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Aggregate

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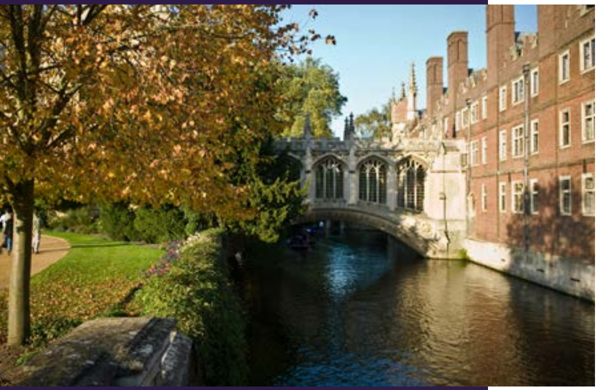


Welcome.

In this edition of Aggregate:

- Connor looks at a recent case that considered how rights and liabilities arising under a Pre-Construction Services Agreement (PCSA) are affected by a later building contract.
- I take a look at AI and warn of some dangers from a disputes perspective – in particular waiving confidentiality and potentially telling your opponents a lot more than you meant to.
- Alicia, who joined the firm in the summer, considers the recurring issue of fitness for purpose under construction contracts.
- Adam looks at the judgment in *Mulalley v. Sto*, the first reported case assessing contribution claims against manufacturers for misleading statements in relation to cladding products.
- And finally, we have some firm news, covering new recruits, panel wins, and our ongoing Construction Law Training webinar series.

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

ARCHOR

Where do the Liabilities Belong?

PCSAs and Continuing Liabilities

Connor McNicholl
Associate

The recent decision in *Belong (Construction) Limited v. Seddon Construction Limited* [2026] is a cautionary tale that parties who move from pre-construction arrangements into a main contract should not assume that earlier rights, liabilities or defaults have disappeared, and that the main contract is the only record of responsibility between the parties.

Liabilities can be left lingering, and remain enforceable, after entering into the main building - not everything has been overwritten by the new contract. This article considers the implications of the case on how to approach these types of arrangements and what to be mindful of when drafting.

Pre-Construction Service Agreements (PCSAs)

PCSAs are commonly used to bridge the period before the main building contract is agreed. They allow employers to obtain early contractor input, surveys, design advice, investigation work and buildability input, while giving contractors a route into the main contract.

They are similar to Letters of Intent (LOI), although PCSAs are for a defined scope of work with a formal contractual backing unlike the vaguer LOI. They can be an attractive way of getting a scheme ready to commence, while avoiding risks of entering into contract before one or both parties are ready. They also allow negotiations on a main contract to continue simultaneously to the PCSA works / services (usually with the PCSA contractor, but sometimes with others).

One risk is to treat the PCSA as an interim or preparatory measure only like an LOI, that is then discarded once complete. This case clarifies that risk.

The Facts

Belong, the employer, was dissatisfied with an adverse adjudication decision that Seddon, the contractor and appointed under a JCT Standard Building Contract (the "Main Contract"), was entitled to an extension of time in relation to opening up and testing of air sealing works. Belong challenged this determination via a Part 8 claim on the interpretation of key contractual provisions of the PCSA.

Seddon, the contractor, had originally been engaged under a PCSA after a previous contractor became insolvent. Its pre-construction role included appraising, surveying and inspecting the partially completed works, including issues relating to opening up and inspecting of air sealing works. When air sealing works later had to be instructed during the Main Contract works, Seddon sought an extension of time. The Contract Administrator originally rejected that claim on the basis that the need for those works arose from Seddon's earlier failure to comply with its PCSA obligations.

The PCSA appended the then draft form of JCT Standard Building Contract which would form the Main Contract (but which was still under negotiation), the "Proposed Contract Documents". These contained an obligation to perform these works, but the eventual Main Contract entered into did not.

Seddon argued that the opening up and testing obligation contained in the PCSA and included in the Proposed Contract Documents did not appear in the final version of the Main Contract as executed, and under the PCSA the parties' respective "rights and liabilities" in respect of the PCSA were subsumed into and to be subject to the Main Contract.

