to adjudicate

We start off our review of the year with a look at adjudication…what else? But to make things a bit more interesting, we head north of the border to the Scottish courts. And consider a case involving an NEC contract – which is relatively rare both there and in the English courts.

The Outer House of the Court of Session (roughly Scotland's equivalent to the High Court) was tasked with considering the dispute resolution provisions of the NEC3 Engineering and Construction Contract in *The Fraserburgh Harbour Commissioners v. McLaughlin & Harvey Limited*. Those familiar with the NEC3 ECC will know that various options are selected when putting the contract together, including which dispute clauses are applicable. For works carried out where the Housing Grants, Construction and Regeneration Act 1996 applies, the usual option clause is W2.

The contract was for works carried out at Fraserburgh Harbour, a harbour near Aberdeen that offers services to the fishing, oil and renewables sectors. The harbour was being deepened to allow increasing vessel sizes to dock and to allow a greater efficiency in the port. Unfortunately, when the works were completed the Harbour identified what it said were defects in the works. It commenced an action seeking damages totalling more than £7million.

However, the contractor, McLaughlin & Harvey, objected to this action. It referred to clause W2.4(1) – a standard part of option W2 – which provides that "A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract". It said that the failure to refer the dispute to adjudication before commencing the proceedings meant the action should not be allowed to continue. It also argued that the 'tribunal' in the contract was arbitration not litigation, and so the court had no jurisdiction anyway.

The Harbour admitted that it had not adjudicated the dispute, but argued, perhaps somewhat optimistically, that there was an implied right to litigate the merits of a dispute through the court regardless of clause W2.4. But the court was having none of it. It said that such an argument was inconsistent with the clear words of the contract, which should be upheld so long as not inconsistent with the Construction Act (which they were not). It said that in effect, clause W2.4 set out a sequence for the different modes of dispute resolution, of which adjudication was the first step – a condition precedent to resort to the tribunal (however defined). And so it struck the claim out.
This was perhaps an unsurprising decision – but it is fairly rare to get decisions on these types of issues, so some judicial clarity is welcome. The court was clear that the parties had signed up to a tiered dispute resolution mechanism – adjudication first – and that they should therefore be held to it. All users of the NEC3 (and NEC4) ECC will be similarly bound unless W2 has been amended, and so they should be careful to make sure they comply with the need to adjudicate first too (or seek an agreement that adjudication can be dispensed with if there are good reasons not to adjudicate).

As a footnote, the case came back before the Inner House of the Court of Session (an appeal court) in October 2021. That time round the court said that the lower decision was wrong to 'strike out' the claim altogether, and said that it should only have been (in effect) stayed pending the outcome of the adjudication. That is potentially an important procedural point for issues such as limitation, but it doesn't affect the underlying decision: W2.4 is an important part of the NEC dispute resolution framework, and parties must respect it by adjudicating first.

Oli Worth
Partner

February

Adjudication & reserving your position

We promise that we won't talk about adjudication every month – but there is a lot of it about!

Those who have been involved in an adjudication will be all too familiar with the responding party reserving its position as to the adjudicator's jurisdiction throughout the adjudication process in the emails and submissions. This reservation on jurisdiction will arise from a responding party's submission, issued early in the process, that the Adjudicator does not have jurisdiction for one or more separate reasons.

But what about once the party receives the decision and wants to defend enforcement of it? In February 2021 the Courts considered precisely this point, in *Croda Europe Ltd v. Optimus Services Ltd.*

The initial facts were quite simple. Croda received an adjudicator's decision and its solicitors wrote to the Adjudicator pointing to a number of alleged clerical mistakes or ambiguities. The email also invited the Adjudicator to include a declaration as to the timing of the payment required to be made.

Following an invitation by the Adjudicator for comments by Optimus, Optimus responded to the points made by Croda, agreeing some and suggesting an alternative declaration for the payment date. The email also confirmed that Optimus would be making payment of the Adjudicator's fees (which it then did).

However, when Optimus didn't pay, Croda issued enforcement proceedings. Optimus ran two grounds to resist enforcement, both of which were unsuccessful, but the interesting point for these purposes was the court's consideration of whether Optimus had elected to treat the decision as binding by way of its correspondence following receipt of the Adjudicator's decision.

In short, the court decided it had done. It said that the wording of Optimus' email, which included a reference to interest being payable as part of a justification for seeking an extended payment date, coupled with Optimus seeking to rely upon the 'slip rule' (the rule which allows an Adjudicator's decision to be corrected due to a clerical mistake or ambiguity) without reserving its position on jurisdiction showed that Optimus had treated the decision as binding.

