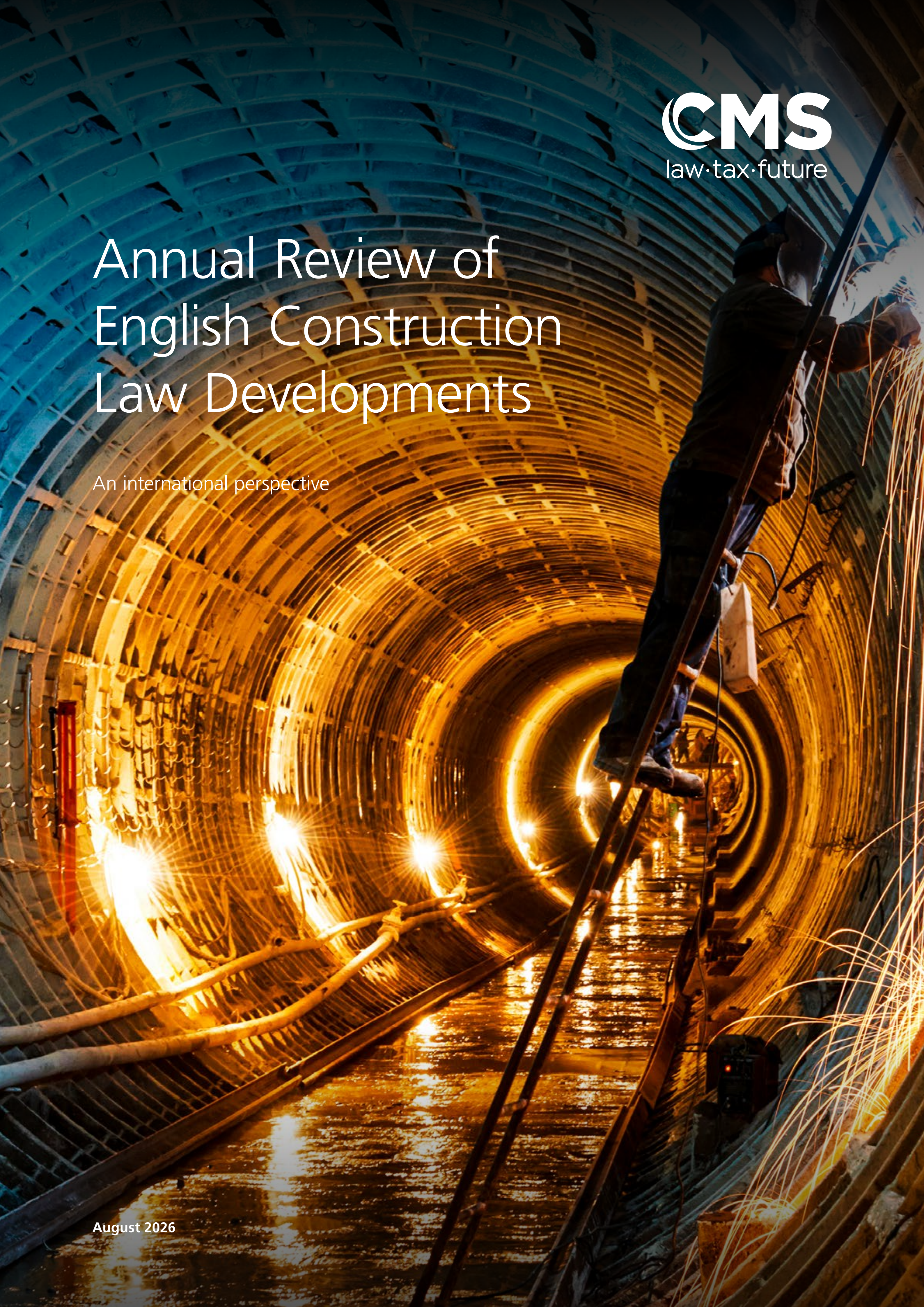


CMS
law·tax·future

Annual Review of English Construction Law Developments

An international perspective

August 2026

Contents

I simply consider this to be ‘mandatory literature’ for anyone interested in construction law.

General Counsel, Global Energy Company

Introduction

Welcome to the 2026 edition of our internationally focused Annual Review of English Construction Law Developments, covering developments from across the globe relevant to international projects governed by English law.

This year's *Annual Review* draws inspiration from across the common law world, including cases from Hong Kong, Australia, India, Trinidad and Tobago, as well as from England and Northern Ireland. The first three articles cover deep principles of law: the deemed fulfilment principle, the prevention principle and the test for causation in prolongation and delay costs claims. Changes in those principles have either already taken place or may be on the cards in the future.

The theme of legal uncertainty continues through two further articles. The first concerns the English approach to local court injunctions when enforcing payment under on-demand guarantees. Three cases on this topic in the past year have given rise to considerable legal and commercial uncertainty. The second article highlights the difficulties which can arise in attempting to rely on the FIDIC claims notification time-bar before arbitral tribunals or in jurisdictions other than England.

The remaining articles consider termination issues, variation clauses, good faith obligations and the making of direct payments to subcontractors. As always, we hope you find this publication useful and we welcome any comments or feedback you may have.

Should you wish to receive more frequent updates throughout the coming year, or for briefer summaries of developments earlier this year, please sign up for our Legal Update service at https://cms.law/en/gbr/legal-updates and select "Construction" as your chosen area of law.

David Parton
Partner, Head of Construction
T +44 20 7524 6873
E david.parton@cms-cmno.com

Steven Williams
Partner, Co-Head of Infrastructure Construction and Energy (ICE) Disputes
T +44 20 7524 6713
E steven.williams@cms-cmno.com

Emma Schaafsma
Partner, Co-Head of Infrastructure Construction and Energy (ICE) Disputes
T +44 20 7367 2316
E emma.schaafsmakratochvilova@cms-cmno.com

King Crude Carriers and the demise of the deemed fulfilment principle

A decision last year of the UK's highest court has found that the longstanding principle of "deemed fulfilment" does not form part of English law. The principle provides that a condition precedent is deemed to have been satisfied if its fulfilment has been prevented by the other party. The principle applies to all manner of conditions precedent including approval conditions under construction contracts. The ousting of the principle, insofar as English law is concerned, may give rise to some unexpected contractual results.

Mackay v Dick and the deemed fulfilment principle

Mackay v Dick concerned a contract for the purchase of a steam-operated digging machine for use in railway construction in Scotland. The machine was to be delivered and a trial of its digging capacity held on a "*properly opened-up*" face at a railway cutting. If the trial was successful, the buyer was to keep the machine and pay the agreed price.

The machine was delivered, but the buyer failed to provide a properly opened-up face for the trial. The seller sued for the price. The House of Lords (the UK's highest court at the time) decided in favour of the seller for two separate reasons. Lord Blackburn treated the requirement for a trial as a condition subsequent, which if it failed, would deprive the seller of its right to the agreed price. He also concluded that the buyer had an implied duty of co-operation to ensure the trial took place. He considered there to be a general rule that:

> "*where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.*"

As the trial did not take place due to the buyer's breach of this implied duty, the condition subsequent did not apply and the seller remained entitled to the price.

Lord Watson decided the case on a different ground. He treated the requirement for a trial as a condition precedent. In his view, the buyer's conduct in preventing the fulfilment of that condition meant that it could be taken as being fulfilled:

> "*The passage … from Bell's Principles … to the effect that, 'If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement,' expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case.*"

Lord Blackburn's findings as to an implied duty of co-operation have long since been held to form part of English law. Lord Watson's principle of "deemed fulfilment" has been more controversial and has now been overruled by the UK Supreme Court.

King Crude Carriers SA v Ridgebury November LLC

This case concerned three contracts for the sale of oil tankers by Ridgebury November LLC and others (as sellers) to King Crude Carriers SA and others (as buyers). Each contract required the buyers to pay a 10% deposit into an escrow account after the account had been opened, with both parties obliged to provide the documentation needed for that process. The deposit clause read as follows:

"As security for the correct fulfilment of this Agreement the Buyers shall lodge a deposit of 10% … of the Purchase Price (the "Deposit") in an account for the Parties with the Deposit Holder within three (3) Banking Days after the date that:

(i) this Agreement has been signed by the Parties and exchanged in original or by email or telefax; and

(ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds.

… The Parties shall provide to the Deposit Holder all necessary documentation to open and maintain the account without delay."

In breach of contract, the buyers failed to provide the necessary documentation to allow the deposit account to be opened. The sellers terminated the three contracts and claimed the deposits in debt, relying on *Mackay v Dick*. The buyers contended that the sellers' sole remedy was in damages and that no loss had been suffered.

The Supreme Court concluded that Lord Watson's principle of deemed fulfilment from *Mackay v Dick* was not part of English law. Among other reasons:

- The doctrine appears to have been borrowed from the civil law and was not a creation of the common law.
- The rule produces significant anomalies in cases involving the sale of goods or land. For example, if the purchaser prevents the transfer of property in breach of contract, the seller would be entitled to the price despite retaining title to the property. See, for example, *Colley v Overseas Exporters* where the buyer failed to nominate an effective ship so that the seller was prevented from loading goods under an FOB contract.
- The rule promotes legal fictions (such as deemed performance or deemed waiver) without any convincing explanation or justification for doing so. Such fictions "*tend to obscure transparent reasoning and, wherever possible, should be removed*".
- The correct approach under English law was to proceed on the basis of the terms of the contract, express and implied, and their proper interpretation rather than by way of fictional fulfilment of a condition precedent. This "*is consistent with the importance which English law attaches to freedom of contract" and "promotes certainty and predictability, which are important considerations, especially in the commercial law context*."
- The rejection of the *Mackay v Dick* principle would not lead to injustice. Where a failure to fulfil a condition precedent had been caused by a breach of contract, "*that breach is appropriately and adequately dealt with in English law through the claimant's remedy in damages.*" In those previous cases where the principle had been applied to permit a debt claim, the same financial result could have been achieved through a damages claim. In the case before it, allowing the sellers to recover the deposit could, in contrast to damages, result in them recovering more than their net loss.