In contrast, Belong argued that it had a valid contractual right to complain about Seddon's failure to comply with the open up and testing obligation as contained in the PCSA and had not lost the right to rely on Seddon's lack of performance of that obligation as a result of its subsequent subsuming into the Main Contract.

The PCSA

The dispute turned on the sub-clauses of clause 2 of the PCSA. Clause 2 used different language in different places:

- That the "obligations" under the PCSA would end on entering into the main contract (clause 2.1 of the PCSA);
- That before execution of the Main Contract the "rights and obligations", shall be governed by the provisions of the PCSA supplemented by the Proposed Contract Documents (the draft Main Contract), and where a conflict exists, the Proposed Contract Documents would prevail (clause 2.2 of the PCSA); and
- On execution of the Main Contract, the respective parties' "rights and liabilities" would be "subsumed into and be subject to" the Main Contract (clause 2.3 of the PCSA).

The decision

The court had to determine

a) whether there the use "obligations" and "liabilities" was in any way determinative or distinguishable; and

a) if it was, whether such language was sloppy usage by the drafter or carefully crafted for an intended consequence; and

a) the answer as to what subsuming of the PCSA means (hint, it's in the dictionary apparently!).

In short, the court said that Belong did not lose the right to rely on the "liabilities" under the PCSA, just because the "obligation" to which it related was not in the Main Contract.

Since the PCSA was drafted by Belong's lawyers, the judge concluded that the choice of wording was deliberate rather than sloppy. Upon entering into the Main Contract, the judge decided that clauses 2.1 and 2.2 meant the obligations to test and open up had ended, but that clause 2.3 meant liability for any failure to do so continued.

In deciding this, the court noted that there is a distinction between (i) an "obligation" – a primary obligation to do something, i.e. the opening up and testing works – and (ii) a "liability" - "a secondary obligation under a contract to being under a liability for breach of a primary obligation".

In considering the 'subsumption' issue, the judge relied on the faithful Oxford English Dictionary which defines "subsumed" as being "to take up or absorb (a concept, thing, person, etc.) into another, esp. one which is larger or higher; to include in". The judge decided that "subsumed" therefore does not mean the original contract entirely loses independent existence, it has instead become part of the larger thing. "Subsumed" under clause 2.3 thus meant that any primary obligations remaining under the PCSA had been superseded by the Main Contract, but that the rights and liabilities remain unaffected.

The Court therefore rejected the argument that "subsumed into and subject to" meant extinguished: accrued rights and liabilities were taken up into the Main Contract and governed by its machinery, rather than erased altogether. That interpretation was supported by the existence of limitation wording in the PCSA, which contemplated claims under the PCSA after practical completion of the works under the main contract. If the PCSA had ceased to matter entirely, that clause would have been irrelevant.

Therefore, Belong, as a consequence of Seddon failing to perform their obligation under the PCSA, had a right of recourse under the Main Contract; i.e. denying entitlement to an EOT even where there was no corresponding obligation under the Main Contract (and a corresponding right to claim LADs for the resulting delay).

Why this matters?

Because PCSAs often sit at the edge of the parties' attention once the main contract is signed, but in practice, may contain the very obligations that explain why the contractor was appointed, what investigations it was expected to carry out, and how the employer intended to derisk the project before committing to the main contract. It should not – unless there are clear words to achieve that – be treated as a document that simply falls away once the main contract is signed.

It also confirms that properly drafted PCSA rights may survive and be relied on later. Clearly, pre-construction services can carry real downstream consequences, even where the final building contract does not repeat the same obligation in identical terms. If the intention is that accrued claims are released or superseded, that should also be stated expressly.

If parties want pre-construction defaults to affect later entitlements to EOT or loss and expense, the drafting should be kept broad. If they do not, they should avoid broad wording that may allow earlier PCSA conduct to be used as a bar to later claims under the main contract.

