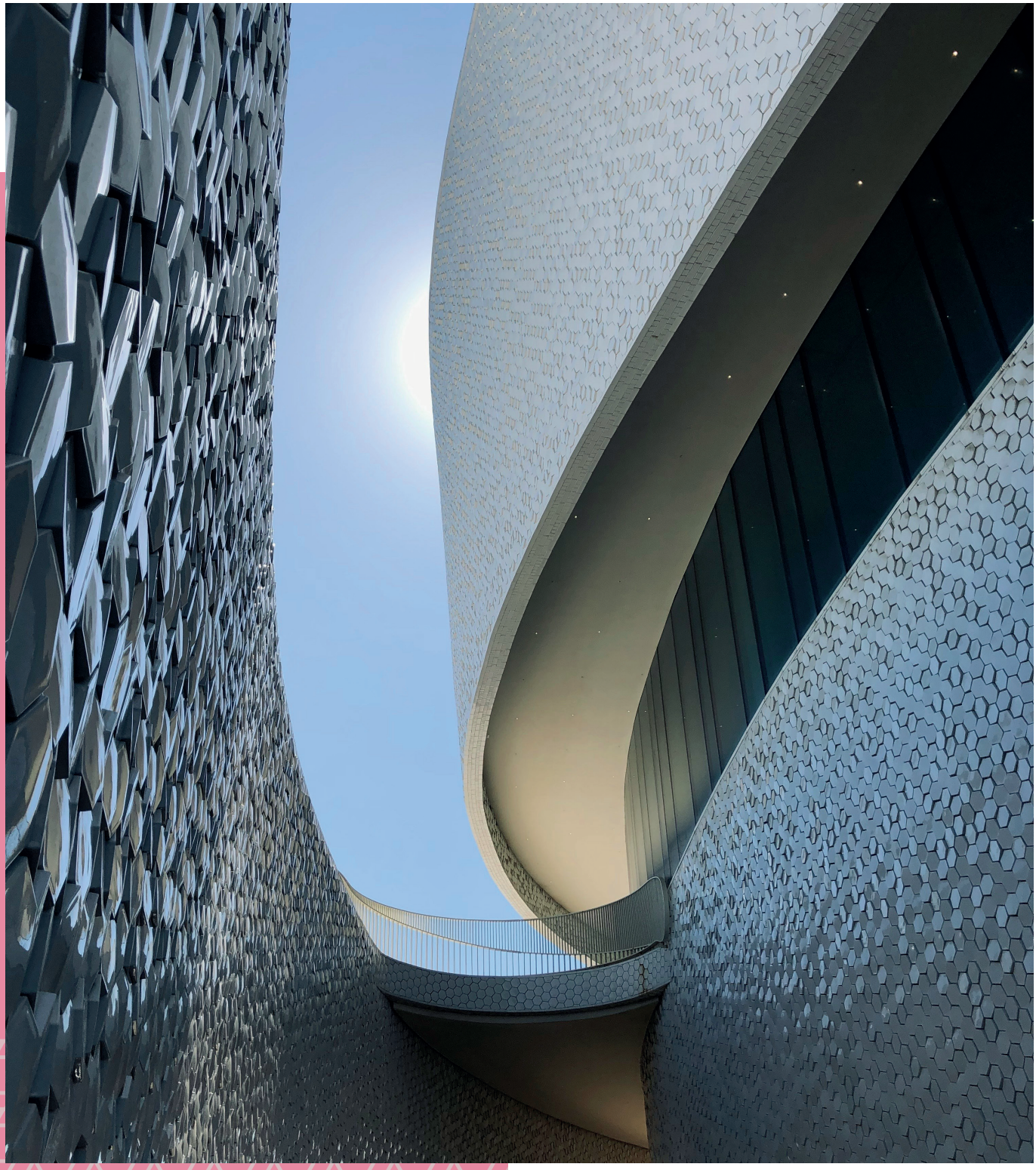
EDITION TWELVE | **MAY 2025**

# *Aggregate*



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# Welcome.