The law applied here was not new, but it is a harsh reminder to those who correspond with the Adjudicator following receipt of the decision, even when dealing with what may be considered to be admin matters. Although 'only' admin matters, the correspondence about them gives rise to a waiver of their right to resist enforcement, however strong their grounds during the adjudication may have been, because they have not reserved their position on jurisdiction.

So Croda was a very simple reminder that you should always reserve your position as to jurisdiction, even after receipt of the decision, in case there is a chance you wish to resist enforcement. Not doing so could end up being very costly.

Ruth Sunaway
Partner

March

VAT reverse finally comes in

The long-anticipated VAT reverse charge finally came into force on 1 March 2021. This had initially been planned to be introduced in October 2019 but was delayed for a year because the industry wasn't ready. It was delayed again in October 2020 due to the effect of covid. But finally the new regulations that have transformed how VAT is handled in the construction industry are here (whether we like it or not!).

Why was the VAT reverse charge introduced?

The aim of the VAT reverse charge is to reduce VAT fraud which is said to be prevalent in parts of the construction sector. Some unscrupulous parties charge VAT on the supply of labour and/or materials, but then fall off the radar without accounting for the VAT to HMRC. It is estimated that £100 million per year has been lost in tax revenue due to such practices so action needed to be taken to combat this issue.

What impact has the VAT reverse charge had on the construction industry this year?

For most construction transactions (except for when the supply of goods and/or services are to end users or intermediary suppliers), the responsibility for accounting VAT to HMRC now lies with the recipient of construction services, rather than the supplier. Processes have changed all round for those involved in construction operations.

For instance, if you are a sub-contractor, there may be a significant impact on your monthly returns. The gross value of payments coming into your business will reduce as your customers will no longer be paying you VAT. Instead, your customer will be responsible for reporting the VAT to HMRC. As a result, you may need to consider how this will impact your day-to-day running of your business and cash flow.

The way in which invoices are produced has also had to change in light of implementation of the VAT reverse charge. When supplying goods and/or services subject to the reverse charge, there must be an explicit reference to the same on the invoice. This can be done in a variety of ways, but it is common to directly refer to section 55 of the Value Added Tax Act 1994 (the piece of legislation which governs the VAT reverse charge) to meet the legal requirement. Alternatively, you could include wording along the following lines: "Customer to account to HMRC for the reverse charge output tax on the VAT exclusive price of items marked 'reverse charge' at the relevant VAT rate as shown above."

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HMRC accepted that the new legislation surrounding the VAT reverse charge could be confusing. Within the first six months, HMRC officers approached practical errors with a light touch unless there was intentional and deliberate avoidance of the new rules.

However, as we are now at the end of 2021, that grace period has ended. Errors made considering the new legislation may not be taken so lightly. Failure to properly understand and implement the VAT charge could end up with a fine from HMRC – and could leave unaware businesses exposed to big tax bills. As the legislation has been many years in the making, and now in force for the best part of a year, there really aren't any excuses for continued non-compliance.

Megan Green
Paralegal

April

Residential property developer tax

So who is going to pay for the cost of recladding high rise buildings? In April 2021 we started to get an answer to that when a consultation was launched – although the tax under discussion isn't planned to come into force until April 2022.

It has been nearly five years since the Grenfell disaster. Although it remains painfully difficult to know the exact causes, and the inquiry still has some way to go before its final report – what is clear is that thousands of buildings built before the disaster suffer from serious issues including the presence of dangerously combustible cladding. Flats in blighted buildings are very difficult if not impossible for owners to sell, until the cladding is replaced. Many residents have no choice but to live in those certified-dangerous buildings.

So far, there have been a mix of schemes aimed at providing the funds to remedy cladding problems. These funds have come from a mix of individual residents, building freeholders, contractors and insurers, and the government. But to put an end to all the uncertainty, the government is now proposing a Residential Property Developer Tax ("RPDT").

The RPDT is essentially a tax on those developers who look to build new high rise residential blocks, in effect to pay for the failings of previous developers. The tax will be in addition to the Building Safety Levy, which was announced alongside the RPDT. The Building Safety Levy is a single charge applied to developers who look to build certain high-rise residential buildings in England from 2023 onwards. So basically a very similar basis for the tax. The detail of the Building Safety Levy remains less advanced than the RPDT, presumably as it is due to come in a year later.

Following the end of the consultation in July this year, Rishi Sunak announced in his October budget that the RPDT scheme was going ahead and that it was going to apply to companies who turnover more than £25 million. The tax was to be set at 4%, with a view it to raising £2 billion in the next 10 years. It is due to come into effect from 1 April 2022.