Conclusion

For employers, the case is a reminder that PCSA obligations can be valuable risk-allocation tools. Where the contractor is asked to investigate, review or satisfy itself about existing works, site conditions, boundaries and such like, the employer should consider whether breach of those obligations should affect future EOT, loss and expense, liquidated damages or final account issues. In any case, it should ensure that liabilities for breach of the PCSA do not end when the later contract is entered into.

For contractors, the risk is the opposite. A contractor may think that once the main contract is signed, the PCSA falls away – but this case shows that won't necessarily be the case. If that is intended, clear wording needs to be included, and if it's not contractors need to beware of lingering liabilities.

Artificial Intelligence

Warnings from a Litigator

Oli Worth
Partner

The purpose of this article isn't to pass judgement on whether AI is good or bad: there are already plenty of people who will tell you it is a 'very good thing'; and plenty who will tell you it is a 'very bad thing'.

Either way, there is no doubting that it is at least a 'thing' – a tool that is now built into our phones, computer software, and for many, our ways of working. At Archor we have seen its use become more commonplace over the last few years, to the extent that we now regularly see (for example) clients using it to collate and summarise documents, other parties using it to write submissions, and (anecdotally at least) it playing a part even in adjudicator's decisions. And in the wider world, there have been numerous reports of AI hallucinations and other horror stories.

So, with the use of AI not realistically about to stop anytime soon, this article considers two of the biggest dangers from the perspective of a litigator.

Hallucination

AI can come in many forms, but in this context we are talking about Large Language Models such as ChatGPT and Claude. LLMs generate responses by predicting what comes next in a particular context, based on patterns identified from masses of training data.

A judgment from the President of the King's Bench Division of the High Court last year (*R (Ayinde) v. London Borough of Haringey* [2025]) cast this warning about the use of tools like ChatGPT in the legal world: "Such tools can produce apparently coherent and plausible responses to prompts, but those coherent and plausible responses may turn out to be entirely incorrect. The responses may make confident assertions that are simply untrue. They may cite sources that do not exist. They may purport to quote passages from a genuine source that do not appear in that source".

These issues are generally termed 'hallucinations', but that is a euphemism: what the AI is actually doing is making things up.

Most AI systems are trained to be helpful, so want to give users the answers they look for, but the data from which they are trained is not always complete (or, the answer they're looking for doesn't exist). Rather than disappoint its user, some AI systems will 'fill the gaps' itself – or 'hallucinate'.

One example comes from the Haringey case. The claimant brought proceedings against the Council due to a failure to provide interim accommodation. In the grounds for judicial review, five cases were cited by his lawyers (Haringey Law Centre) which simply did not exist. When the Council asked for copies of these cases, they could not be provided (because they did not exist). The cases looked real – they were in the format one would expect and contained citations again in the correct format (which in one case was real – just for a different case) – but fundamentally they didn't exist.

Another comes more recently with a case from this year involving solicitors Pinsent Masons. In *Malcolm Cork & Anor v. Smith* [2026], as part of an application Pinsent Masons referred to a power within the Insolvency Act 1986 that did not exist. The judge queried this, and asked Pinsent Masons for more information. In response they asserted a specific provision of the Insolvency Rules gave the relevant power, which the judge said "came as a surprise to me". When he looked himself, no such power existed, and he demanded an explanation.

> *Confidentiality is key for most businesses. Asking questions about any confidential business or financial transactions risks that information becoming known to third parties, with commercial consequences.*
>
> **Oli Worth**
> Partner

Pinsent Mason's response was to claim that they had not argued there was a specific power and nothing was intended as a 'direct quotations'. The judge said "I was astonished by this reply" with the explanation "impossible to accept". Understandably irate, the judge called for Pinsent Masons to give full evidence of what had happened, through which it transpired that a fee earner had used their custom AI software to draft the two letters. 59 pages of AI prompts were disclosed in which – in fairness to the AI – it had warned that it could not be relied on and presciently observed that "The last thing you want is to cite a provision to the court with inaccurate wording".

Both these cases involved legally qualified individuals who obviously should have known better – in the Haringey case the judge described the lawyer's actions as 'improper, unreasonable and negligent'. And both involved 'cover ups' where the response to the errors clearly made matters worse.

