

# Session 6 – Common pitfalls and our experiences

## Presenter

### *Andrew Rush*

Senior Partner

Andrew used to be an engineer. After requalifying as a lawyer he spent time at a leading City firm before establishing an industry-leading construction team at large regional firm and becoming a member of the Legal 500 'Hall of Fame' in the process. His background allows him to get to the root of the issue and provide pragmatic commercial advice alongside specialist construction legal advice.

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## Presenter

### *Hanna McNab*

Partner

Most of Hanna's work involves disputes, but she is equally adept working on contract documents, giving ad hoc advice, and providing training. Hanna is queen of the escrow agreement, is involved with all sorts of industry bodies and committees, and, most importantly, is our Social Secretary (an honour she prizes above all others). Legal 500 has said Hanna is "on course for a very successful career". Hopefully that career is in law.

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# *Partners*



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# The Team



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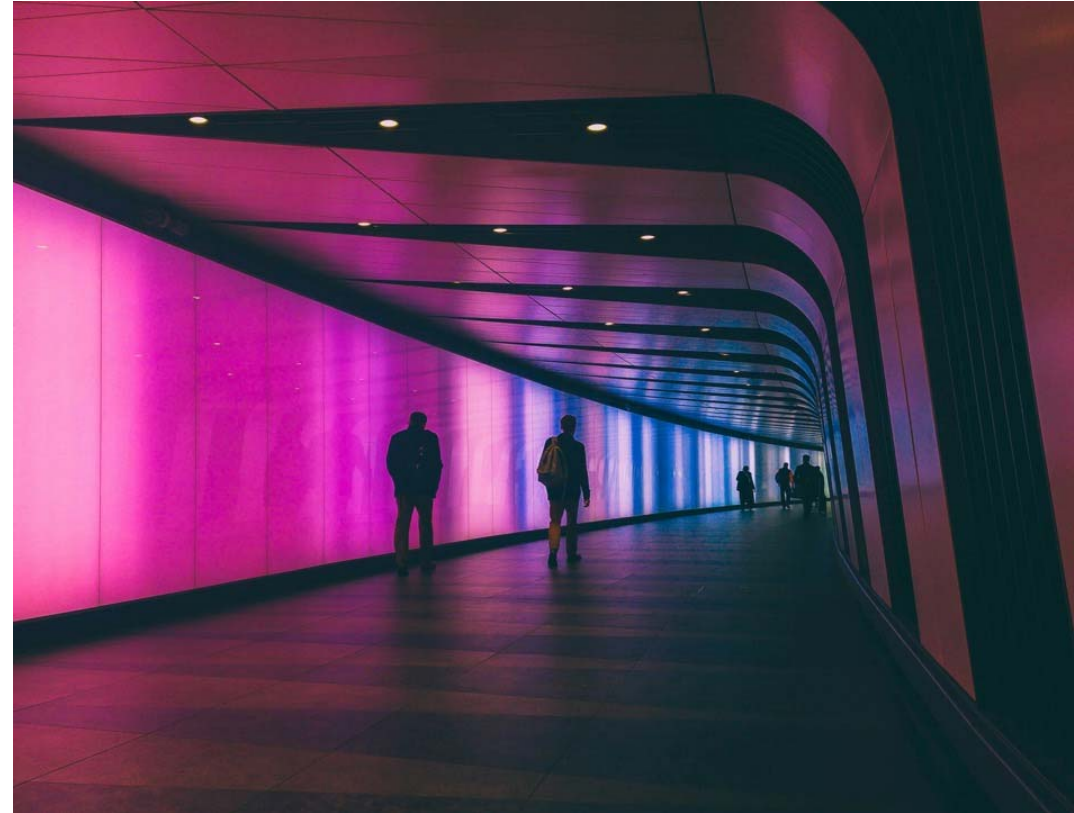
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# *Summary*