The Supreme Court also rejected an alternative argument that the deemed fulfilment principle could be supported by way of contractual interpretation on the basis that the presumed intention of the parties should be to prevent a party from taking advantage of its own wrong. The argument was summarised by the Court of Appeal as follows:

> *"It cannot have been the parties' intention that the buyer could avoid his obligation to pay the deposit by the simple expedient of deliberately failing to comply with what is on any view a subsidiary obligation to sign the necessary forms to open the account."*

However, the problem with this argument is that it would mean the parties cannot have intended what they clearly stated and agreed to. In this case, it would mean that the deposit obligation was not in fact conditional upon confirmation that the deposit account was "*fully opened and ready to receive funds*".

The Supreme Court also cast doubt on the value of any general principle that a party cannot profit from its own wrong. Previous cases which had suggested such a principle were best rationalised as ones where such a conclusion reflected the proper interpretation of the contract in question based on the objective intention of the parties set against any relevant factual background. Those cases did not:

> *"support any wider presumption that a party may not take advantage of its own wrong. There are many contractual circumstances in which a party may do so. This is most obviously illustrated by the principle that damages for breach of contract are to compensate the claimant and not to punish the defendant and, subject to rare exceptions, damages or an account of profits are not awarded to strip profits made by the defendant's breach. Contract law permits efficient breach and the defendant may therefore profit from its wrong."*

A further alternative case as to implied terms was also rejected by the court.

Implications for construction contracts

The Supreme Court's judgment affects what had previously been thought to be a fundamental principle of English law and will have wide ranging implications for many different contractual scenarios.

One of the more obvious implications for construction contracts relates to approval conditions. For example, in *Bennett (Construction) Ltd v CMC MBS Ltd* a domestic English construction contract included bespoke provisions for milestone payments which referred to "*sign-off*" of certain key construction phases. The English Court of Appeal considered various meanings of the word "sign-off", but on the assumption that the phrase required approval by the employer, the court held that such a condition would make no difference

to the contractor's entitlement to be paid once the relevant work had been completed: "*If [the work] was in a state where it could be signed off, Bennett could not avoid their liability to pay Milestone 2 simply because the document had not in fact been signed off*". The justification for that conclusion was said to be that, "*if the employer prevents the issue of a certificate, which should otherwise have been issued, he cannot rely on its absence, because 'no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself'*".

This reasoning would appear to run directly contrary to the Supreme Court's comments in *King Crude Carriers*. Whilst the contractor in such a case would still be able to bring a damages claim, important differences may arise between such a claim and a simple debt claim. Contractual interest provisions are unlikely to apply to a damages claim, for example. Compliance with local payment legislation may also be called into question if the employer's refusal to certify means that no claim in debt arises (i.e. the contract would not provide for payment in such circumstances).

The possibility that payment claims may need to be pursued by way of damages also raises the prospect that exclusion and limitation clauses may apply. Exclusion clauses for "loss of profit" and "loss of revenue" have been held to apply to damages claims for loss of the contract price. For example, in *EE Ltd v Virgin Mobile Telecoms Ltd*, EE claimed that Virgin Mobile had breached an exclusivity arrangement whereby Virgin Mobile had agreed not to provide mobile phone services to its customers using any other non-EE networks. EE claimed damages in the amount of the contractually specified sums which would have been payable to it by Virgin Mobile had Virgin Mobile not diverted its customers to an alternative network. The English Court of Appeal held that the claim was precluded by an exclusion of liability in respect of "*anticipated profits*", which was held by the court to have the same meaning as an exclusion for "loss of profits".

An analogous situation might arise under a construction contract were an employer to prevent the attainment of pre-conditions to payment. For example, a contract for the construction of a power plant might specify a bonus payment of £5 million in the event that commercial operation or the commencement of testing is achieved by a specified date. The employer might be responsible for the supply of fuel to the plant and delays in supply may cause the contractor to miss the bonus milestone date. In light of *King Crude Carriers*, the contractor would struggle to able to bring a claim for the bonus payment directly, but would need to claim in damages for loss of the bonus. Such a claim might then be said to be one for "loss of profit" or "loss of revenue" in the same way as the sums claimed in *Virgin Mobile* were held to be "anticipated profits".

There is, of course, no reason why the consequences of the court's decision cannot be reversed by the parties. As the Supreme Court itself noted:

> *"it is always open to the parties to include a term in the contract making clear that a condition precedent to a debt obligation does not apply where the failure of the condition precedent is caused by the debtor's breach."*

Contractors in particular may wish to ensure that such a clause is included as a matter of course when negotiating future construction contracts.

The *King Crude Carriers* decision may also have knock-on effects on other areas of law where similar deeming principles apply without reference to the contractual terms. In the next article, we consider whether the decision may give cause to reassess the operation of the prevention principle.

References: *Mackay v Dick* (1881) 6 App Cas 251; *Colley v Overseas Exporters* [1921] 3 KB 302; *Bennett (Construction) Ltd v CMC MBS Ltd* [2019] EWCA Civ 1515; *EE Ltd v Virgin Mobile Telecoms Ltd* [2025] EWCA Civ 70; *King Crude Carriers SA v Ridgebury November LLC* [2025] UKSC 39.

Can the prevention principle survive *King Crude Carriers*?

Distinct similarities exist between the prevention principle and the deemed fulfilment principle discarded by the Supreme Court in King Crude Carriers. That case may now prompt consideration as to whether a similar challenge could be made to the prevention principle at the Supreme Court level. This article provides a detailed overview of the development of the prevention principle under English law and gives consideration to the grounds on which such a challenge might be brought.

The development of the prevention principle

The classic modern statement of the prevention principle (as applied to construction contracts under English law) comes from *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (No. 2). Mr Justice Jackson (as he then was) summarised the principle as follows:

> *"The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.*
>
> *In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor.*
>
> *It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time. Thus, it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract."*

At first blush, the principle is a surprising one for English law to adopt. It results in the wholesale substitution of an agreed time for completion and liquidated damages regime with a general obligation to complete within a reasonable time without any liquidated damages. This is the effect whether the prevention be for 1 day or 1 year.

The juridical basis of the rule is not clearly articulated. If it is a general rule of law, the basis for such a general rule has not been established and is contradicted by case law (including *Multiplex*) which has held that the principle does not apply where the absence of an extension of time is due to the effect of a contractual time-bar (i.e. a failure to submit a delay notice on time). If the principle is based on implied terms, one would expect an analysis in each case of whether a term can properly be implied based on the usual rules for implication – but such analyses do not feature in the cases on the prevention principle.

To better understand the basis of the prevention principle under English law it is helpful to consider the older cases where it first emerged. The principle is usually dated back to *Holme v Guppy* in 1838. The case concerned the construction of a brewery. Carpenters were engaged to complete certain work within four and a half months with liquidated damages agreed at £40 per month. The carpenters were denied possession for four weeks, were delayed one week on their own account and a further four weeks by other contractors on site. They ultimately completed the works five weeks late. The lower court (then known as the "assizes") had refused to allow liquidated damages for the whole of the five weeks, but referred to a higher court (the Court of Exchequer) the question of whether liquidated damages of £40 could be deducted on account of the one week of delay for which the carpenters were responsible. In refusing any deduction, Parke B noted that there were clear authorities that:

"if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default (1 Roll. Abr. 543; Com. Dig. Condition, L.(6)). It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract; and there is nothing to shew that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The plaintiffs were therefore left at large; and consequently they are not to forfeit anything for the delay."

The authorities referred to are summarised in Comyns Digest, Volume 3, published in 1822. The relevant section reads as follows:

"(L6.) By the obstruction of the obligee.

So the performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house; and he, or an other by his order, hinders his coming upon the land. 1 Rol. 543. 1. 50.

Or says that it shall not be built. 1 Rol. 454. l. 2.

Or interrupts the performance. 1 Rol. 454. l. 5. 20.

So, if a condition be that the lessee shall leave a house in good plight; and fire out of the chimney of the lessor next to it consumes it. 1 Rol. 454. l. 15.

…

But it ought to be an obstruction which disables the performance. …"

The references after each proposition are to *Rolle's Abridgement*, the first digest of English law by subject matter, published in 1668.

It is apparent from the examples in Comyns Digest that the obstruction of the condition is total and "*disables the performance*". It is also apparent that the condition falls away entirely. Accordingly, where the condition is to build a house, and the employer has obstructed the condition, the condition falls away and the contractor is no longer obliged to build the house. This appears also to be the sense in which the principle was applied in *Holme v Guppy*. The carpenters were "*excused from performing the agreement*" and there was no evidence to show that they had "*entered into a new contract*" to continue to perform the works in a different period. This appears to be the sense in which the court considered the carpenters to be "*left at large*".

It is also important to note that general principles as to the implication of terms had not yet been developed in English law in the early 19th century. These came toward the end of the century with cases such as *Mackay v Dick* in 1881 and *The Moorcock* in 1889. As noted in the previous article, Lord Blackburn was the first to formulate a general implied term of co-operation in *Mackay v Dick*. Against this background, it is illuminating to find a description of the prevention principle based on implied terms in the 1870 case of *Roberts v The Bury Improvement Commissioners* decided by a six-member panel of the Exchequer Chamber (the forerunner of the modern English Court of Appeal). Lord Blackburn and Mellor J put the position as follows:

"The contractor also, from the nature of the works, could not begin his work until the commissioners and their architect had supplied plans and set out the land and given the necessary particulars; and therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and, if they broke that implied contract, the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract: for, it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L); and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract. These principles have been applied to contracts very analogous to the present, in the cases of Holme v. Guppy [and others] …"

The justification for the principle given in this passage is twofold: (i) the impermissibility of taking advantage of any delay caused by one's own breach of contract; and (ii) circuity of action in that any claim for delay damages would meet an equal and opposite claim for breach of an implied term.