But they are far from the only cases – Haringey lists numerous other cases of hallucinations both domestically and overseas, and that is only those that have been spotted. How many other hallucinations have been referred to in correspondence, in non-court submissions (such as adjudication), or simply not picked up on?

The lesson should be clear: LLMs like ChatGPT are not reliable. As the judge in *Haringey* put it, they "are not capable of conducting reliable legal research". They may tell you the answer you want, or at least give you an answer, but without checking underlying source material you cannot be sure that what you are being told is accurate or relevant.

Confidentiality and disclosure

A lot of LLMs, the free and consumer versions of ChatGPT included, are not confidential. They may store conversations, and they may use the contents of discussions to train AI models. The courts have confirmed that placing information "into an open source AI tool, such as ChatGPT, is to place this information on the internet in the public domain" (*R (Munir) v. Secretary of State for the Home Department* [2026]).

Confidentiality is key for most businesses. Asking questions about any confidential business or financial transactions risks that information becoming known to third parties, with commercial consequences.

In a legal context, confidentiality can become even more important. As part of litigation, parties are generally required to disclose relevant, non-privileged documents to other parties.

'Documents' has a wide meaning in that context and includes electronic records. It is fairly clear that records of prompts to AI software, and the results of those prompts (including work product from the LLM), would come within that definition.

As such, all conversations with AI may ultimately fall to be disclosed – indeed, AI prompts have formed part of the evidence in a number of the cases referred to above. It is unlikely that such prompts would be exempt from disclosure, such as through privilege, because of the lack of confidentiality and the fact that AI discussions are inherently not with a solicitor (so legal professional advice privilege will not apply).

Consider, then, what this means in practice. Potentially all discussions with AI, and its responses, may end up being seen by your opponent. You may ask AI about weaknesses in your case, drawing attention to those. You may make comments that imply an admission about certain matters. Or you may make other comments that come back to haunt you.

One recent example comes from America and a case concerning an explosion in 2020 at a manufacturing plant in Houston which killed three people and destroyed around 200 homes. Through 'discovery' (the US version of disclosure), it transpired that an expert retained by 3M, Josh Autenrieth, had asked ChatGPT to "create an exceptional expert witness report defending the standard of care at 3M" which he said should "show how 3M is 0% at fault for the explosion". Analysis showed that Mr Autenrieth's report was 85%+ created by ChatGPT – despite him being paid around $90,000 for it. The revelation clearly significantly undermined Mr Autenrieth's credentials as an independent expert – in England, experts owe a duty to the court to present impartial evidence, and the suggestion that the report should show his instructing client to be '0% at fault' would undoubtedly have been catastrophic. Although this related to an expert, it's also not difficult to imagine a case where a factual witness statement might be found to have used AI in its drafting, which could be similarly damaging.

While the interplay between AI and disclosure is relatively untested at this point – it has simply not been round long enough for there to have been significant litigation about it – this will undoubtedly happen over the next few years. Our warning is simple: be aware of the risk, and if you choose to have discussions with an AI engine about a legal case, know that it may not be confidential and could all be disclosable.

> “
> ***While it can undoubtedly be a helpful research tool, AI is a relatively new and untested tool where the consequences of getting it wrong can be dramatic, as the examples in this article show.***
>
> **Oli Worth**
> **Partner**

Conclusion

AI "is a tool to be used with caution" and "has the potential to be wholly unreliable". So said the judge in the Pinsent Masons case, and similar sentiments have been made on now frequent occasions by other parts of the judiciary in England and Wales and beyond.

While it can undoubtedly be a helpful research tool, AI is a relatively new and untested tool where the consequences of getting it wrong can be dramatic, as the examples in this article show. Even leaving aside potential contempts of court or regulatory actions for professionals, the practical effect of using AI wrongly will generally be to undermine confidence in a party's case, or through disclosure of non-confidential AI prompts to give an opponent an easy cross-examination point.

Next time you consider asking an AI for the answer, or to draft something for you, ask yourself whether it's worth the risk, and make sure you understand the inherent weaknesses of whatever it produces.