1. **Payments on account**
2. **Payment for off-site materials**
3. **Incorrect valuation of Changes / Variations**
4. **Provisional sums**
5. **Out of time payment notices**
6. **Termination**
7. **Our experiences**



# Payments on account

# *Payments on account*

- Two forms – advance payment / payment on account of say, variations
- Advance Payment:
  - Need security
  - Use an Advance Payment Bond – if they can't give one is it the right contractor?
- Payment on account:
  - All payments are interim until final
  - Be wary of agreeing on account payments – change of QS at the end
  - Don't be lulled into a false sense of security

# Off-site materials

# *Materials on Site*

- Right to be paid?
- Clause 4.13:
  - Adequately protected?
  - Premature?
  - Listed Item (Off-Site)



# *Materials off Site*

- Right to be Paid? (Contract Particulars)
- “Listed Items”?
  - 4.15.2: Have the requirements been met?:
    - Vesting certificate
    - Insurance
  - 4.15.3: Labelling / storage
  - 4.15.4/5 – bonds in place?
- What are you doing downstream?



# *The principles*

- Fixed vs Unfixed
- Common Law vs Statutory vs Contractual

# *Fixed vs Unfixed*

- Overriding principle:
- Materials once fixed – employer’s property
  - “quicquid plantatur solo, solo credit”
  - (Whatever is attached to the soil becomes part of it)
- Is it attached?
  - heavy plant
  - equipment that can be unbolted?

# *Unfixed Materials – Supply Only*

- Section 25(1) of the Sale of Goods Act 1979
- Buyer in possession after sale.
- *(1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.*

# *Unfixed Materials – Supply and Install*

- Supply of Goods and Services Act 1982 (not SGA)
- Title will not pass to the employer because of the nemo dat quod non habet rule.
- Even if the contract states that title passes if the employer pays the contractor for the materials but in fact title remains with the original supplier due to a retention of title clause.
- The employer can not get title in materials, if the contractor does not own that title.
- A contractor cannot transfer good title if he never had it in the first place.

# *Title to Materials – Question Time!*

A sub-contractor enters into a sub-contract with a contractor in relation to some works on a large residential property. The sub-contractor is a supplier of extremely expensive hand-crafted ornate metal staircases. Following previous bad experiences it always inserts a retention of title clause in its sub-contract. The sub-contractor has installed the staircases when the main contractor enters into insolvency. At this point in time, the main contractor has not paid the sub-contractor for the materials and/or installation costs. The contractor himself has been paid by the employer for the materials.

Question 1: Does the sub-contractor retain title to the goods and as such can he go and retrieve the staircases (they can be unbolted from the permanent position relatively easily)?

Answer: (1) Yes  
(2) No

# *Title to Materials – Question Time!*

Question 2:        Would the answer be different if the employer had not paid the contractor for the staircases?

Answer: (1)        Yes  
              (2)        No

Question 3:        Would the answer be different if the sub-contractor also installed the staircases and the contractor had not paid the supplier?

Answer: (1)        Yes  
              (2)        No

# *Payment for off-site materials*

- Why?
- Long lead-in items – why you are employing a contractor who cannot pay for this?
- If you do, what do you need:
  - Vesting Certificate – is that all?
  - Bond / Security
  - Personal Guarantee – why?
- Alternatives – direct payment contracts – between contractor and supplier?
- Recent examples:
  - Fabricated vesting certificates – no materials had been paid for.