There is proposed draft legislation, albeit with some significant gaps. The basic position appears to be a very wide interpretation of residential development (albeit excluding student accommodation and care homes), and a recognition that non-residential development activities forming part of a company's turnover (i.e. commercial development) will be excluded from any taxable figure. The potential for masking types of works is recognised – the efficacy of anti-avoidance measures will be found out over time.

So is it the right way to approach this? Developers building new high-rise blocks who have to pay this tax will simply pass it onto the end purchaser. For a development to be financially viable there has to be a certain level of return to set against the risk. So this will just form part of that appraisal.

The RPDT may ultimately provide a fund for the government who in theory are funding the re-cladding works, but in practice it is not the developers or government actually paying for this – it's the new purchasers. And although this might raise a level of taxation for the government, unless the government actually gets on and does the work needed now (rather than keep talking about it), it doesn't actually get the cladding replaced on existing buildings. The government is promising to pay for the re-cladding in the short term, but to date government action has been painfully slow bearing in mind the time that has passed since the Grenfell disaster.

Rory Abel
Partner

May

Dispute adjudication boards the JCT way

In May 2021, JCT published its new approach to dispute resolution – the dispute adjudication board documentation (DAB 2021).

When confronted with a possible conflict, avoidance can produce a better outcome than engagement. In other words, why fight if you have an alternative means of resolution? This seems to be the spirit in which the JCT has developed the DAB 2021. The JCT DAB is a suite of documents that seeks to provide a pathway through which parties can resolve a dispute before a costly and irreversible escalation occurs. In other words, the JCT DAB is a way of reaching an amicable conclusion to a dispute, without the need for a statutory adjudication or other proceedings.

Construction disputes are costly by nature, and the larger the project, the more likely it is that the parties will have to continue working together while they are in the midst of a formal dispute. Such disputes have the potential to corrode hard-won relationships that have developed between parties and impede the overall progress of the project.

Practically speaking, the suite is comprised of several documents: a DAB tripartite agreement (TPA), and a set of DAB rules. The DAB rules are designed to be used with the JCT Design and Build and the Major Project forms, while the TPA is designed to be signed by the two contracting parties and the DAB member(s) (typically the panel has three DAB members). Once the DAB rules are integrated, and the TPA has been executed, this forms a binding agreement which allows a DAB to be set up. This agreement can only be terminated if both contracting parties agree. Any decisions of the DAB are binding until final dispute resolution (if required).

The DAB is primarily a mechanism for avoiding disputes by anticipating them. It fulfils its purpose by advising under article 9 of the JCT DAB Rules, and the parties can request advice as and when they require it. This might occur in many contexts: during a site visit, a regular meeting, or by written request. Both parties remain involved in any discussion under the DAB. The utility of this is primarily to avoid disputes, rather than to work out disputes that have already arisen.

The success of the JCT DAB rests on whether people accept the assumption that collaboration is a cheaper, more amicable, and less time-consuming alternative to an argument between parties. It may be that in some cases a DAB merely acts as an unnecessary prelude to a full-blown dispute, wasting both time and money – particularly if the parties go in with an adversarial mindset and aren't prepared to compromise. There is also a query about whether DABs are actually needed with adjudication already providing a temporarily binding decision within 28 days. But of course, that is an inherently adversarial process and sees control ceded to a third party - which the DAB does not.

If DABs do catch on, it's likely to be on larger longer running schemes where there is merit in spending time setting up a DAB during the project – it's hardly worth it for a final account dispute or a small project, where adjudication is likely to be sufficient. There may also be a role for public sector organisations, who traditionally advocate a more collaborative approach, to lead the way. Ultimately we will have to wait and see.