The reliance in *Roberts* on the employer's breach of contract raises a question as to how the principle could be justified in circumstances where the delay to completion arises from the exercise of powers expressly given to the employer or its agents under the contract. Such a case was considered by the English Court of Appeal in *Dodd v Churton* in 1897. The contract in that case provided for liquidated damages to accrue weekly in respect of any delays beyond the time for completion. It also provided for the employer's architect to instruct variations and additions to the work which were stated not to vitiate the contract. The total contract sum was £664 and the contractor completed the works 27 weeks late. A variation worth £22 had been instructed by the

architect and was said to have added 2 weeks of delay to the works. The employer therefore claimed only 25 weeks of liquidated damages.

The claim was rejected on the basis of the principle stated in Comyn's Digest quoted above. In the judgment of Esher MR:

> *"The principle is laid down in Comyns' Digest, Condition L (6.), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with Holme v. Guppy, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor."*

The judgment of Lopes LJ was to similar effect:

> "*It has been often laid down that, where there is provision that a contractor shall pay penalties for delay as in the present case, no penalty can be recovered where delay has been occasioned by the act of the person endeavouring to enforce the penalties.*"

As was Chitty LJ's:

> "*The case of Holme v Guppy and the subsequent cases in which that decision has been followed are merely examples of the well-known principle stated in Comyns' Digest, Condition L (6.), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it.*"

It is notable that none of the judgments seek to provide a rationale for the rule. The *Roberts* case was not referred to and there is no mention of implied terms. The employer's proposed solution of making due allowance for the additional time made necessary by the variation is not discussed. As a result, a variation valued at just over 3% of the total cost of the works and which accounted for only 7% of the total delay beyond completion allowed the contractor to escape liability for the remaining delay for which it was otherwise responsible for. There is no mention in the case of any ability of the employer to bring an action for general damages based on a reasonable time to complete the works.

As a result of these cases, extension of time clauses became a ubiquitous feature of English law construction contracts, allowing employers to maintain both the benefits of a liquidated damages clause and contractual powers to instruct variations or take other action which might cause delay to the works. The development of the prevention principle in the context of construction contracts largely paused at this point. The next decision of note is the English Court of Appeal's decision in *Peak v McKinney* in 1970.

In *Peak*, McKinney were responsible for defective foundation piling. When they finally came back to carry out the necessary remedial work, it took just 6 weeks to complete. However, the overall delay to the works was 58 weeks because, prior to the remedial works being carried out, Liverpool Corporation had delayed in deciding what they should do and how the problem should be rectified. There was an extension of time provision but it was limited, and the only relevant sub-clause referred to delays as a result of "*any other unavoidable circumstances*". The Court of Appeal held that the delay resulting from the Corporation's indecision could not be said to have been an unavoidable circumstance. There was therefore no basis on which time could be extended as a result of the delays for which the Corporation were responsible and, in consequence, the court found that time was set at large and no liquidated damages could be levied. Lord Justice Salmon explained the position as follows:

"A clause giving the employer liquidated damages at so much a week or month which elapses between the date fixed for completion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause. The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled … I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach. No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was partly to blame for the failure to achieve the completion date. In such a case the architect would extend the date for completion, and the contractor would then be liable to pay liquidated damages for delay as from the extended completion date."

The reference to the employer recovering "*such damages as he can prove flow from the contractor's breach"* was not explained further. However, two years later in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*, Denning MR in the Court of Appeal suggested that the prevention principle had the effect that "*time becomes at large*" and that work must then "*be done within a reasonable time*". On appeal to the House of Lords on a separate issue, Lord Pearson disagreed with the extension of the principle in this way:

"Lord Denning M.R. decided first on a point of construction or perhaps on a rule of law which he derived from Dodd v Churton … I will set out a passage from the judgment of Lord Denning, inserting '(1)' and '(2)' to divide it into two parts:

'(1) It is well settled that in building contracts — and in other contracts too — when there is a stipulation for work to be done in a limited time, if one party by his conduct — it may be quite legitimate conduct, such as ordering extra work — renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.

'(2) The time becomes at large. The work must be done within a reasonable time — that is, as a rule, the stipulated time plus a reasonable extension for the delay caused by his conduct.'

Then he said: 'That was established by Dodd v Churton.'

Now Dodd v Churton does establish the first part of that passage, which I have marked '(1),' but does not establish, or afford any support to, the second part of the passage which I have marked '(2).'"

The next Court of Appeal decision to revisit the prevention principle is *Rapid Building Group v Ealing Family Housing Association Ltd*, decided in 1983. The case concerned delays in giving possession due to the need to evict squatters. Whilst only 24 days of delay out of a total delay of 10 months were attributable to the squatters, the Court of Appeal felt bound to follow *Peak* in agreeing that the right to claim liquidated damages had become lost (the contractual extension of time clause did not cover delays to possession). However, in refusing summary judgment the Court of Appeal held that the employer was still able to bring an unliquidated damages claim. Lord Justice Stephenson noted that:

"It is accepted that a party must elect whether to claim liquidated or unliquidated damages; but as it seems to me, where the claim for liquidated damages has been lost or has gone, as has been rightly held by the judge, the defendants are not precluded from pursuing their counterclaim for unliquidated damages."

No mention is made in the judgments of time becoming at large or of there being substituted a reasonable time to complete. The unliquidated claim brought by the employer was based on a loss of rent across the whole of the 10 month period of delay, without any allowance for the 24 days of squatter delays.

It is worth pausing at this point to note that some of the judges in *Peak* and *Rapid Building* expressed surprise at the principle which had been presented to them. Lord Justice Phillimore in *Peak* noted that he was:

"somewhat startled when Mr Gardam said in the course of his argument that the moment any part of the delay which has occurred can be attributed to the employer, then any agreement as to liquidated damages disappears."

Similarly, Lloyd LJ in Rapid Building was:

"somewhat startled to be told in the course of the argument that if any part of the delay was caused by the employer, no matter how slight, then the liquidated damages clause in the contract, clause 22, becomes inoperative.

I can well understand how that must necessarily be so in a case in which the delay is indivisible and there is a dispute as to the extent of the employer's responsibility for that delay. But where there are, as it were, two separate and distinct periods of delay with two separate causes, and where the dispute relates only to one of those two causes, then it would seem to me just and convenient that the employer should be able to claim liquidated damages in relation to the other period."

He went on to note that he would have adopted such an approach in the case before him, by allowing the employer to claim for liquidated damages for the full 10 months of delay less the 24 days of delay due to squatters, were it not for the earlier Court of Appeal decision in *Peak*.

Multiplex and *Cyden*

The above summary brings us chronologically back to the *Multiplex* decision and Jackson J's (as he then was) assertion that the prevention principle, in addition to preventing the recovery of liquidated damages, sets time "*at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time*."

The foregoing summary suggests there is scant support for such a broad principle in the English authorities. Indeed, a previous attempt to extend the principle in this way by Lord Denning in *Trollope* had been expressly disapproved of by Lord Pearson in the House of Lords.

However, some support for the formulation in *Multiplex* has emerged in the most recent Court of Appeal decision to consider the principle, *North Midland Building Ltd v Cyden Homes Ltd*, decided in 2018. The issue in that case was whether a clause excluding extensions of time for concurrent delay offended the prevention principle. The court rejected an argument that the prevention principle operated independently of the terms of the parties' contract. In the court's judgment:

"the prevention principle is not an overriding rule of public or legal policy. There is no authority for such a proposition: it is not expressed in those terms in Multiplex or any of the other authorities noted above. … I do not consider that it is analogous to the rule which strikes down liquidated damages as a penalty, a rule which has an entirely different legal provenance."

Instead, the Court considered that the principle operated by way of implied terms, which were capable of exclusion by express terms such as the concurrent delay clause agreed in the case before it. Lord Justice Coulson (with whom the other members of the court agreed), noted that:

"the fact that the mechanism of implied terms does not help the appellant on the particular facts of this case does not mean that such terms are not the right vehicle by which, in a conventional case, the prevention principle is given contractual force. In one sense, that is what Merton v Leach was doing: making acts of hindrance and prevention breaches of implied terms of the contract, thereby setting time at large. Moreover, when time is set at large, the obligation to complete by a fixed date is replaced with an implied obligation to complete within a reasonable time (see paragraph 48 of Multiplex). In my view, therefore, the prevention principle can only sensibly operate by way of implied terms."

A critique

The above survey of the case law shows that the prevention principle has been advanced on two potential grounds: a general principle of law or as the result of implied terms. However, neither of these grounds appears to provide an adequate foundation for the broad formulation of the principle set out in *Multiplex* and commonly referred to in practice.

The broad thrust of the cases referred to in this article has been to treat the prevention principle as a general principle of law. Despite Lord Blackburn's attempt to rationalise the principle by way of implied terms in *Roberts*, the Court of Appeal in *Dodd v Churton* referred only to the bare rule taken from *Comyn's Digest*. Subsequent cases, including *Peak, Rapid Building and Multiplex*, have simply restated and applied the rule from *Dodd* that any delay caused by the employer to completion (without a corresponding entitlement to an extension of time) will render a liquidated damages clause inoperable. There is no discussion in those cases of implied terms.

Taken as a general principle of law, however, the principle is incoherent and lacks any proper justification. The passage from *Comyn's Digest* referred to in *Dodd* was written in 1820 and is itself based on cases reported in the 17th century, almost 400 years ago. That was a time when general English law principles of implied terms had not been developed. The rule as stated in *Comyn's Digest* therefore represents a response to certain factual scenarios, but not any developed principle of law. Despite the attempt made in *Roberts*, subsequent cases have not sought to give the principle any firmer foundation or to reconcile it with other more modern legal principles.