# Incorrect valuation of Changes / Variations

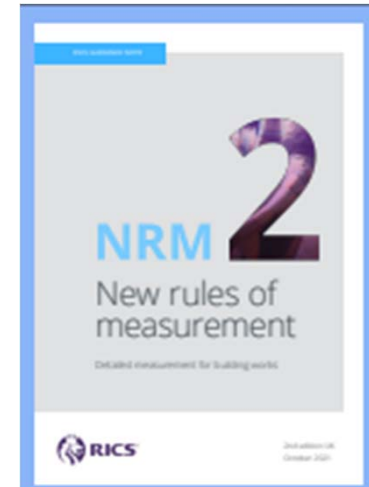
# *Incorrect valuation of Changes / VOs*

- Can an agreement be reached?
- If not, valuation rules apply:-
  - For omissions, the price in the CSA is used
  - For additions, is there any similar work in CSA?
  - If so has there been any change in conditions to depart from the agreed price?
  - If not a fair valuation is made
  - Allowance for:-
    - More / less design
    - More / less site administration / facilities
    - Temporary works

# Provisional Sums

# *Provisional Sums*

- Essentially two types:
  - Defined and undefined – key difference
- A provisional sum is not part of the Works until instructed.
- The instruction of a provisional sum is a Relevant Event – its basically a change



# Provisional Sums

- What is a defined provisional sum?

<b>Defined provisional sum</b>	A sum provided for work that is not completely designed but for which the following information is provided: <ul style="list-style-type: none"><li>• the nature and construction of the work</li><li>• a statement of how and where the work is fixed to the building, and what other work should be fixed</li><li>• a quantity or quantities that indicate the scope and extent of the work, and</li><li>• any specific limitations, etc. identified.</li></ul>
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- What is an undefined provisional sum?

<b>Definitions</b>	
<b>Undefined provisional sum</b>	A sum provided for work that is not completely designed, but for which the information required for a defined provisional sum cannot be provided.

# *Provisional Sums*

- NRM says the following:

Where provisional sums are given for defined work, the contractor should be assumed to have made due allowance in their programming, planning and pricing preliminaries. Any provisional sum given for defined work that does not comprise the information listed in this section should be construed as a provisional sum for undefined work, irrespective of the fact that it was given in the BQ as a provisional sum for defined work.

Where any aspect of the information listed in this section cannot be given, work should be described as an undefined provisional sum. Where provisional sums are given for undefined work, the contractor should be assumed not to have made any allowance in programming, planning and pricing preliminaries.

Provisional sums should be exclusive of overheads and profit. Separate provision should be made in the BQ for overheads and profit (refer to section 2.5.7).

# *Provisional Sums*

- Beware current trends to:
  - Seek to cap provisional sums
  - Remove right to a Relevant Event
  - Seek to include OH&P
- Typically it is not the fact it is a provisional sum it is when it is issued.



# Out of time payment notices

## *Out of time / defective payment notices / pay less notices*

- A payment notice cannot be a pay less notice? Or can it?
- Vision –v- Gypcraft:

*“Furthermore, it would, in my view, entirely undermine the Act and the Sub-Contract if what the parties clearly intended at the time to be a Payment Notice could somehow retrospectively be converted into a Pay Less Notice. As Coulson J (as he then was) observed in Grove Developments Limited v S&T (UK) Limited [2018] BLR 173 at [29]:*

*“In my view, that general guidance applies equally to a payment notice and a pay less notice. Each has to make plain that it is, respectively, a payment notice or a pay less notice. Each has to clearly set out the sum which is said to be due and/or to be deducted, and the basis on which that sum is calculated. Beyond that, the question of whether or not it is a valid notice in accordance with the contract is a matter of fact and degree.”*

- What needs to be in it?
- Best solution is to mirror application.

## *Current position on “defective” payment notices / pay less notices*

- See later *RBH v James - Coulson* on the warpath?
- Until then, some recent cases:
  - *Placefirst Construction –v- CAR Construction* (2025) – a PLN can be issued at any time after notified sum arises
  - *Laing O’Rourke Delivery Ltd –v- Shepperton Studios* (2026) – PLN not automatically invalid if PN invalid, PLN can still take effect
- What does this tell us?

# Termination

# Termination

- *Providence Building Services Limited –v- Hexagon Housing Association Limited [2026] UKSC1*
- Clause 8.9.4
  - *“If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not):
    - .1 the Employer repeats a specified default;
    - .2 a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby,then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor’s employment under this Contract.”*

# *Termination - notices*

- Notices

8.2.3 Each notice referred to in this section, except for the notices referred to in clause 8.13, shall be given in accordance with clause 1.7.4.