Will Fear
Paralegal

June

The month of ARCHOR

And now for a commercial break…

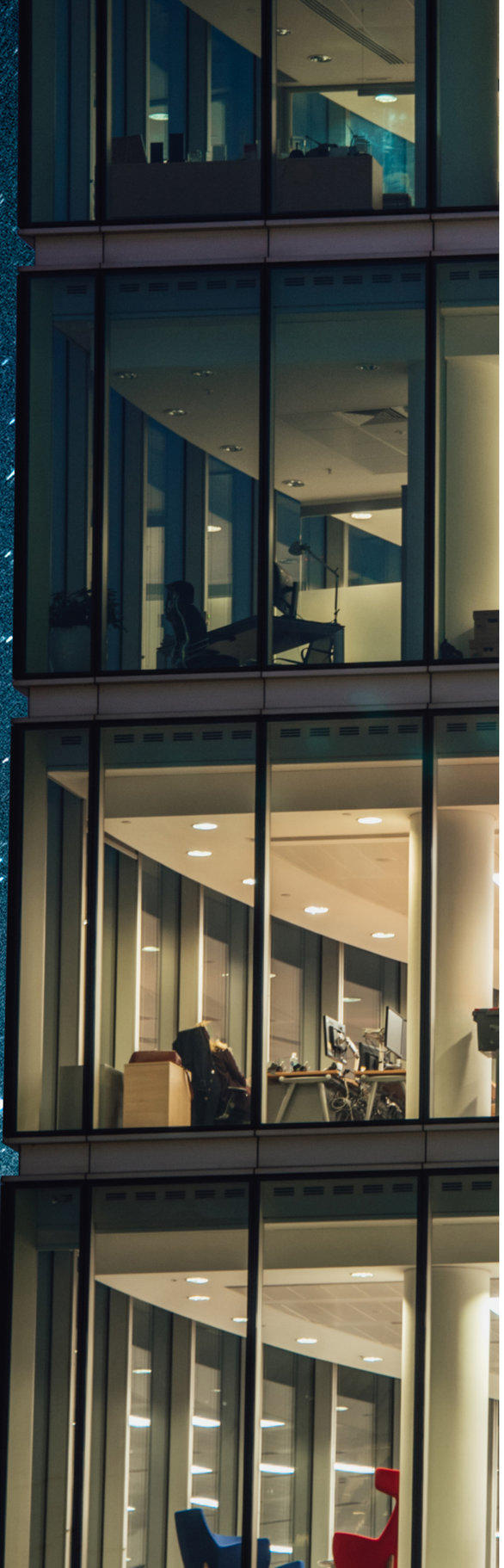
June was the month that we launched. It was an incredibly exciting time for us and we're so grateful for all the support we've received since. We've come a long way in just over six months, and we're looking forward to being able to share more exciting news in the New Year.

In the meantime, our Christmas message, very simply, is thanks.

Now back to the law!

July

CALM DOWN LADS!



Hanna McNab
Partner

It's been kicking off on the issue of liquidated damages for some years now, and this year saw two further cases of note.

July 2021 saw the Supreme Court hand down its judgment in *Triple Point Technology v. PTT Public Company*. Although this was a dispute concerning a software contract, the judgment is extremely important to those involved in the construction industry as it relates to liquidated damages.

Liquidated damages (also known as liquidated and ascertained damages – or LADs) clauses are commonplace in construction contracts. They allow the parties to a contract to pre-determine the damages suffered by one party because of the other party's breach. In a construction context, LADs are often recoverable by an employer whereby the contractor has not completed the works by the agreed completion date. In that scenario, the contract will usually include a rate of LADs for each day/week/month the works are late, and the contractor will be required to pay to the employer the calculated amount of LADs up to the date completion actually takes place.

But what happens if the contract is terminated before completion of the works? It is this age-old question that the Supreme Court had to answer in the Triple Point case.

The relevant contract contained a clause which provided that if the supplier failed to deliver the work within the time specified, it would be required to pay the customer a penalty of 0.1% of undelivered work per day of delay "from the due date for delivery up to the date [the customer] accepts such work". The contract was terminated before the work was completed, and as such was never accepted by the customer.

In those circumstances, was the customer entitled to LADs? The Court of Appeal said no on the basis that the clause did not apply as the work was never completed. Although the customer was entitled to general damages, it was not able to recover LADs at all – either for the period up to termination or afterwards.

However, the Supreme Court overturned this decision, stating that the Court of Appeal's approach was "inconsistent with commercial reality and the accepted function of liquidated damages". It said:

"Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract…After that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law….".

This common-sense approach from the Supreme Court has been welcomed by practitioners as it reflects commercial reality (not to mention the long-understood position). It does, however, remind us to ensure careful drafting around LADs clauses, to avoid disputes later down the line.
A month later, the courts were looking at LADs again, this time in in Eco World – *Ballymore Embassy Gardens Co Ltd v. Dobler UK Ltd*. This case related to work on a scheme at Nine Elms in London, with the argument relating to partial possession and LADs.

In a normal JCT contract, if a party takes possession of all or part of the works, the LADs for delay are reduced pro-rata by the value of the work over which possession is taken. However, as with a lot of larger contracts, the contract was not a standard JCT – it was an extensively amended JCT 2011 Trade Contract. One of the provisions allowed the employer to take over part of the works prior to practical completion, but did not explain what the effect was on the level of LADs.

The High Court, perhaps surprisingly, decided that without a clause expressly saying that the LADs are reduced, there is no presumption that LADs will be reduced. This meant that the LADs remained at the stated level of £25,000 per week, even though the employer had taken possession of parts of the works. In a somewhat bizarre twist, this was the interpretation pleaded by the trade contractor, presumably because if general damages had applied it would have been a lot worse off.