As a general principle, it is incoherent because even in *Dodd* it was accepted that the rule could be excluded by express words to the contrary. This had already occurred in the *St Johns College* case, where liquidated damages were upheld despite the ordering of variations and the absence of any extension of time mechanism. The variation provision in *Dodd* was held not to be sufficiently clear for this purpose, but there is no discussion of how a general principle of this nature could have the effect of making the exercise of a contractual power (i.e. to order variations) render inoperative a separate contractual provision in the same contract (i.e. the liquidated damages provision).

As noted previously, the inadequacy of treating the prevention principle as a general principle of law has now been accepted by the Court of Appeal in *Cyden*. However, the implied term justification for the broad formulation of the prevention principle described in that case is equally problematic.

Any implied term justification must distinguish between acts of prevention which are breaches of contract and those which are contractually justified (such as the ordering of variations). As noted in *Roberts*, where breaches of contract are in issue, the implied term of co-operation or non-hindrance allows any liquidated damages to be reclaimed by the contractor as damages for breach – effectively cancelling out the liquidated damages. However, this provides no justification for the finding in *Peak* that liquidated damages are not claimable at all, even in relation to contractor-culpable delays not caused by the employer's breach.

Implied terms provide even less justification for the operation of the rule with regard to contractually justified acts of prevention such as the ordering of variations. It is settled law that no term that conflicts with an existing express term in a contract can be implied by law. Where there is both a variation provision and a liquidated damages provision, but no corresponding right to an extension of time, there ought to be no scope for a term to be implied which renders the liquidated damages provision inoperative if variations are ordered. To do so would be to contradict the liquidated damages provision. Other solutions to the tension created by such provisions might exist; for example, it may be possible to imply a right to an extension of time where variations are ordered. However, the concept that an implied term might render an express contractual provision inoperative ought to be foreign to English law.

Similar criticisms apply to the suggestion (from *Cyden*) that "*the obligation to complete by a fixed date is replaced with an implied obligation to complete within a reasonable time*". As established in this article, there is no support for such a proposition in the pre-*Multiplex* case law and the wholesale replacement of express clauses with implied obligations could not be more inimical to the English law approach to the implication of terms. Such a result is one which could only be achieved by a general principle of law, such as the doctrine of penalties.

In our view, the outcome which is most consistent with English law principles is one where liquidated damages are irrecoverable in respect of delays caused by acts of prevention and for which no extension of time is available, but otherwise remain in place in respect of other delays. This is the common sense position favoured by Lloyd LJ in *Rapid Building* and is achievable through a straight-forward application of existing law as regards the implication of terms. Acts of prevention which are also breaches of implied obligations of co-operation and non-hindrance (or indeed, express terms) can "cancel out" any liquidated damages attributable to the act of prevention as suggested in *Roberts*. Acts of prevention supported by express contractual powers may be argued to give rise to an implied right to extend the time for completion. Such an implication will, of course, be subject to the usual tests for the implication of terms and would in that regard depend on the circumstances of each case.

King Crude Carriers

The Supreme Court's decision in *King Crude Carriers* discussed in the previous article appears to support the above critique.

Conceptually, the deemed fulfilment principle from *Mackay v Dick* has parallels with the prevention principle. Both principles concern acts of prevention and a supposed transformation of contractual obligations which is said to arise as a result. In the deemed fulfilment principle, a condition precedent is taken to have been satisfied, whereas in the prevention principle a "condition", in the words of *Comyn's*, is said to be "excused". On the broader formulation of the prevention principle, the act of prevention transforms the agreed date for completion into an obligation to complete within a reasonable time, not unlike the transformation which occurs on the deemed fulfilment principle allowing conditional benefits to be claimed without fulfilment of the stated condition. In the words of the court in *Peak*, the prevention principle results in the "*stipulated time for completion having ceased to be applicable*" in a similar way as a condition precedent ceases to be applicable under the deemed fulfilment principle.

Many of the reasons given by the Supreme Court for rejecting the deemed fulfilment principle apply either directly or in modified form to the prevention principle:

— Although not borrowed from the civil law, the prevention principle – particularly in its broader form – does not have clear support in the early English authorities. Even in its narrower form expressed in *Dodd*, the principle appears to have been derived from a handful of 17th century cases quoted in *Comyn's Digest* whose facts and reasoning (if any) have never been considered.

— The English authorities do not speak with one voice. Certain judges noted above have expressed reservations as to the principle (in *Peak, Trollope and Rapid Building*), as have other judges writing extra-judicially (see, for example, a presentation given by Mr Justice Ramsey to the Society of Construction Law on 3 April 2012). Some authorities treat the principle as one operating generally, whereas others treat it as a result of the implication of terms.

— The principle is at odds with more established principles of law in relation to the implication of terms (as we have noted).

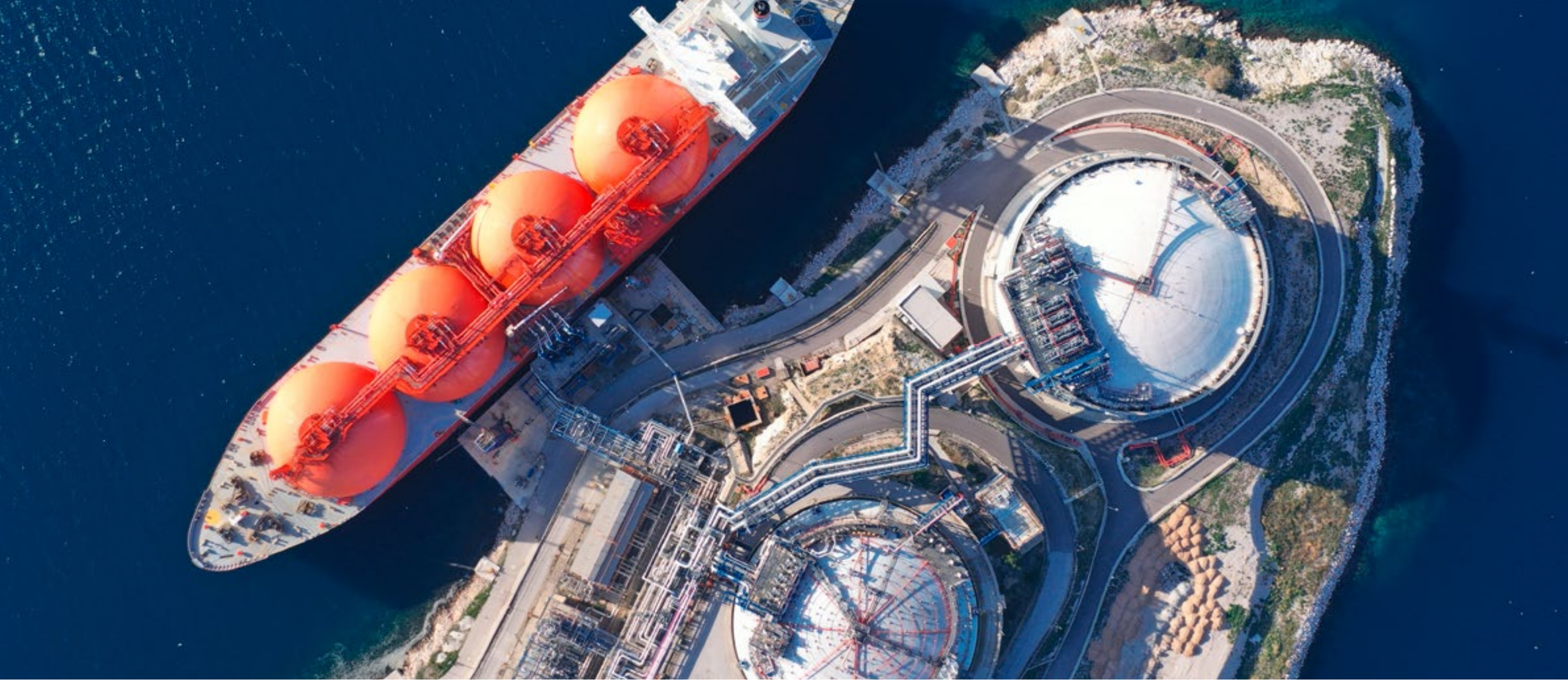
— The rule promotes legal fictions such as completion being "*excused*" (*Comyn's*) or the "*stipulated time for completion having ceased to be applicable*" (*Peak*) or an obligation to complete within a reasonable time to which the parties have not agreed.

— The better approach is to proceed on the basis of the terms of the contract, express and implied, and their proper interpretation. As noted in *King Crude*, this "*is consistent with the importance which English law attaches to freedom of contract*" and "*promotes certainty* and *predictability, which are important considerations, especially in the commercial law context.*"

— The rejection of the prevention principle in its present form would not lead to injustice. To the contrary, the present rule enables a contractor to escape the contractual consequences of its own delays in circumstances where minor delays have been caused by employer acts of prevention for which there is no corresponding extension of time. The approach we have suggested allows the agreed terms to remain intact whilst protecting the contractor against having to pay liquidated damages for delays caused by employer acts of prevention (especially where those acts amount to breaches of contract).

Given the various Court of Appeal cases referred to in our analysis of the genealogy of the principle, any challenge to the prevailing formulation of the prevention principle is likely to require the involvement of the Supreme Court. The decision in *King Crude Carriers* may provide the encouragement necessary to achieve that end.

References: *Holme v Guppy* (1838) 150 ER 1195; *Roberts v The Bury Improvement Commissioners* (1869-70) LR 5 CP 310; *Jones v St. John's College* (1870) LR 6 QB 115; *Mackay v Dick* (1881) 6 App Cas 251; *The Moorcock* (1889) 14 PD 64; *Dodd v Churton* [1897] 1 QB 562; *Peak v McKinney* (1970) 1 BLR 111; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601; *Rapid Building Group v Ealing Family Housing Association Ltd* (1984) 29 BLR 5; *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC); *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744.