Are Contracts Fair?

Well, the simple answer is no. What I mean is that we continually see well-respected law firms drafting building contracts that seek to impose fitness for purpose obligations on contractors in relation to design – which we think is unfair (and not sensible for either party).

Alicia Hilton
Associate

This article examines why as a contractor you should be very wary of this, and equally why as an employer you should be asking your solicitor why they are seeking to impose clauses that may have unintended consequences (including meaning the contractor is uninsured for design).

What is fitness for purpose?

When we talk about fitness for purpose obligations, we are talking about design. But, before we focus on design, it is important to remember that "works" can effectively be split into three categories, (1) materials, (2) workmanship and (3) design, and they each have a different standard.

Materials are required to be fit for purpose, as implied by the Sale of Goods Act 1979. This is standard.

Workmanship is required to be carried out in a "good and workmanlike manner". Again, this is standard.

Design is required to be carried out using "reasonable skill and care". However, when considering design, the key question to ask is what standard of reasonable skill and care is required. Is it to the standard of a designer? Or is it to the standard of a contractor? We will come back to this later.

The reason this is relevant is because where a contract has a fitness for purpose obligation in relation to design, this creates an absolute legal duty and/or responsibility to achieve a particular standard, outcome or result. This means even if the contractor has used reasonable skill and care in relation to the design, if the design subsequently fails (and the design is not fit for purpose) the contractor will be liable under the contract.

We continue to see contractors who have signed up to contracts not knowing that they have been amended to include fitness for purpose obligations in relation to design, thereby holding them to a higher standard.

What does this look like in practice?

Fitness for purpose obligations come in many different forms and they do not expressly need to use the words "fit for purpose" for them to be considered as such. A fitness for purpose obligation can be implied, by way of reference to other documents including (but not limited to) the employer's requirements, technical specifications, and schedules. This was confirmed by the landmark case of *MT Hojgaard v. E.ON Climate Renewables UK* [2014], which said that even when a "fitness for purpose obligation" may be concealed in a technical specification, it is sufficient to impose a fitness for purpose obligation on a contractor, even where there are conflicting standards in the contract.

In *Hojgaard*, the contractor had an obligation to carry out the design of wind turbines in the Robin Rigg offshore wind farm using the reasonable skill and care of a designer. However, buried within one of the technical documents was an obligation to ensure the works would not need any major maintenance for 20 years. The court said that this obligation amounted to saying that the works would be fit for purpose for 20 years, meaning the design would also be fit for purpose for 20 years.

The contractor did carry out the design to the then recognised standards using the reasonable skill and care required of a designer, but the wind turbines still failed.

The Court decided that the two tests, fitness for purpose and reasonable skill and care were not mutually exclusive and could coexist in the same contract, albeit the contractor was required to meet the more onerous of the two tests. As such, despite carrying out its design with reasonable skill and care, the contractor here was still liable.

> *So, in simple terms, the words that define the standard of care for design need to be set to the standard of a designer, not a contractor.*
>
> **Alicia Hilton**
> Associate

What standard does the design have to be carried out?

What we continue to see is clauses with wording like 'the contractor is required to carry out the design using all reasonable skill and care to be expected of a properly qualified competent design and build contractor'.

Why is this a problem? Well, the use of the words 'design and build contractor' are a red flag when it comes to fitness for purpose obligations because a design and build contractor is (surprisingly) held to a higher standard when it comes to carrying out design, than a designer would be. Although counter-intuitive, the logic is that a designer only promises to use reasonable skill and care, whereas a contractor is seen as providing a 'product' – a finished building – that is fit for purpose.

This distinction stems from the case of *Independent Broadcasting Authority v. EMI Electronics Ltd and BICC Construction Ltd* [1980], some 46 years ago. The Court of Appeal established that a design and build contractor undertakes a higher responsibility to ensure the structure fulfils its intended function. So, in simple terms, the words that define the standard of care for design need to be set to the standard of a designer, not a contractor.