It will be interesting to see whether that case ends up in the appeal courts like Triple Point. Unsurprisingly, LADs are frequently the subject of disputes, given that they often involve huge sums of money. We truly were treated to have two notable decisions to entertain us over the summer months.

August

Supply shortages ramp up

In August 2021, material shortages (which had been causing problems in the construction industry for months) finally began to make worldwide news. Dubbed the 'perfect storm', a number of factors contributed to the shortages. The biggest of these was the surge in demand for materials. Governments worldwide put money into construction to kick start struggling economies following the height of the pandemic. Additionally, many projects that would otherwise have previously completed were restarting, and a huge number of residential projects were underway, largely prompted by individuals spending more time in their homes and so wanting to make improvements.

In addition to the demand surplus, Brexit, congested transport routes, rises in shipping costs, container shortages and even climate change compounded the problems, with key materials including bagged cement, timber, steel and aluminium all being affected. As a result of this, contractors began to suffer huge delays to lead times, and prices for materials soared.

For many years, the standard industry position has been that contractors take the risk for material delays and material price increases. And indeed, this has not been a real concern for contractors for several decades. The events of 2021 have changed this. While some contractors have successfully negotiated some leverage with employers on ongoing projects, supply shortages likely do not constitute an event of force majeure in the same manner that Covid related delays are thought to.

There appears to be no clear end in sight to the supply shortages, with industry press currently reporting that the shortages will likely continue for a minimum of 6 months into 2022. It is therefore important that parties understand this, and if possible reduce their risk when negotiating new contracts.

Some of the options available to contractors, who ultimately are the party most exposed with traditional contractual setups, are as follows:

Fluctuation provisions – the JCT suite of contracts include three optional fluctuation provisions which are designed to compensate contractors in the event of material price increases after the contractual base date. The provisions are rarely used but the most appropriate option in these circumstances is Option B. The relevant clause in NEC is the secondary option X1. Again, this provides for price adjustment for inflation but is rarely used.

Advance payments – advance payments should enable contractors to order materials at an earlier stage to hopefully avoid delays due to long lead times and also to hopefully prevent further price increases. Employers may be more receptive to a request for an advance payment, especially if the contractor will enter into a bond as security.

Letters of Intent – the industry has seen an increase in the use of LOIs, to enable contractors to order materials as soon as possible so as to fix prices.

Provisional sums – provisional sums are priced on a fair and reasonable basis at the time they are instructed and so a contractor carries far less risk on these items.

Prime Cost items – again prime cost items ordinarily relate to works where the materials have not yet been selected and so contractors carry far less risk on these items.

EOTs – contractors may be able to negotiate extension of time provisions that apply in the event that materials are delayed beyond required dates set out in a schedule. Although this will not assist where prices have increased, it will at least give relief against potential delay damages.

Although negotiations across the market still appear to be very much employer-led, the events of 2021 have seen contractors push back hard with new contracts. How far this continues and the effect it has on project pricing and delivery is sure to be one of the big stories of 2022.

Carolyn Porter
Partner

September

once, twice, three times an invoice

So we managed to stop talking about adjudication for six months – but it was always going to come back!

In September 2021, the question of what disputes could be referred to adjudication came before the court in *Quadro Services v. Creagh Concrete Products Limited.*

Quadro and Creagh entered into an oral agreement whereby Quadro were to provide labour to Creagh. There were five contracts and this case concerned one – the Woking Contract – where a dispute arose concerning Creagh's failure to pay three outstanding invoices.

Quadro raised three applications and corresponding invoices. These were cumulative, with each invoice raised being for the full value of the work done, less the previous payment application. For the first two cycles, Creagh's Quantity Surveyor approved the applications and asked Quadro to raise VAT invoices, but it was silent on the third.

Despite the request for invoices on the first two applications, all three invoices went unpaid. No pay less notices were raised. After a period of non-payment, Quadro referred the dispute to Adjudication in March 2021.

The Notice – that is the route of an adjudicator's jurisdiction – detailed that: *"the dispute concerns Quadro's entitlement to payment of £40,026 (including VAT) in respect of agreed invoices dated 24 July 2020, 27 August 2020 and 12 October 2020".*

In response, Creagh challenged jurisdiction. They argued each application and invoice should have been referred to adjudication separately, where validity could have been individually assessed. It said (as is uncontroversial under the Scheme) an adjudicator does not have jurisdiction to adjudicate more than one dispute referred in a single adjudication. Creagh took no further part in the Adjudication.