Prolongation claims: concurrent delay, near critical paths and the "but for" test

Much has been written as to the treatment of concurrent delay in claims for extension of time. Comparatively little has been written as to impact of concurrent or parallel delays on prolongation claims. English law has traditionally applied a stricter, "but for" test to the proof of such claims in comparison to various forms of critical path analysis used to assess extension of time claims. An Australian decision decided last year has explored the basis for this distinction and found that satisfaction of the "but for" test is not always necessary when pursuing such claims.

Concurrent delay and extensions of time

In its broadest sense, concurrent delay arises as an issue whenever claims for extension of time are met with an allegation that the contractor would have been unable to complete the works on time even if the event claimed for had not occurred due to its own delays or those for which it is contractually responsible.

The position with regard to concurrent delay in Scotland has largely been settled by the Inner House decision in *City Inn Ltd v Shepherd Construction Ltd* in 2010, which permits responsibility for concurrent delay to be apportioned between the parties. Apportionment has, however, been rejected by the English courts and the position in England is generally believed to be as stated in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*, that the contractor is entitled to an extension of time but not additional cost.

A significant area of debate under English law concerns the definition of concurrent delay for the purpose of the *Malmaison* principle. When are two delays sufficiently significant that they can both be said to have caused concurrent delay to completion? Is it sufficient merely that each would have caused delay to completion in the absence of the other? Or must they both be on the critical path or of roughly equal impact on the project? Broadly speaking, three schools of thought exist as to the causative connection required under English law:

— One traditionally popular view, sometimes referred to as the "consensus view" or dominant cause approach, requires two delaying events to be of "equal causative potency". A critical path analysis will typically be used to eliminate delaying events which have not impacted the critical path, but even events which both impact the critical path may not, on analysis, be shown to be of "equal causative potency". The question is one of common sense in all the circumstances.

— A broader test has been advocated by some commentators, described as a "reverse 'but for' test". This approach asks simply whether the delaying event for which an extension of time is claimed would have delayed completion in the absence of the delay event(s) that the contractor is responsible for. In such circumstances, the delaying event claimed for is an "effective cause" of delay and there is no need to ask whether it is of "equal causative potency" with any contractor culpable delay events.

— A narrower test to the consensus view is sometimes advanced which focuses on the point in time at which delaying events occur. Where an existing event has caused delay to completion, subsequent delay events are treated as not being a cause of delay to completion at all unless and to the extent that they increase the delay already caused by the existing event. This is sometimes referred to as the "first-in-time" approach.

Support may be found to varying degrees for each of the above approaches in the cases. Recent English Commercial Court cases, as well as the Second Edition of the SCL Delay and Disruption Protocol, have favoured the "first-in-time" approach. However, a purely first-in-time approach was recently rejected by the English Technology and Construction Court in *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* and the latest English Court of Appeal authority, although not addressing the question directly, favoured an "equal causative potency" definition of concurrent delay: *North Midland Building Ltd v Cyden Homes Ltd*.

Concurrent delay and prolongation claims

By contrast to extension of time claims, there is very little authority on the correct causation test for prolongation claims (i.e. claims for delay costs) where concurrent delays exist. In *De Beers UK Ltd v Atos Origin It Services UK Ltd*, Edwards-Stuart J summarised the approach to extension of time and prolongation claims as follows:

> *"The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.*
>
> <u>*By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible*</u>*. [Emphasis added]"*

No authority was cited for this general rule, however it has been adopted in *Keating on Construction Contracts* (a leading English construction law textbook) and was applied in *Thomas Barnes*, where a prolongation claim for a period of concurrent delay was rejected, whilst an extension of time claim for the same period was accepted. The relevant passage from *Keating* – approved in *Thomas Barnes* – reads as follows:

> *"In respect of claims under the contract:*
>
> *(i) depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and*
>
> *(ii) depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the "but for" test. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible."*

The basis for the differential treatment of extension of time and prolongation claims therefore lies in the application of the traditional "but for" test to prolongation claims as against a more lenient test for extension of time claims, informed by a critical path analysis and the adoption of one of the three approaches to concurrent delay claims noted above. Keating notes the following potential justification for the stricter treatment of prolongation claims:

> *"... it is arguable that an examination of the purpose of the provision in question may justify and explain the distinction between the modified causation test applicable to extension of time clauses (which, properly understood, are intended to be for the benefit of both the contractor and employer) and the more traditional test based upon a simple application of the "but for" test which normally applies in the case of loss and expense clauses (which are primarily for the sole benefit of the contractor to provide a contractual regime for the recovery of extra actual loss and expense and may therefore have been intended to attract a more rigorous test of causation)."*

Although the above principles were described as "*settled*" in *Thomas Barnes*, there has been very little judicial consideration of the justification for imposing a stricter causation test on prolongation claims compared with extension of time claims. A decision of the Queensland Supreme Court last year provides a more fulsome exploration of the issue.

Santos v Fluor

Santos engaged Fluor under a cost-reimbursable EPC contract for the upstream works of the Gladstone LNG project in Queensland, Australia, carried out between 2011 and 2014. In 2016, Santos commenced proceedings alleging it had overpaid Fluor by more than A$1.4 billion because various costs claimed by Fluor were excluded from, or not properly payable under, the contract.

The contract required Santos to pay "*Actual Costs", defined as: "Actual Costs properly incurred by the Contractor in the performance of the Work but excluding … Excluded Costs.*"In turn, Excluded Costs were defined as:

> " *... any expenses, damages, liability or other amounts arising out of or as a consequence of: 1 (subject to clause 23.6) a breach of the Contract by the Contractor Personally; 2 breach by the Contractor of a subcontract…*".

Santos sought to recover the Actual Costs it paid which were alleged to have included Excluded Costs arising from a breach by Fluor of one its subcontracts. This had caused the subcontractor to incur delay costs which had been passed on to Fluor, who in turn had charged them to Santos along with its own delay costs.

There was a dispute over whether the delays in question had been caused by Fluor's breach of the subcontract. Delay experts were appointed by both parties and carried out an As-Planned-vs-As-Built ("**APAB**") analysis. Both experts agreed this was the most appropriate delay analysis methodology. The evidence of Santos' expert (Ms Wendy McLaughlin) that Fluor's breaches were on the critical path and the cause of certain delays was accepted. However, she had also noted that a "but for" analysis was not possible on a project of this complexity and would be "*completely subjective and speculative*" as there were an unlimited number of possible scenarios as to how work may have proceeded in the absence of Fluor's breaches. Fluor argued this showed that Santos had not satisfied the legal test for causation. Fluor's expert had also identified near critical paths, which were used to argue that "but for" Fluor's breaches, not all of the delay relied on by Santos would have been incurred.

The dispute was referred by the Queensland Supreme Court to three referees, two of whom were retired judges and the third being an eminent construction silk. Their findings on this issue were as follows:

- The APAB analysis advanced by Santos was considered sufficient to prove causation for delay costs.
- The competing causes relied on by Fluor were not "concurrent causes" on an APAB analysis.
- It was for Fluor to prove alternative causes of delay, not for Santos to disprove the alternative causes advanced by Fluor.
- The reliance on near critical paths was inappropriate and did not prove a "but for" analysis, because it was not safe to assume the works would have proceeded in the same way absent Fluor's breaches.
- What was required for the "but for" test was a collapsed as-built analysis. Both of the experts had agreed that such an analysis was impractical due to the complexity of the project.
- Accordingly, Fluor had "*not proved that there were other causes of delay in the instances in which it pleaded alternative causes.*"

The Queensland Supreme Court, on appeal from the referees, upheld their findings and concluded that a critical path, APAB analysis, was capable of satisfying the legal test for causation without a strict "but for" analysis. In the court's view:

> *"As the authors of Halsbury have explained, the requirement that the plaintiff to [sic] prove that, but for the defendant's breach, the loss or damage in question would not have been suffered is not an exclusive, exhaustive or decisive test. To those qualifications, one needs to add that the 'but for' analysis is not a formula to be slavishly applied. What is involved is an examination of the link between the alleged wrong and the outcome. And, as explained, that examination can be performed in a positive or a negative way. The essential requirement is that the defendant's wrongful act was necessary for the loss.*
>
> *… In each case, proving causation is a question of satisfying the tribunal on the balance of probabilities, that … the actionable conduct of the defendant was a necessary condition of the occurrence of the harm in respect of which the plaintiff claims damages. What is required will depend upon the facts and nature of each case.*
>
> *The issue of causation did require Santos to satisfy that requirement. But there was no further requirement in that it fell to Santos to disprove every other possible cause of delay. In some cases where causation is an issue, the tribunal may impose such a requirement because of the nature of the case. But, in deciding this case, the referees made a decision on the facts. I do not perceive an error in their approach to the factual issue."*

Conclusions

The *Santos* decision provides a helpful exploration of the need for "but for" causation in prolongation or other delay cost claims. In considering the decision, however, it is important to distinguish between two categories of case:

1. A case where there is "concurrent delay" on whichever definition of that term has been adopted. In such a case, the "but for" test applies and there is no recovery of delay costs.
2. A case where parallel non-critical delays are being relied on to claim that parts of the delay claimed for do not pass the "but for" test.

The *Thomas Barnes* case is an example of the first category, whereas *Santos* is an example of the second category (as is clear from Fluor's reliance on near critical paths). The application of the "but for" test in the first category presents less evidentiary challenges, because a finding of concurrent delay carries with it an acceptance that "but for" either one of the delaying events, the same delay would have occurred to completion. The same cannot be said for cases within the second category, due to the need to speculate as to whether certain sub-critical delays would have been critical had the primary delays to the critical path not occurred. Rejecting a delay costs claim on the basis of an uncertain application of the "but for" test in such circumstances carries obvious unfairness.

On the other hand, finding a sound legal basis to endorse critical path analysis as an appropriate test for legal causation is challenging. For example, it is not clear that the court's emphasis on the wrongful act being "*necessary for the loss*" takes the question any further than the "but for" test itself. Whether something is necessary for the loss means simply that without it, the loss would not have occurred.