## *In this edition of Aggregate:*

- One year on from the end of the transitional period for Higher-Risk Buildings under the Building Safety Act 2022, Hayley looks at how the new gateway regime has worked in practice.
- Lucy looks at a recent case that found that a payment notice and pay less notice sent at the same time could nevertheless be valid.
- Liam discusses a case we acted in, successfully establishing that a contract could be formed by WhatsApp and that the contractor's applications for payment were valid despite not individually itemising every line.
- And finally, Andrew considers the allocation of risk in construction contracts in light of a recent decision in which the court was asked to consider whether the contractor or client took the risk on existing structures.

We hope you enjoy this edition, and as ever, if you have any ideas for future articles or other feedback, do please get in touch.

*Oli*
**Editor-in-Chief**

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# Higher-Risk Buildings and the Building Safety Act

## One year on

*Hayley Morgan*
Senior Associate

**Now that a year has passed since the end of the transitional period, we look at how the implementation of the Building Safety Act's new gateway regime for projects across England has impacted the market. In particular, we examine the practicalities for the market, and discuss those elements of the BSA which are still to be implemented.**

### *Delay, delay and…more delay*

One of the key considerations when working on a Higher-Risk Building (HRB) is ensuring the project proceeds swiftly through the relevant gateways. Under the BSA it was expected that the Building Safety Regulator (BSR) would have a statutory period of 8-12 weeks to review and approve each gateway application, but to date more than two thirds of applications submitted in Autumn last year remain unapproved.

The Government, once it became aware of the resourcing issue within the BSR, subsequently provided them a target date of April 2025 to clear the backlog of gateway 2 applications - but this again appears to have been missed. The BSR has further tried to overcome this issue by setting a stricter standard as to what qualifies as a properly submitted application, either through a meticulous punctuation and grammar check or by limiting the types of application it will review. For example, phased applications appear to be being reviewed on an exceptions basis rather than as a given.

In some cases the approval delay is in excess of 30 weeks from the date of submission of the relevant application. This backlog is in turn having a knock-on effect for contractors and developers alike, as without gateway 2 approval, it is increasingly difficult to secure supply chains early on and - most importantly - it is more difficult to secure third party funding as many institutional funders are pulling away from HRB projects until this issue is resolved.

The hope is that the BSR will be more confident and resourced for the influx of gateway 3 applications expected in the coming months and years, but this is yet to be seen on a significant scale. The BSR recently confirmed of the ten gateway 3 applications received so far, only one had passed, so it appears there is a lot of room for improvement on all parts before the influx.

> *"In some cases the approval delay is in excess of 30 weeks from the date of submission of the relevant application*
>
> **Hayley Morgan**
> Senior Associate

### *The death of Design and Build*

There has been a lot of debate in the market as to whether the changes implemented by the BSA have resulted in the 'death' of the true design and build (D&B) contract that many know and love.

Developers will see that many contractors are no longer happy with a rough set of drawings and taking the sole risk in the development of that design. Instead, they are advocating for key responsibility matrixes alongside the novation of more members of the developer's design team before they will agree to sign. Further, many developers are now taking a more cautious approach to a project's design given they remain the key responsible party in the event of any breach and are appointing more professionals to not only design but to oversee the design development through to completion.

However, while the D&B may be evolving, it has not been made entirely redundant by the new regime. It is important that the engagement, cooperation and coordination of the contractor with the developer's professional team happens earlier than it would normally under a D&B, and that the design be taken further than it usually would have been than schemes pre-BSA, but overall the D&B remains alive and kicking.

> *"The market is also due to see home warranty providers offering packages that extend the usual 10 year cover to 15 years.*

**Hayley Morgan**
Senior Associate

We have also seen an increase in PCSAs being utilised to manage this early design engagement for the contractor, as well as notice to proceed mechanisms within the contracts themselves, so that the design can be carried out more extensively before the gateway 2 application made and shovel takes to ground.

### *What is to come*

Alongside the evolution of those elements already in place under the BSA, there are other elements that are still due to hit the market fully.