The Adjudicator continued, and on 27 April 2021 issued his decision. He found that he did have jurisdiction and that Quadro's payment applications were valid. The invoices arose from one contract, and the dispute referred concerned a single issue (whether Quadro were entitled to the overall sum claimed) and various sub-issues (validity of each application, whether a pay less notice was issued, and the sums due). Two out of three invoices were expressly confirmed by Creagh, and an extended period had lapsed in relation to the third, so it could not be challenged. Therefore, Quadro were awarded £40,026.00, interest and compensation.

But Creagh still didn't pay, relying on the same jurisdictional issue. Quadro sought enforcement of the Adjudicator's decision, relying on a passage from *Witney Town Council v. Beam Construction: "say there was a dispute with 100 sub-issues. The parties cannot sensibly have intended in these circumstances that each sub-issue for the purposes of adjudication…give rise to a separate adjudication…A particular dispute, somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on"*

The court said that Creagh's argument that the validity of each application could have been decided in isolation from the other was reasonable. But this didn't mean that those issues could not be sub-issues to the wider dispute as to whether Quadro are entitled to the sum claimed. The court recognised the impracticality and inconvenience of referring sub-issues to individual proceedings.

It was noted that if it was required, it could undermine the fundamental basis of construction adjudication: efficient and cost-effective resolution. It has long been known that a dispute can include various sub-issues. This frequently comes up in relation to (for example) delay adjudications, in which the adjudicator might have to decide lots of smaller issues before arriving at an overall decision – but this case shows the principle can be equally applicable to more 'run of the mill' payment disputes.

For parties – both referring and responding – it is important to look at the facts of the case and to use common sense as to whether there is one overarching dispute. While responding parties are always likely to raise jurisdictional arguments at the outset in the hope that they might come off, at the back end they should think carefully about whether it's worth the cost risk that comes from resisting enforcement through the courts.

Megan Green
Paralegal

October

Adjudicating while insolvent

The case of J*ohn Doyle Construction Limited (in liquidation) v. Erith Contractors Limited* was decided by the Court of Appeal in October 2021. The case was referred to the Court of Appeal by those acting for John Doyle as they had failed to enforce an adjudicator's decision in the High Court. Most of you will know the background, so we won't repeat it, save to say the actual dispute related to work on the 2012 Olympics!

John Doyle are in liquidation, and the general rule is that an insolvent company (particularly in liquidation, there being some exceptions for CVAs) will be unable to enforce an adjudicator's decision due to their temporary nature. This general rule was thrown into doubt last year by the Supreme Court's decision in *Bresco v. Lonsdale* apparently saying differently.