The court's reasoning also fails to consider the more principled reasons – explained in the passage from *Keating* above - why a different approach to causation applies to the assessment of extension of time claims as opposed to claims for delay costs. The position approved by the court in *Fluor* would eliminate the difference in approach and permit critical path analysis, at least in complex cases, to be determinative for both.

On one view, however, the extent of the reasoning in *Fluor* is merely to say that in the absence of evidence establishing a "but for" defence where near critical paths are relied on (i.e. the second category above), a claimant is entitled to rely on an ordinary critical path analysis to establish a claim for delay costs. The decision does not appear to go as far as to say that had Fluor and its delay expert been able to establish a "but for" defence by reference to near critical paths, that Santos would still have succeeded with the full amount of its claim based on a critical path analysis.

Given the "but for" test remains the *status quo* under English law, the court's findings suggest that it may be worthwhile for employers to explore near critical paths and to submit separate delay analyses, preferably of a collapsed as-built variety, to address potential "but for" arguments in the event the employer's primary case as to the critical path is unsuccessful.

References: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 33; *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68; *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744; *Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council* [2022] EWHC 2598 (TCC); *Santos v Fluor* [2025] QSC 184.

Express termination rights: waiver and reasonable time limitations

Parties involved with distressed construction projects often face the difficult decision of whether to exercise termination rights as and when they arise. The parties may be involved in negotiations aimed at getting the project back on track and a balance will usually be sought between allowing negotiations to take their course while at the same time preserving rights of termination in the event negotiations sour. Two related legal issues which arise in this context are the circumstances in which termination rights can be lost through waiver and the extent to which those rights must be exercised within a reasonable time. This article considers these issues by reference to an English Court of Appeal decision decided last year.

URE Energy Ltd v Notting Hill Genesis

URE Energy Ltd ("**URE**") submitted a successful bid to a local housing association for a long term 25 year contract for the supply of low cost electricity from renewable sources (the "**PPA**"). The lengthy contract term was needed to underwrite the construction of a 5 megawatt solar farm from which the electricity would be supplied. The parties were not in a position to execute the PPA immediately and entered into a 4-year short-term contract (the "**Contract**") whilst the PPA was being negotiated. Neither party was obliged to enter into the PPA at this stage, however, since URE would charge below market rates under the Contract, the long-term PPA was crucial for URE to recover its investment.

Approximately 9 months later, the housing association was amalgamated with another association (together, "**Genesis**"). This gave URE a right to terminate the Contract, but instead it continued to supply electricity under it. URE also continued to pursue negotiations over the PPA and to exercise a right of access for the installation of smart-meters. A further six months later, Genesis advised URE that it no longer intended to proceed with a long-term PPA.

On 31 October 2018, URE issued a termination letter citing material breaches by Genesis, specifically the failure to provide access for meter installations and readings ("**Termination Letter One**"). URE subsequently forwarded Termination Letter One to its legal advisors, who referred the matter to their litigation team. Following further legal advice, Termination Letter One was subsequently revoked by URE (on the basis that URE was required to give Genesis notice to remedy the alleged breach before the termination right could be triggered) (the "**Revocation Letter**"). URE confirmed in the Revocation Letter that it would continue to perform its obligations under the Contract and requested Genesis to remedy the alleged breach of the Contract.

On 5 November 2018, a telephone call took place between URE and its legal advisors during which URE was advised that it could have a right to terminate without notice on the basis that Genesis had not sought URE's approval for the amalgamation. Burges Salmon subsequently issued a second termination letter to Genesis, this time citing the amalgamation as a ground for termination under clause 10.2(d) of the Contract and reiterating the material breaches ("**Termination Letter Two**"). Clause 10.2 of the Contract read as follows:

> "*10.2 The Supplier may terminate this Contract at any time for all or any Supply Premises if … (d) the Customer passes a resolution for its winding up which shall include amalgamation, … (other than a solvent amalgamation… approved in advance by the Supplier) …*"

Genesis contended that URE had waived the right to terminate by its continued performance of the contract. URE commenced proceedings in the English Commercial Court, which held that URE had not waived its right to terminate as it did not have actual knowledge of the termination right until advised by its legal advisors on 5 November 2018, some seven months after the amalgamation. Genesis appealed.

The rule in Peyman v Lanjani

The core issue before the Court of Appeal was whether the decision in *Peyman v Lanjani*, which established that a party entitled to rescind a contract will not be held to have elected to affirm it unless it knows of that right, applies equally to express contractual termination rights. Genesis argued that a contracting party must be deemed, as a matter of law, to have knowledge of the express terms of its contract, relying on *L'Estrange v F. Graucob Ltd*, and principles of commercial certainty emphasised in cases such as *The Golden Victory* and *MUR Shipping BV v RTI Ltd*.

The Court of Appeal rejected this argument. It decided that *Peyman v Lanjani* was expressly decided as an application of the general law of waiver by election, and there was no principled basis for distinguishing between an express contractual right and other rights arising under general contract law. It observed that while some contracts may be straightforward, others "*contain detailed (and sometimes indigestible) provisions which it would be unrealistic to expect the parties to carry in their heads*".

Practical mitigations of the rule

The Court of Appeal identified several practical mitigations of the rule in *Peyman v Lanjani*:

1. First, an express contractual right may be construed as having to be exercised within a reasonable time, so that if not exercised the right lapses. However, this was not suggested in the present case.

2. Second, judicial scepticism provides a practical check. Courts are unlikely to believe claims of ignorance regarding well-known termination rights in common commercial contexts. Here, clause 10.2(d) was one of nine sub-clauses conferring termination rights, and even within that sub-clause, solvent amalgamation was only one of many triggering events.

3. Third, a party receiving legal advice is presumed to be aware of its rights, although this presumption is rebuttable upon waiver of privilege as URE successfully demonstrated.

4. Fourth, even where there is no election to affirm because the electing party lacks knowledge, sufficiently unequivocal conduct may found an estoppel where there is detrimental reliance by the other party.

Did URE waive its right by lapse of time and continued performance?

Genesis submitted that URE should be deemed to have elected to affirm the contract through its continued performance after knowing of the amalgamation, supplying electricity, including, invoicing Genesis, pressing for access to fit meters, and negotiating the long-term contract. The Court of Appeal accepted that this was positive conduct going beyond mere lapse of time, and agreed that such conduct would have been "*sufficiently clear and unequivocal, on an objective basis, to demonstrate that URE intended to affirm the contract*". However, without the knowledge of the right to terminate, there could be no waiver by election.

Academic and judicial criticism of Peyman v Lanjani

The Court of Appeal acknowledged significant academic and judicial criticism of *Peyman v Lanjani*. Andrews, Tettenborn & Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, describes the decision as "*difficult to defend*" on the basis that it is inconsistent with the principle that ignorance of the law is no defence, and makes it difficult for a defendant to prove affirmation. The Hon Kenneth Handley in his article *Exploring Election* goes further, asserting that the decision was "*wrongly decide*d" because it encourages perjury and rewards those who do not seek advice. Mr Justice Leggatt (as he then was) had also criticised the rule in *Involnert Management Inc v Aprilgrange Ltd* as "*difficult to justify in principle*".

However, the Court of Appeal concluded that despite these criticisms, *Peyman v Lanjani* has stood for 40 years and the Court of Appeal is bound by it. It observed that the decision is not unprincipled; rather, "*it rests on the principle of fairness that a person who has a right to choose between alternative courses of action should not lose that right if they do not even know that they have it*".

Reasonable time restrictions

As noted above, the Court of Appeal in *URE Energy* indicated that the rule in *Peyman v Lanjani* could be mitigated in some circumstances by a reasonable time restriction on the exercise of an express termination right. This would require the court to:

> *"construe the right in question as having to be exercised within a reasonable time, so that if not exercised the right will lapse. … But it has not been suggested in the present case that URE's right to terminate the contract in the event of an amalgamation would lapse, as a matter of construction of clause 10.2(d), if not exercised within a reasonable time."*

The termination clause before the court begun by stating that URE could "*terminate this Contract at any time … if*". It is unclear if the words "at any time" formed the basis court's view that no reasonable time restriction could be read into the clause. The point had been discussed at first instance, however, in the Commercial Court. URE had argued that those words excluded the doctrine of waiver altogether by expressly allowing rights under the clause to be exercised at any point after they arose. Such an interpretation would also have ruled out any reasonable time restriction. However, the argument was rejected, with the court finding that "*at any time*" referred either to the event of default or the ability to fix a termination date in the future:

> *"Assuming that the terminating party was aware of its right to terminate, I can see no good commercial reason why the parties intended it to be able to nurse a private intention to terminate without disclosing it or without at least reserving its rights and I do not consider that this is what a reasonable person would have understood the parties to intend. After all, the underlying premise of clause 10.2 is that the stipulated events are so serious as fundamentally to undermine the relationship between the parties such that the innocent party is allowed to choose whether to bring it to an end or not. … in such circumstances, it can reasonably be expected that the terminating party will make a decision promptly and I can discern no objective intention that it should be allowed to wait and see indefinitely without either disclosing its intentions to the other party or reserving its rights."*

There is therefore a distinction between the doctrine of waiver, whereby rights are lost through continued performance and affirmation of the contract, and an inherent restriction on the time within which an express termination right is to be exercised, whereby the right will be lost purely through the passage of time. The distinction is controversial. See for example, Lord Diplock in *The Antaois*:

> *"On the one hand there are dicta … which, if read out of context, might be taken to suggest that there is an implied term or rule of law that such a right be exercised within a reasonable time otherwise it is lost, regardless of whether any inference of election can be drawn from the passage of such time. On the other hand, there are decisions … which appear to make it clear that such a right will only be lost by election, whether expressed or inferred from the circumstances."*

Two recent cases suggest that a reasonable time restriction may in certain circumstances be read or implied into an express termination clause, but that each clause must be considered on its own terms and that no generally applicable rule exists to this effect.