One of the key changes due to come in within the next year, is the Product Safety Regulator (PSR) which will be a key body responsible for conducting market surveillance and reviewing complaints so as to assess the safety of products. The PSR will be an arm of the Health and Safety Executive much like the BSR, so time will tell as to whether they will experience the same resourcing and other practicalities faced by the BSR and what the government can do to assist with this.

The market is also due to see home warranty providers offering packages that extend the usual 10 year cover to 15 years. We have not yet seen any insurance backed warranty provider operating any 15 year product as of yet, but understand that these are to be released within the next few months. We look forward to receiving details of these in due course and how the phasing of obligations under these policies are intended to operate for end users of new homes.

Finally, the government recently released a consultation response in connection with the proposed building safety levy to be applied to HRBs. There have been some concerns around the levy such as it resulting in a reduction in the number of affordable housing units on schemes, which would in turn impact disadvantaged and/or protected groups, but this does not appear to be substantiated just yet. While this consultation had a low response rate overall with just 5 developers, 17 local authorities and 5 undisclosed responders, the proposed levy will still need to be debated through Parliament before we see any real movement on this proposal.

As it has always been, the BSA represents a learning curve for all – developers, contractors, lawyers and the regulator are all, to that extent, in the same boat. We will continue to update on developments as we see them, but in the meantime please get in touch if you have any BSA queries.

# *Can a payment notice and pay less notice both be valid, despite being sent at the same time?*


*Lucy Day*
**Associate**


**This is precisely what happened in the recent case of *Placefirst Construction Ltd v. CAR Construction (North East) Ltd [2025]*. The court said they could – but with conditions.**

### *The case*

CAR, a sub-contractor, issued a 'smash and grab' adjudication against Placefirst, the contractor. CAR was successful in this adjudication and applied to court to enforce that successful decision when Placefirst did not pay the sum owed. However, Placefirst also issued Part 8 proceedings about the underlying dispute and sought to defend the adjudication enforcement on that basis alone.

Part 8 proceedings are used where there is a discreet issue to be determine that does not involve a substantial dispute of fact. The TCC opted to hear both the adjudication enforcement and the Part 8 claim together.

### *The main question*

The underlying dispute between the parties concerned interim application number 30. In response to CAR's application for payment, and prior to the final date for payment, Placefirst issued an email to CAR containing two attachments. The first attachment was a letter which purported to be a pay less notice. The second attachment was an Excel spreadsheet entitled "Valuation 30". The body of the email referred to "the attached Payless Notice and Valuation 30 to support…".

CAR's position was that a payment notice had not been issued, and further that the purported pay less notice had been issued in advance of the date that it should have been issued pursuant to the Contract (and the Construction Act). Placefirst's position, on the other hand, was that it had issued both a timely and valid payment notice and pay less notice to CAR. The basis of the Part 8 proceedings was that Placefirst sought a declaration that the "Valuation 30" document was a valid payment notice, and additionally, that the pay less notice issued within the same covering email was also valid and effective.

The judge considered the case of *Advance JV v. Enisca Ltd [2022]*, referring to the interpretation of payment notices and giving consideration to how a reasonable recipient would interpret any such notice.

### *The result?*

The adjudicator's decision was not enforced. Assessing the facts and principles in Advance, the judge determined that the Construction Act does not require a payer to serve both a payment notice and pay less notice if they contain the same information (as was the case here).

In addition, the judge determined that the "Valuation 30" document was intended to be a payment notice, therefore, the 'payment notice' and 'pay less notice' could be served simultaneously within the same email. The judge concluded that there was no requirement for "Valuation 30" to describe itself as a payment notice, and further, that a payment notice is not required to expressly state that the sum contained within it is the sum considered due at the due date.

### *Conclusion*

This case will be seen to provide a refreshing decision, not least because the court opted not to take an "unduly legalistic interpretation" of the requirements of the Act, instead taking an arguably quite sensible approach. It was clear that the parties knew what was being paid and why, so the court steered away from holding the parties to an overly technical requirement.