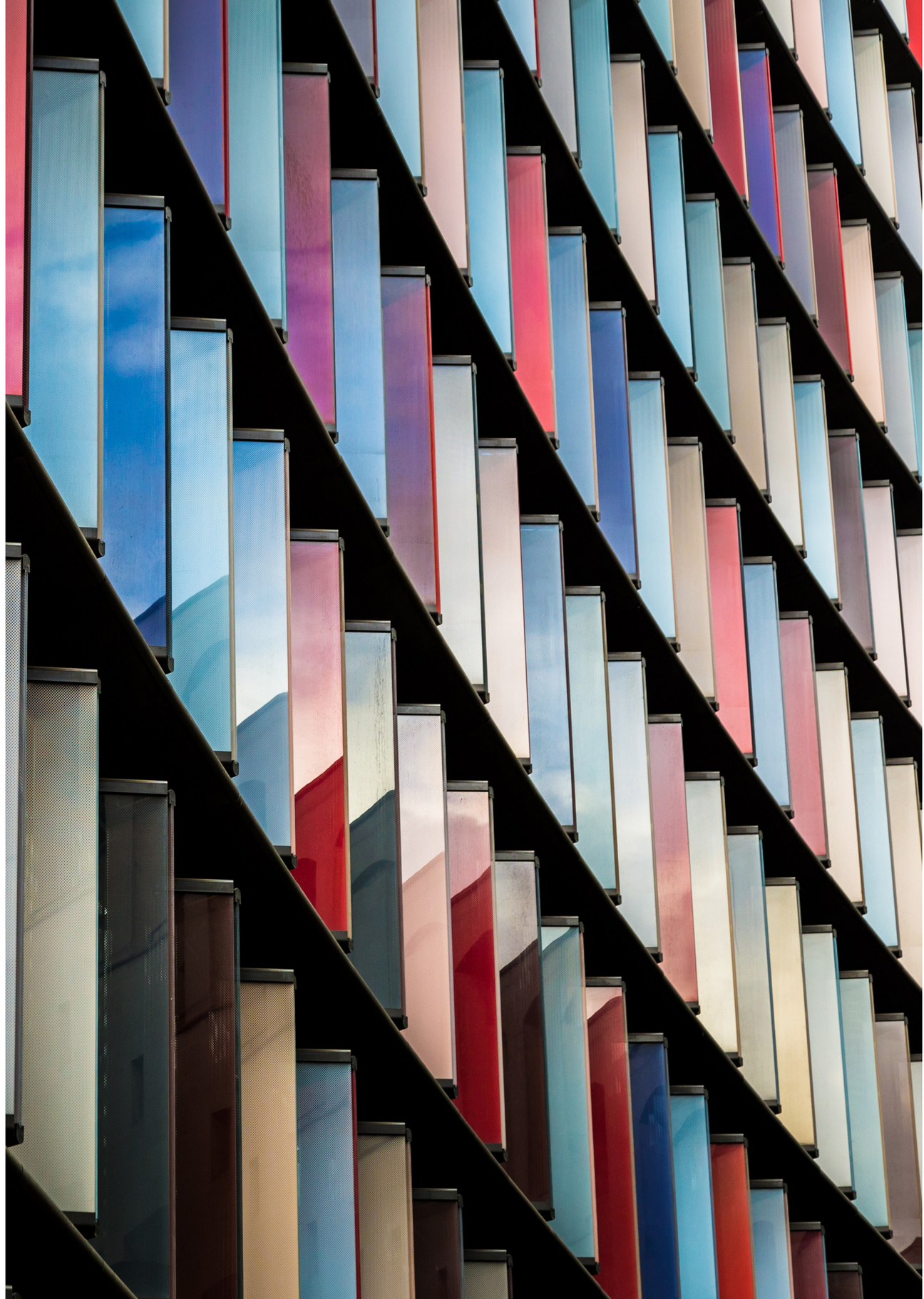
John Doyle argued following Bresco that as they had provided adequate security, they were entitled to enforce the original adjudicator's decision.
There are essentially two points to come out of the Court of Appeal's judgment. The narrow point was that the alleged security offered by John Doyle's liquidators was insufficient, lacked transparency and did not in practice provide the security claimed.

The wider point was Lord Justice Coulson's view on the issue 'Lurking in the Shadows', being the whole matter of whether a company in liquidation can ever actually enforce an adjudicator's decision.

Lord Justice Coulson didn't say it would never be possible for a company in liquidation to enforce an adjudication decision, but the type of security that would be required would probably render the benefit of ever trying to do so a futile gesture. He dismissed the idea of paying the sum into Court as a sensible solution as this deprived every party of cash flow. He made clear that the type of security that may be acceptable effectively amounted to an indemnity from the liquidator and a promise to ring fence any sum paid in settlement of an adjudicator's decision, until a full-blown Court case had been tried. In such circumstances, it is difficult to see what benefit a liquidator would get from pursing enforcement of an adjudicator's decision (and for that matter ever bringing an adjudication), because at best there would be some money sitting somewhere that they couldn't use. This pot of money would be unavailable to all parties until the outcome of Court proceedings (which could be two plus years). And notwithstanding these issues, liquidators are not known for giving indemnities!

So is this the end of such claims? For those of us who find ourselves on the other side of adjudications commenced by insolvent companies it can be difficult to know whether to fight the adjudication. If there is a genuine crossclaim or defence, is it worth spending your client's money fighting an adjudication that is unlikely to be enforced? John Doyle may see the end of such attempts by liquidators of companies – but as we've almost certainly said before, only time will tell.

Andrew Rush
Partner



November

DID YOU GET THAT? THE IMPORTANCE OF DOCUMENTING AGREEMENTS

Picture the scene: a contractor, engaged to extend and refurbish student accommodation but struggling to complete in the wake of covid, phoned its employer to discuss the problem. The contractor later claims that an agreement was reached during that phone call (made between two managing directors, while they were both driving) whereby the employer agreed to forego its claim for liquidated damages (LDs) in exchange for the contractor abandoning its loss and expense claim. The employer denies any such agreement was made.

Despite it being impossible to ever prove what was agreed, in November 2021 the TCC held that an agreement had been reached, and the employer could not pursue its claim for LDs.

The relevant case is *Mansion Place Ltd v. Fox Industrial Services Ltd.* The dispute between the parties was initially referred to adjudication, wherein the adjudicator determined that the parties had agreed to waive LDs and loss and expense respectively. The employer, dissatisfied with the decision, then issued proceedings in the High Court seeking a declaration that such an oral agreement had not been reached.