This explains why clause 2.17.1.1 of the JCT D&B states: "the reasonable skill and care in such design to be expected of a qualified and experienced architect (or other appropriate professional designer) undertaking the design of works similar in scope and character" – i.e. referring to an architect rather than a contractor. This avoids implying a fitness for purpose obligation for design based on the EMI case.

As identified above in the Hojgaard case, because it is not always possible to identify provisions that may amount to fitness for purpose obligations, it is now standard to put a catch-all clause that expressly excludes fitness for purpose for design. The 2024 JCT D&B recognised this and introduced clause 2.17.1.2, which expressly excludes any fitness for purpose obligation in relation to design, limiting the contractor's liability to the reasonable care and skill of a designer. However, it will come as no surprise that we regularly see amendments which seek to remove this clause in an attempt to reinstate the fitness for purpose obligation under the contract.

In addition to the above, we often see a mismatch between the standard of care expressed in the building contract (typically correctly limited to that of a designer) compared to what is put in the corresponding collateral warranties, where we continue to see reference to the design standard of a design and build contractor.

We can only assume that this is because the construction team draft the amendments to the contract, whereas the property team draft the collateral warranties to reflect the property documents (which is why it is a good reason to use a specialist construction practice to review both!).

Why does this affect you?

As well as being a higher standard, and therefore more difficult to meet, fitness for purpose obligations are uninsurable as most professional indemnity policies will only cover a breach of the common law standard for design, being the reasonable skill and care of a designer.

Therefore, if you enter into contracts with these obligations, aside from the greater risk of not meeting the standard, you run the very real risk of not being insured: professional indemnity insurers may refuse to cover any claim under a contract where you have agreed to a fitness for purpose obligation.

Where possible, you should therefore try and negotiate these clauses out of your contract, however if you are unable to do so, we would recommend introducing additional wording to your contracts which limits your liability for design to that of the reasonable care and skill of a designer. To the employer that argues that's not fair for it, you can fairly ask the question – is it better to have an insured contractor, or an uninsured one?

Product Liability Under the BSA

Another String to your Bow?

Adam Brown
Legal Director

When the Building Safety Act 2022 (the BSA) came into force, section 149 drew a lot of attention because it created an entirely new liability for past defaults relating to cladding products. While numerous claims will now have been made as a result of this new liability, *Mulalley v. Sto* [2026] is the first published case where the TCC has assessed the quantum of a contribution claim arising from a section 149 liability. It is also another example of the TCC granting a building liability order ('BLO'), this time to extend the liability of the original cladding supplier / manufacturer based in the UK to its parent company in Germany.

Section 149 of the BSA

Section 149 imposes a new and retrospective statutory liability for past defaults relating to cladding products if certain conditions are met. Those conditions are:

- **Condition A** – At any time before Section 149 came into force on 28 June 2022, a person fails to comply with a cladding product requirement in relation to a cladding product OR a person who markets or supplies a cladding product makes a misleading statement in relation to it OR a person manufactures a cladding product that is inherently defective. A 'cladding product requirement' is defined as a requirement under certain construction product regulations.
- **Condition B** – The cladding product is attached to or included in the external wall of a relevant building. A 'relevant building' is a building which consists of a dwelling or which contains two or more dwellings.
- **Condition C** – When those works are completed, the building or one or more of the dwellings in the building is unfit for habitation.
- **Condition D** – The facts referred to in Condition A are the cause or one of the causes of the building or dwelling being unfit for habitation.

Section 149(6) states that the person referred to in Condition A is "liable to pay damages to a person with a relevant interest in relation to the relevant building". That 'relevant interest' is a legal or equitable interest in the building or any dwelling contained in the building.

It follows that Section 149 creates a liability for a cladding supplier / manufacturer which is owed to the owner of the building or dwelling that might not otherwise have been available under contract, tort or existing statutes.

Significantly, the limitation period for an action brought under Section 149 is 30 years (if the right accrued before 28 June 2022) or 15 years (if the right accrued or accrues on or after 28 June 2022). Cladding suppliers / manufacturers are therefore potentially on the hook for projects stretching as far back as 1992.