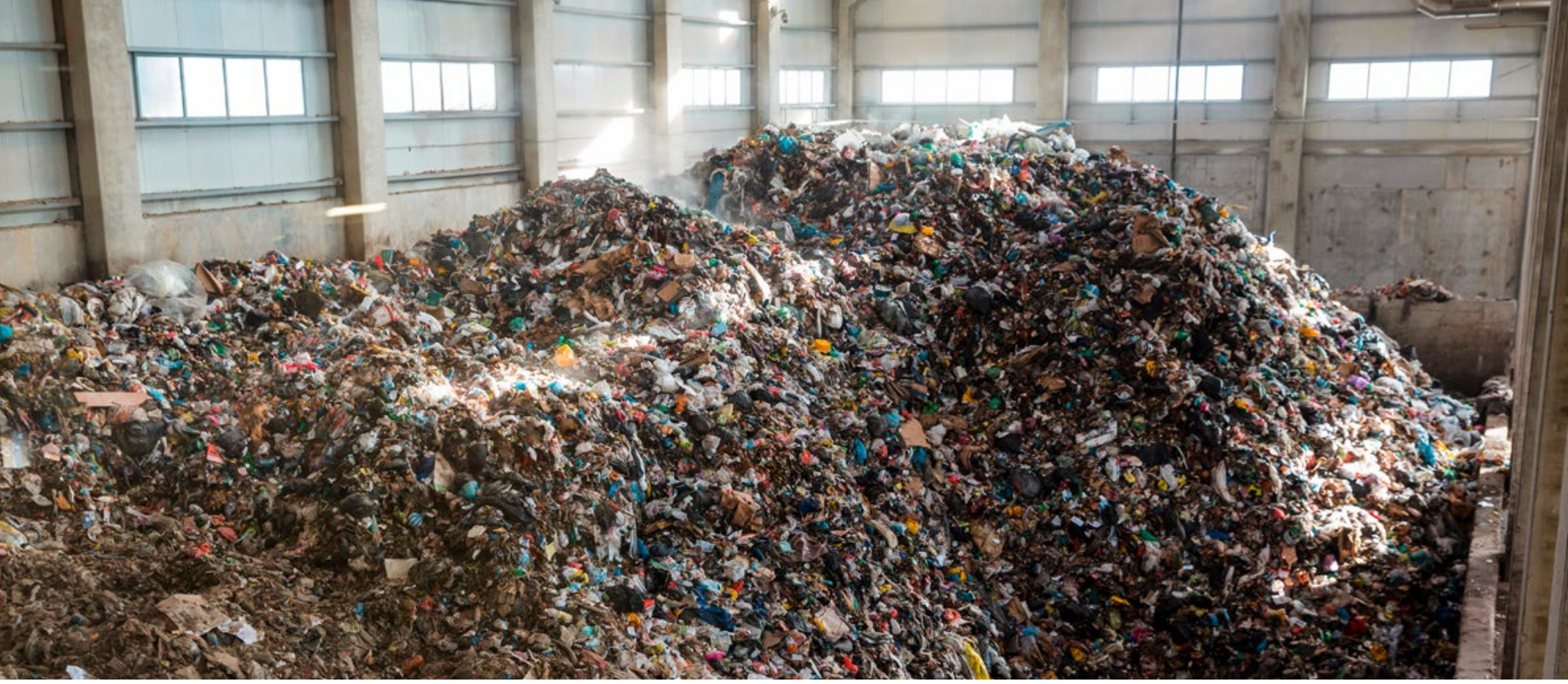
Essex County Council v UBB Waste (Essex) Ltd

In this case, Essex County Council ("**Essex**") engaged UBB Waste (Essex) Ltd ("**UBB**") to carry out the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant in Basildon (the "**Facility**"). The Facility was required to pass certain Acceptance Tests by the Planned Services Commencement Date. The Facility failed to pass the Acceptance Tests by that date and still had not passed them by the Acceptance Longstop Date 18 months later, thereby giving Essex a right to terminate. The termination clause stated simply that in the event of such a Contractual Default, if the Authority "*wishes to terminate the Contract it must serve a termination notice on the Contractor.*"

More than two years later the Acceptance Tests had still not been passed and the English Technology and Construction Court was asked to give declarations that Essex was entitled to terminate. UBB resisted the declarations arguing for an implied term that any notice of termination must be served within a reasonable period and that it was now too late for Essex to give such a notice.

The court applied the established rules for the implication of terms (first set-out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings)* and rejected any general rule that a reasonable time limitation applies:

> *"I reject … the argument that there is an immutable rule of law that all rights of termination must be exercised within a reasonable time after such right first arises. Rather the shipping cases demonstrate a number of circumstances where business efficacy and fairness as between the contracting parties call for promptness. Clearly any right to load an alternative cargo is time sensitive and must be lost (whether by an implied term or waiver) if unreasonably delayed.*



Equally, the right to cancel a charterparty will be lost through unreasonable delay at some point where the party entitled to cancel stands by as the ship is loaded and sets sail. In my judgment, the proposed term in this case that the contractual right of termination of this PFI contract must be exercised promptly should be tested upon the usual principles."

In the result, it was neither "*commercial, practical or obvious*" to imply a term that could give rise to a situation in which Essex could not terminate, due to delay in exercising the right to do so, but the Facility could not enter the Services Period, due to its inability to pass the Acceptance Tests, leaving the parties in a "*contractual stalemate*" for the 25-year life of the contract. The implied term would also have had the effect of discouraging Essex from allowing UBB an opportunity to rectify the issues with the design.

Tata Consultancy Services Ltd v Disclosure and Barring Service

The Disclosure and Barring Service ("**DBS**") engaged Tata Consultancy Services Ltd ("**Tata**") to streamline DBS's criminal record checks process. The project was divided into different parts with each part having separate milestone dates.

By November 2017, Tata was in culpable delay in relation to the milestone completion date for works known as "R1-D". In September 2018, DBS served a notice of partial termination in respect of the R1-D works relying on the following provision in the contract:

"55.11 Subject to the provisions of clause 56 (Remedial Plan Process), the AUTHORITY may, by one (1) month's prior written notice, require the Partial Termination of any part of the Services on the occurrence in relation to that part of a material Default by the CONTRACTOR, where the Default is not capable of remedy or, if the Default is capable of remedy, the Default has not been remedied in accordance with the Remedial Plan Process."

DBS did not follow the Remedial Plan Process, but contended that the delays to the R1-D works were irremediable on the basis that the contract contained an expiry date of 31 March 2019. The TCC accepted this argument on the basis that there was not sufficient time remaining for R1-D to be delivered even if Tata had a credible remedial plan.

However, the court found that DBS was unable to rely on clause 55.11 in circumstances where the breach had first arisen 10 months earlier and would have been remediable at that earlier date. A reasonable time limitation applied:

"the proper construction of the contract is that the Authority could only exercise a right of Partial Termination within a reasonable time of the operation of the Remedial Plan Process or the alleged material Default. This construction is both obvious and necessary. The whole purpose of the Remedial Plan Process is to give the Contractor, within defined timescales, the opportunity to remedy a material Default which otherwise gives the Authority the right to remove that part of the work. The purpose of the regime would be defeated if, in relation to a material Default of which it is aware, the Authority could simply wait until, by reason of the effluxion of time, it is no longer capable of remedy, and then invoke Clause 55.11 and, by so doing, sidestep the obligations in Clause 56 to which Clause 55.11 is expressly subject."

The court relied on the doctrine of election rather than an implied term:

"The construction/implication sought relates to how this Agreement, if at all, regulates the principles of election, affirmation, and waiver, which apply equally in the case of a contractual right to (partially) terminate a contract as they do in the case of a common law right to terminate upon acceptance of a repudiatory breach. However, in the context of contractual rights the operation of the principles depends upon the construction of the particular contractual right …"

These two passages are not entirely satisfactory. The reference in the first passage to a default of which DBS "*is aware*" confirms the statement in the second passage that the doctrine of election and waiver is in mind. However, if that is the case, then no special construction or implication is necessary, simply a finding that the clause has not excluded the doctrine of waiver. However, the first two sentences of the first passage refer to a positive restriction that the right be exercised within a reasonable time of the alleged Material Default. Such a restriction is said to be "*obvious and necessary*" which is shorthand for the established test for the implication of terms set out in *BP Refinery*. Such an implied restriction has nothing to do with waiver or election and would operate independently from DBS' awareness of any default.

Conclusion

The above cases present a complex picture for parties involved in distressed projects. *URE Energy* provides some encouragement for parties to ignore potential termination rights while seeking a commercial resolution to the continuation of a project to completion. Once negotiations break down, parties might then seek advice as to the existence of any rights of termination which have arisen and claim ignorance of such rights prior to the receipt of such advice. Such a strategy may allow certain termination rights to be preserved when they would otherwise have been lost, but carries a number of risks:

— If the termination right in question is obvious and well-known, the court may infer knowledge, particularly where "wilful blindness" is suspected.

— Although the cases discussed above show the difficulties in implying a reasonable time restriction into termination rights, such implications remain possible and may result in the lapsing of rights even without knowledge.

— If continued performance of the contract and/or participation in negotiations has caused the counter-party to incur costs or change its position in the expectation that the contract will not be terminated, an estoppel may arise which prevents the termination right from being exercised.

The more straight-forward strategy of taking advice in tandem with any commercial negotiations and taking steps to preserve any rights of termination which may have arisen is likely to be more beneficial in many cases. A simple reservation of rights will often be effective to prevent a waiver. Many contracts also contain "no waiver" clauses which may provide extra protection against waiver. Where legal advice suggests that a reasonable time restriction may apply to a specific termination right, an informed decision can be taken as to whether to risk the loss of the right in favour of continuing commercial negotiations.