The three-day hearing saw witnesses giving evidence in person on the point, before the court found in favour of the contractor. It held that it was able to make a finding as to the gist of the conversation on the balance of probabilities, ultimately finding that the contractor's recollection of the conversation was more reliable than the employer's.

In addition to finding the contractor's witness evidence to be more reliable, the other significant factor was that the employer's internal documents showed that it was concerned the contractor would either leave site or deliberately delay the works and was very anxious to avoid that consequence. In those circumstances the agreement to drop its claim for LDs was less surprising – and anecdotally is one that has been made on lots of projects where parties have agreed a 'time but no money' approach to covid issues is a reasonable apportionment of risk.

This case also considered some of the more common arguments surrounding LDs, with the Court confirming that:

- The contractor's notice of delay and claim for an extension of time did not preclude the employer from issuing a non-completion notice and claiming LDs;
- The LDs did not constitute a penalty. The employer's interest in completing the works on time was a very significant one, and the contractor could have negotiated changes to the rates before entering into the contract; and
- There is no automatic presumption that LDs are unenforceable where there is sectional completion or partial possession but the contract provides a single rate of LDs. This was something that had been confirmed in August in Eco World – *Ballymore Embassy Gardens Co Ltd v. Dobler UK Ltd*, as mentioned in Hanna's article. In any event, in this case clause 2.34 of the JCT DB 2016 did provide a reduction in the rate of LDs in such circumstances.

This case came as a surprise to some in the industry, and it highlights the importance of setting out all agreements in writing. As a bare minimum, a follow up email to confirm a conversation can speak volumes in any subsequent dispute, but a signed agreement will should prevent disputes all together.

Carolyn Porter
Partner

December

What happens next?

It's left to me to bring the year to its end by getting the Archor crystal ball out and considering what might happen next year. The world of construction never stops!

First and perhaps most critically, because everything else rides on it – construction market analysis firm Glenigan predicts a return to pre-covid levels during 2022, with underlying starts anticipated to be 3% above 2019 levels. That's likely to be driven by public sector projects in particular infrastructure investment, and a swathe of office refurbishment to cope with post-covid working styles. A good workstream is clearly good news for the industry – although the effect that will have on labour and materials remains to be seen.

On that front, there have been some signs of labour and material shortages levelling off. But there is little sign of a long-term change in the availability of labour post-Brexit, so how sustainable that is remains to be seen. Material shortages should lessen as the world gets back to something like pre-covid operations, although there are likely to still be pinch points around certain projects and resources. Those tendering would be wise to build these into their prices, or to find ways to guard against the risk of further spikes.

Perhaps the difficulties around labour supply will see more and more contractors turning to technology and Modern Methods of Construction, particularly offsite production where labour levels can be more carefully moderated. There has certainly been a trend towards this in recent years and the industry has shown it is willing to embrace the change. The slight compulsion caused by shortages might in the long-term be good for accelerating adoption of new technologies.

There's little concrete legislation in the pipeline. A private members' bill was introduced into the House of Lords in October that seeks to abolish the taking of retention altogether – a step further than previous attempts, which have sought to have retention limited and placed in a deposit scheme. As with most private members' bills this one is expected to fail for lack of legislative time, but it keeps the question of retention alive. At some point, though perhaps not in 2022, the industry is going to have to address this.

The Grenfell Inquiry will continue, with the last phase scheduled for May 2022 expected to consist of further evidence from expert witnesses. It's unlikely that the Inquiry will lead to any specific action in 2022, but the Building Safety Bill is continuing its passage through Parliament. This Bill is the primary means by which the government plans to implement the major recommendation of the Hackitt review, which was the independent review led by Dame Judith Hackitt looking at Building Regulations and fire safety that reported in May 2018 – so expect lots of construction-related developments including the creation of the Building Safety Regulator and the New Homes Ombudsman, amendments to Building Regulations and Building Control, and a new regime for the regulation of construction products.

On the disputes side, we expect to see the end of more projects that have been affected by covid, and therefore a rise in delay and loss and expense disputes. At some point we may get a court decision on how covid is dealt with under the main forms of contract, which would be welcomed by many: although there is a working view of what probably happens under JCT, NEC etc, some judicial guidance based on actual events would be useful. It will take a dispute large enough to make court proceedings worthwhile, though, and could still take some time for it to make its way through the process, so a decision in 2022 might be a little optimistic.

Even given the last few years' events, it's a brave person who predicts the future with any certainty, we can be pretty sure that there will continue to be plenty of disputes about payment and pay less notices. So whatever else 2022 brings (and would it really be an edition of Aggregate without our saying this?!): make sure you get your applications and payment notices in on time! What better way to end?

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