# Contracts by WhatsApp and the requirements for payment notices

In Jaevee Homes Limited v. Steve Fincham t/a Fincham Demolition [2025] EWHC 942 (TCC), the contractor (Jaevee) engaged the sub-contractor (Fincham) to carry out demolition works at the former Mercy Nightclub in Norwich, and a dispute arose about payment.

*Liam Hendry*
**Senior Associate**

The court had to resolve two main issues: the first about the contract formation, and the second about what 'setting out the basis of calculation' meant for the purposes of a payment application.

### *Can contracts be formed by WhatsApp?*

First, the court decided that an exchange between the contractor and sub-contractor by WhatsApp formed a binding contract. It found that a scope of works was agreed, rough payment terms (supplemented as necessary by implication by the Construction Act and Scheme), and a starting date.

In particular, following an exchange about scope and the starting date, the sub-contractor messaged on 17 May 2023 stating *"Ben Are we saying it's my job mate so I can start getting organised mate"*. Ben, a reference to Ben James of Jaevee, responded on the same day stating *"Yes"*. The court said that this was "redolent of a concluded agreement". In the following few hours there was a further exchange about payment periods, which the court said "concluded the agreement".

> *"The court said that assessing whether the basis of calculation was set out was a question of fact and degree which must consider the context of the contract*
>
> **Liam Hendry**
> Associate

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### *Is an invoice containing a list of work carried out and a single sum due a valid payment application?*

The sub-contractor, Fincham, submitted a series of invoices to the contractor, Jaevee. The invoices contained a list of work carried out and a single sum due. As an example, the sub-contractor's first invoice listed six activities carried out and stated "First Interim Payment £48,000 + 5% VAT".

The contractor issued a Part 8 claim and alleged that the sub-contractor's invoices were not valid payment applications because they did not set out the basis of calculation for the sum due (as required by section 110A(3)(b) the Construction Act).

> *The Claimant's arguments as to the requirements of the Contract, the application of the Scheme and the requirements for the Invoices are divorced from the factual context and, with respect, the reality as to how these sorts of contracts can and do operate*

**Liam Hendry**
Associate

The court said that assessing whether the basis of calculation was set out was a question of fact and degree which must consider the context of the contract. Considering the terms of the sub-contract and the context in which they were issued here, the majority of Fincham's invoices were valid applications. The relevant factors included: the lump-sum nature and terms of the sub-contract; that the sub-contractor's invoices could be read together with its quotation; and the parties' previous dealings under other contracts.

A secondary question was whether the invoices were intended as payment notices. The court endorsed Fincham's submissions that *"The Claimant's arguments as to the requirements of the Contract, the application of the Scheme and the requirements for the Invoices are divorced from the factual context and, with respect, the reality as to how these sorts of contracts can and do operate"*. Again then, the court encouraged a fact-sensitive consideration of payment notices and their intent.

### *Conclusion*

The fact that a contract can be concluded by WhatsApp is perhaps not surprising, but this does indicate the importance that the court will place on those exchanges. Parties should be careful about what they say on messaging applications like this, particularly if they don't intend to reach binding agreements – if that is the case, they will need to make that clear from the outset.

In terms of the payment application, the decision confirms that the court will take a holistic view of whether a document is a valid payment application and a mathematical breakdown of the sum due is not strictly necessary, as well as confirming that attention needs to be paid to the context in which notices are served. Given the test – setting out the basis of how the sum was calculated – also applies to payment notices and pay less notices, it will be interesting to see how the courts address this going forward.

*Archor acted for Fincham in this case, with Andrew Rush, Liam Hendry and Megan Green instructing James Frampton of Keating Chambers.*

## Structuring construction contracts:

# *Lessons from Sisk v C&C*

**Construction contracts are increasingly complex, particularly for projects including existing buildings and structures. Common examples include re-cladding and refurbishment projects and developments including listed buildings.**

It's important for a construction contract to clearly document the agreed allocation of risk in the above scenarios – otherwise a party could incur significant unforeseen losses or there might be costly disputes to establish which party bears a particular risk.

In John Sisk and Son Limited v Capital and Centric (Rose) Limited [2025] EWHC 594 (TCC), a dispute arose regarding the allocation of existing structures risk in an extensively-amended JCT Design and Build 2016 contract.