However, the new liability under Section 149 should not only be of intrigue to owners and leaseholders but also to defendant contractors and consultants who currently face a cladding claim against them. That is because it potentially opens the door for those defendant contractors and consultants to bring the cladding supplier / manufacturer into the claim, or commence an entirely new claim against the cladding supplier / manufacturer, by seeking a contribution under the Civil Liability (Contribution) Act 1978. In general, it can be argued that, to the extent the upstream claim from the owner is established against a contractor / consultant, the supplier / manufacturer is also liable to the owner under Section 149 and this in respect of the same damage as the upstream claim. In those circumstances, the contractor or consultant would say that there is a shared liability between them for the cost of remedying the defects.

However, a contribution claim brought on the basis of a liability under Section 149 has not yet been fully tested in the TCC and so the law in relation to it is far less developed than other new remedies introduced by the BSA.

Case Facts

In *Mulalley v. Sto, Mulalley* was engaged to design and build various refurbishment works at the site of a residential tower block known as Parkside Court in Chelmsford. Mulalley sub-contracted the cladding works specifying the use of the StoTherm Classic System. Following the Grenfell fire, it was identified that the cladding system was defective and Mulalley entered into a settlement agreement with the employer to remove and replace the defective cladding and to pay certain sums.

In these proceedings, Mulalley brought claims against two defendants:

1. A contribution claim based on Section 149 against Sto Limited, the company who supplied the cladding system ('Sto'); and
2. A claim for a BLO against Sto SE & Co KGaA, Sto's parent company in Germany ('Sto Germany').

Sto entered administration after the claim was issued and so the claim against it became subject to a statutory moratorium. As for the claim against Sto Germany, it failed to defend the claim and so default judgment (a procedural remedy where a claim is not responded to) was entered, with damages to be assessed.

Because of the default judgment against Sto Germany, Mulalley's allegations in the Particulars of Claim were deemed admitted and so liability was already established. Amongst those admitted liability findings were that:

- Sto failed to supply a cladding product that complied with the functional requirement B4(1) and regulation 7 of the Building Regulations;
- Sto made misleading statements about the StoTherm Classic system;
- The StoTherm Classic system was inherently defective; and
- The misleading statements and the inherently defective nature of the StoTherm Classic system were the causes of the apartments being unfit for habitation.

The only live issue left for the TCC to determine was the amount of damages that should be awarded. This required the TCC to assess the just and equitable contribution payable by Sto by virtue of the contribution claim based on Section 149 and, in turn, by Sto Germany pursuant to the BLO ordered against it.

Judgment

The court found that the total remedial costs incurred by Mulalley due to the defective StoTherm Classic system were £2,025,499.62 and that Sto Germany was responsible for 87.5% of this figure. This means that an order was made against Sto Germany in the amount of £1,772,312.17 plus interest.

In reaching this assessment, the TCC found that the principal cause of the remedial works was plainly the fact that Sto marketed and supplied an inherently defective product.

While workmanship issues were also alleged in respect of the fire barriers, the primary issue for the barriers was that Sto's standard detail included a layer of combustible insulation over the face of the fire barriers. This was the very same fault considered in another case that involved Mulalley (*Martlet Homes Ltd v. Mulalley & Co Ltd* [2022]). There, it was observed that the detail was "fundamentally deficient" and "would have allowed any fire to bypass the fire barrier in direct contradiction of the design philosophy behind the specification of fire barriers". It followed that the fire barriers had to be replaced in any event because of the infill panel defects.

Take Aways

Save for providing an example assessment of what the court considered to be a just and equitable contribution, *Mulalley v. Sto* arguably does not raise anything substantially new or surprising. Because the claim was not defended and default judgment was entered as a result, the viability of a contribution claim based on a Section 149 liability remains, strictly speaking, untested by the TCC.