1.7.4 Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4:

1.7.4.1 shall be delivered by hand or sent by Signed For 1st class or Special Delivery Guaranteed post (or any method of posting as has replaced either method and is then current) and, where sent by post in that manner, shall be deemed to have been received on the second Business Day after the date of posting; or

1.7.4.2 (where clause 1.7.4.2 is stated in the Contract Particulars to apply) shall be sent by email to the recipient's email address stated in the Contract Particulars against clause 1.7.4.2, or to such other email address as the recipient may from time to time notify to the sender (provided that such notification states that it is a notice of change under this clause 1.7.4.2), and shall be deemed to have been received on the next Business Day after the day on which it was sent.

# *Termination - payment*

- Does the Scheme apply?
- New clause 8.13 in JCT 2024
- Final date, notices and amount
- BUT – what if not a termination under the Contract?

# *Termination - insolvency*

- Insolvent – notice at any time to terminate
- BUT what about before insolvency event?
- Notice of intention to appoint administrator?

# Some Key Cases

# Cases

- *RMP Construction Services Ltd v Chalcroft Ltd* [2015] EWHC 3737 (TCC)
- *ISG Construction Ltd v Seevic College* [2014] EWHC 4007
- *Henry Construction Projects Limited v Alu-Fix (UK) Limited* [2023] EWHC 2010 (TCC)
- *Jaevee Homes Limited v Mr Steve Fincham (t/a Fincham Demolition)* [2025] EWHC 942 (TCC)
- *RBH Building Contractors Ltd v James & Anor* [2025] EWHC 2005 (TCC)

# *RMP v Chalcroft*

- Contractual arrangements a real mess
  - RMP – contract by way of acceptance by e-mail
  - Chalcroft – LOI or LOI with exchange of e-mails or JCT sub-contract order
- No difference in process (Scheme) or nominating body (none)
- Para 53:
  - *“In reaching this conclusion I do not ignore the possible difference in substantive outcome that could arise from identifying the contract correctly. But it seems to me to be consistent with the legal policy and authority that I have summarised above to treat these substantive differences as going not to jurisdiction but to substantive outcome only. Once that approach is adopted, the present case is to be treated as one where the Adjudicator had jurisdiction to resolve the dispute that was referred to him (namely, how much was owing under interim application number 8) and addressed the correct question without bias, breach of natural justice or any other vice that would justify overturning his decision. If, which cannot be resolved now, he has made an error of law in referring to the wrong contractual provisions when deciding the substantive question that was referred to him, that falls within the category of errors of procedure, fact or law which the Court of Appeal has repeatedly emphasised should not prevent enforcement.”*

# *ISG v Seevic*

- We acted for Seevic!!
- What happened Before ISG v Seevic
- What happened after?
- Watered down (to a point)
- Current position:
  - S&T (UK) Ltd v Grove Developments Ltd



# *Henry v Alu-fix*

- Developed the issue of pay first – too far?
- When can you start a true value adjudication?
- Current position?

[Henry Construction Projects Limited](#), a major London-based contractor with a £400m+ turnover, collapsed into administration in June 2023, owing over £43 million to creditors. The company faces ongoing investigations into missing plant machinery and potential legal actions against former directors, with administration likely to last until 2027. 📰 Construction Enquirer +3

# *Jaevee v Fincham*

- Relates to a site in Norwich
- On-going cases
- Can WhatsApps evidence a contract
- Simple answer yes – no different to an email
- WhatsApp can be less certain, so runs risk of uncertainty.

# *RBH v James*

- Court of Appeal decision pending
- Relates to “domestic occupier” and what needs to be in pay less notice
- Awaiting Decision – CoA may have something to say on smash and grab adjudications

# Questions

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# Thank you

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