### *Background*

C&C engaged Sisk under an "extensively-amended" JCT Design and Build 2016 Contract in 2022. The Works under the Contract involved the design and build of two new residential buildings and the refurbishment of two listed mills in Stockport (which are adjacent to the River Mersey and are situated under a brick viaduct).

The Contract included clauses that made Sisk responsible for all risks in relation to the site, including the condition of any existing structures. Those clauses, were, however, subject to *"item 2 of the Clarifications"*.


*Andrew Rush*
**Senior Partner**


The electronic and paper version of the Contract included different clarifications documents – both versions included a document called *"contract clarifications"* and the electronic version also included a document called *"tender submission clarifications"*.

The contract clarifications included the following row of a table:

| *Sisk Clarification* | *Comments / Risk Owner* |
|---|---|
| Existing Structures Risk including ability to support / facilitate proposed works | The Employer is to insure the Existing buildings/ works. Employer also to obtain warranty from Arup with regard to the suitability of the proposed works. Employer Risk |

> *"The Contract included clauses that made Sisk responsible for all risks in relation to the site, including the condition of any existing structures*

**Andrew Rush**
Senior Partner

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> *The principles in Sisk v C&C could apply to the allocation of any major risk in a construction contract – including, for example, existing structures, ground risks and approvals by statutory bodies*

**Andrew Rush**
Senior Partner

The tender submission clarifications included an item numbered 2.1.02 under section 2 (headed *"design responsibility"*). Some of the comments under that item included *"Existing Structures Risk sits with the Employer including insurance"* and *"Employer to warrant that the structural condition of the existing fabric is suitable to facilitate the new works"*.

The parties fell into dispute regarding who was contractually responsible for the risk of existing structures, including their ability to support and/or facilitate the Works.

Sisk issued a Part 8 claim and sought declarations that C&C was responsible for existing structure risk and, if that risk eventuated, it would be entitled to additional time and money under the Contract.

### *Court's decision*

The court decided that on a proper interpretation of the Contract, C&C was responsible for the risk of existing structures. It made the following points to support its decision:

- The clauses in the Contract regarding site condition (clauses 2.42.1-4) were clear – site conditions risk (including existing structures risk) sat with Sisk, *"subject to Clarification 2"*.
- *"Clarification 2"* was a reference to line 2 in the contract clarifications document only (see above) rather than to both of the clarifications documents. That conclusion was reinforced by line 2 referring to existing structures.
- Conversely, the relevant section in the tender submission clarifications was headed *"design responsibility"* and dealt with issues much broader than just existing structures.
- The words *"Employer Risk"* in the contract clarifications could only mean that the risk associated with the existing structures was accepted by C&C – that is why the contract clarifications were included in the Contract.

The court also dealt with an incidental issue as to whether pre-contract negotiations between the parties were admissible and supported either party's case. The court followed the general rule that negotiations are not admissible (the parol evidence rule), and said that, in any case, they did not assist either party.

### *Takeaways*

The principles in *Sisk v C&C* could apply to the allocation of any major risk in a construction contract – including, for example, existing structures, ground risks and approvals by statutory bodies. It is therefore important to properly document the agreed allocation of risk – otherwise one party could be left with a risk which it is not suitable to manage and/or hasn't costed.

Parties should therefore consider the following points when preparing a construction contract:

1. Are the terms and commercial and technical documents consistent? The parties in Sisk v C&C could have saved a lot of time and money if the Contract terms and two clarifications documents were consistent with each other.
2. Does the contract include all of the documents that you want to have contractual effect? Any documents to be relied on should be properly incorporated into the contract (especially if the contract includes an entire agreement clause). Examples of relevant documents include derogations from the specifications and pre-contract meeting minutes. Conversely, documents that don't reflect the agreed position (for example, post-tender negotiations that have been superseded) should be excluded.
3. Does the contract include an order of precedence clause and, if so, how does it operate? An order of precedence clause can help to allocate risk and avoid disputes where complicated commercial and technical documents might be interpreted differently.

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