If such a claim was defended, we would expect to see various arguments deployed by the cladding supplier / manufacturer. These might include what constitutes a "misleading statement" or whether a cladding product is "inherently defective" (in relation to Condition A) and whether the misleading statement or inherently defective cladding product was causative of the building or dwelling being unfit for habitation (in relation to Condition D). As with almost all contribution claims, we would also expect the contribution defendant to argue against a contribution being ordered because the damage for which it is liable is not the "same damage" for which the contribution claimant is also liable. Accordingly, although *Mulalley v. Sto* brings into sharp focus that cladding suppliers / manufacturers are significantly exposed where their defective product caused or contributed to building safety failures, the outcome of such claims will inevitably differ from case-to-case.

We will very likely continue seeing contribution claims based on a Section 149 liability which are brought by contractors and consultants against cladding suppliers / manufacturers. However, where contractors and consultants have agreed settlements upstream, they should be mindful of the short limitation period that applies to contribution claims: claims must be brought within two years of a judgment establishing liability or the date on which a settlement amount is agreed, noting that the latter can include a payment in kind such as an agreement to carry out remedial works.

Archor News

Back in June we were delighted to be joined by hundreds of our clients and contacts at our Fifth Birthday Party. Thanks to all that came and made it such a special night. A selection of photos is shown to the right, with more available on our website as a reminder of the evening. – here's to the next five years!

Since then, we've been busy with new arrivals. **June brought Alicia Hilton and Lauren Barden-Williams to the Archor family.** Alicia is a solicitor based in Colchester, with a focus on disputes, while Lauren who is currently undertaking her CILEX qualifications, joins in the Cambridge office specialising in non-contentious construction.

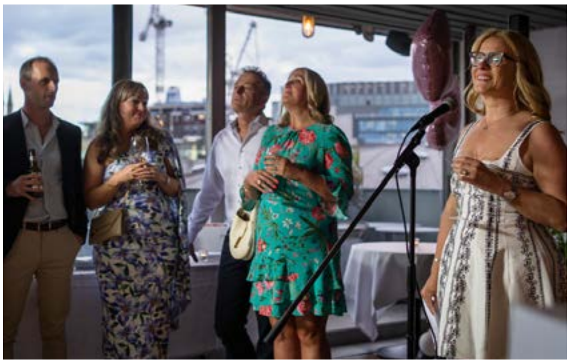
More recently, Yasmin Wilbram has also joined the Cambridge office as a paralegal, where she'll straddle both contentious and non-contentious work, while Jane Macdonald is another new starter in Colchester who will focus on our knowledge management and non-contentious work.

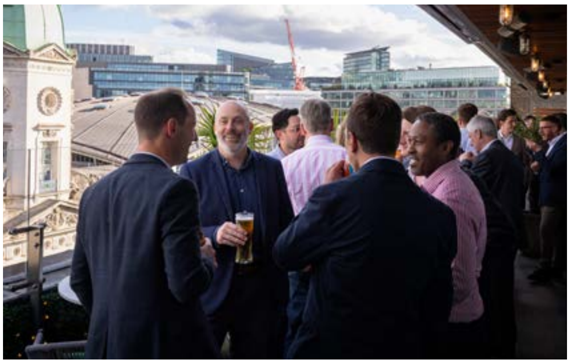
Away from building the team, we're also very pleased to report we are now B-Corp Certified. The extensive and rigorous certification process tested us on all fronts, to ensure we meet high standards of social and environmental performance, transparency, and accountability.

And we've been **appointed to Government Commercial Agency's (GCA's) Framework** Contract RM6374 Legal Panel for Public Sector, where we have been named as a supplier in relation to construction legal advice on Lot 2 Focused Legal Support. GCA is the UK's central commercial and procurement organisation, connecting public and private sectors to achieve the best outcomes for the UK and its citizens. Being on the panel means we can more easily bring our specialist services to public sector and shared legal services teams.

Coming up, after the success of our JCT training in Autumn/Winter 2025/26, across 2026/27 we're running a series of NEC training sessions. Ruth Kavanagh will be joined by various members of the Archor team to look at the basics of NEC contracts across four webinars – the first of which is on 16 September at 8.30am. You can signup for your free place **here**.

And on 30 September at 10am, Katrina Bretten and Sarah Lester will be presenting a webinar focussed on construction contracts for the public sector. While this will have a public sector focus, all are welcome, and you can book your free place **here.**





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