The uncertainty posed by these issues can, of course, be avoided entirely by addressing the position expressly in the relevant termination provisions. An example is provided by the JCT form of contract, a domestic UK construction form, which states specific periods within which a termination right must be exercised. None of the NEC, FIDIC, LOGIC or ENAA forms of contract address the position expressly. Whilst both LOGIC and ENAA include words similar to the "at any time" wording considered by the English Commercial Court in *URE Energy*, such words are unlikely to allow the exercise of termination rights to be delayed at will for the reasons given by the court in that case.

References: *L'Estrange v F. Graucob Ltd* [1934] 2 KB 394; BP Refinery *(Westernport) Pty Ltd v Shire of Hastings* [1977] UKPC 13; *Peyman v Lanjani* [1985] Ch 457; *The Antaois* [1985] 1 AC 191; *The Golden Victory* [2007] UKHL 12; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225; *Essex County Council v UBB Waste* (Essex) Ltd (Rev 1) [2020] EWHC 1581 (TCC); Andrews, Tettenborn & Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 4th Ed (2023); *MUR Shipping BV v RTI Ltd* [2024] UKSC 18; *Tata Consultancy Services Ltd v Disclosure and Barring Service* [2024] EWHC 1185 (TCC); *URE Energy Ltd v Notting Hill Genesis* [2025] EWCA Civ 1407.

Termination payments and costs "reasonably incurred"

A decision last year of the Privy Council (composed of members of the UK's highest court) has considered the extent of a contractor's entitlement to payment after termination for convenience under a FIDIC 1st Edition Yellow Book contract. The terminology considered by the court is commonly found within the termination provisions of other standard form construction contacts, making the decision of wider interest in an area where there is little previous case law. In finding that the contractor's costs in this case had not been reasonably incurred, the decision highlights the significance of such restrictions and the more generous approach taken by some standard forms.

Termination payments under the standard forms

Many common standard forms used for construction projects include a requirement that, in certain termination scenarios, the contractor is to be paid – among other things – the costs reasonably or properly incurred in anticipation of completing the works. For example, in the FIDIC 1st and 2nd Editions the contractor is entitled to recover, upon termination for convenience, employer default or Force Majeure / Exceptional Events, "*any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works*" (clauses 19.6(c) and 18.5(c) respectively). The 2nd Edition also permits the recovery of loss of profit.

In the NEC3 and NEC4 standard form, the contractor is entitled to recover, for any termination, "*other Defined Cost reasonably incurred in expectation of completing the whole of the works*" (clause 93.1, termination payment "A1"). In the Infrastructure Conditions of Contract (ICC) form, upon termination for employer default or frustration, the contractor is entitled to recover, "*any cost reasonably incurred by the Contractor in the expectation of completing the whole of the Works …*".

The requirement under these forms for costs to be incurred reasonably contrasts with the more generous approach taken under the ENAA form where termination for convenience or employer default entitles the contractor to recover "*any amounts*" to be paid to subcontractors as a result of the termination, as well as the cost of other obligations undertaken to third parties "i*n good faith*" (clause 42.1.3, Process Plant Construction).

Water and Sewerage Authority of Trinidad and Tobago v Waterworks Ltd

The Water and Sewerage Authority of Trinidad and Tobago ("**WSATT**") entered into two FIDIC 1st Edition Yellow Book contracts with Waterworks Ltd ("**Waterworks**") for the design and construction of water treatment plants. The contracts were terminated for convenience before designs had been finalised with no construction work having taken place. Over a year prior to the contracts being terminated, Waterworks entered into contracts for the supply of equipment for the plants. Under those contracts, Waterworks was liable to pay cancellation charges calculated at 30% of the total price.

Waterworks claimed these cancellation charges were recoverable under clause 19.6 of its contracts with WSATT. This clause was unamended from the original quoted above, requiring that costs be "*reasonably incurred*" in the expectation of completing the Works. Waterworks claimed that it was common practice for contractors to seek to "*lock in*" prices quoted by suppliers once a main contract had been entered into – so as to avoid price increases which could not be passed on.

The trial judge considered it would have been unreasonable for Waterworks to have entered into unconditional supply contracts at a point in time when designs had not been approved by the Employer. However, the trial judge considered Waterworks' supply contracts to be akin to an option, whereby Waterworks agreed to purchase equipment at some point in the future in return for the supplier holding its quoted prices, but subject to a 30% cancellation charge if the purchases were not ultimately made.

The Court of Appeal in Trinidad and Tobago disagreed with the trial judge, finding that Waterworks had entered into unconditional supply contracts and that this was unreasonably premature in the absence of approved designs. Waterworks appealed to the Privy Council in the UK.

Unreasonable supply contracts

The Privy Council agreed that Waterworks had entered into unconditional supply contracts. As to reasonableness:

- Reasonableness could not be inferred where the project was at an early stage. The fact that no steps had been taken to perform the supply contracts reinforced that impression. It was "*prima facie unreasonable*" for Waterworks to agree cancellation charges in relation to a period when the supplier was not incurring any costs or liabilities for which compensation was required.
- Evidence was required from Waterworks to displace this *prima facie* position. For example, any long-lead time activities the supplier was to undertake, such as arranging export and import permissions or arranging its own sub-supply contracts.
- The only benefit properly evidenced by Waterworks was the protection said to be obtained against subsequent price increases. However, there was no evidence that this was actually the reason for the placing of the supply contracts. There were also contrary indications; for example, the supply contract was entered into almost 2 years after the contracts with WSATT.
- In any event, other means of protecting against price increases could have been explored, such as an agreement to hold prices for a given price. There was no explanation as to why such options had not been explored.

The meaning of "reasonably incurred"

The Privy Council also provided guidance as to the meaning of the term "reasonably incurred" in the context of a termination claim:

> *"… as a general rule under a contract of this kind the contractor is entitled to proceed and to incur costs and liabilities on the assumption that the contract will be performed. Arguments that, because the contractor knew or ought to have known that the employer was likely to exercise its right to terminate the contract early for its 'convenience', the contractor acted unreasonably in ordering materials or equipment required if the works were to be performed will not generally carry weight. … To hold back from expeditious performance because of an expectation that the contract was likely to be terminated before completion would … expose the Contractor to a risk of liability to pay liquidated damages and incurring other additional costs in the event that the contract was not terminated early for which it would not be entitled to any compensation from the employer. It is unreasonable to expect the Contractor to take such a risk."*

Accordingly, the fact that various problems arose after the contracts were signed which gave rise to a likelihood that WSATT would terminate for convenience were not relevant to whether Waterworks had acted unreasonably in placing the supply contracts when it did. However, the court was not able to agree with the full extent of Waterworks' submission that it was sufficient for the purpose of clause 19.6(c) to show merely that costs had been incurred in a "*genuine expectation of completion of the works and that, had the works been completed, those costs or liabilities would have been no more than reasonably necessary to perform the contract*".

In the court's view, the fact that a contractor was entitled to assume that the contract would be performed did not mean "*all questions of timing are irrelevant in applying the test of reasonableness. A prudent contractor would not generally commit itself to purchasing equipment before it is needed (taking into account delivery times) and before the designs to which the equipment must conform have been finalised.*"

Conclusions and implications

This is a significant decision from judges of the UK's highest court as to the meaning of termination clauses which permit a contractor to recover costs reasonably incurred at the point of termination. The court's decision shows that a contractor need not pre-judge whether the contract will be terminated, but mere *bona fides* in committing itself to supply contracts and sub-contracts will not be sufficient to ensure recovery. Work or equipment ordered too far in advance of when it is needed may be subject to question.

The decision also highlights the potential significant effects of the more liberal drafting of the more liberal drafting adopted by contracts such as the ENAA form, which permit any payments, or any *bona fide* payments, to sub-contractors or suppliers to be recovered.

It is notable that Waterworks' claim failed entirely, even though other charges (for example, to hold the quoted prices for a certain period) may have been reasonable had Waterworks proceeded differently. It is unclear if an alternative claim for such charges would have been successful had Waterworks produced evidence to support them.

Many standard forms also entitle a contractor to claim more generally for losses incurred as a result of termination, in addition to costs "reasonably incurred" in anticipation of completing the works. This is the case in all of the forms quoted above in relation to employer default, and also in termination for convenience scenarios under the FIDIC 2nd Edition and NEC3. It is unclear whether these more general provisions would enable a contractor to avoid the need to show that costs had been reasonably incurred.

References: *Water and Sewerage Authority of Trinidad and Tobago v Waterworks Ltd (Trinidad and Tobago) [2025] UKPC 9*.

On-demand bonds and local court injunctions: an uncertain landscape

On-demand bonds and guarantees issued in respect of international construction contracts are often made subject to English law and jurisdiction. These guarantees will, however, typically be issued by financial institutions outside England, usually by banks local and/or known to the contractor. Such a situation can give rise to difficulties where enforcement of the bonds is sought in England but rendered illegal by orders of local courts with personal jurisdiction over the relevant financial institutions. Three cases over the past year have considered the issues which arise in such situations and, unfortunately, have reached contrary views on key points.

Introduction

It is standard practice for financial institutions issuing on-demand guarantees to inform their client (often a contractor) immediately upon receiving a demand under the guarantee. This provides the client with an opportunity to seek interim orders from local courts with personal jurisdiction over the financial institution (the "**Local Jurisdiction**"). These courts often have broader principles upon which they are willing to restrain calls under on-demand guarantees than are applicable in England. The parties can therefore become quickly embroiled in a cross-border dispute over enforcement of the guarantee.

Until the cases discussed in this article were decided, there was very little English law authority on how the English courts should treat injunctive orders issued by the courts of a Local Jurisdiction in a dispute involving an on-demand guarantee subject to English law and jurisdiction. The only case in which such orders had prevented enforcement by an English court was *AES-3C Maritza East 1 Eood v Crédit Agricole Corporate and Investment Bank*. The on-demand bond in that case was given by a French bank and a temporary injunction had been issued by a French court restraining payment. The bond was subject to English law and the non-exclusive jurisdiction of the English courts. Proceedings were commenced in England and the court granted summary judgment but stayed enforcement of the judgment pending the lifting of the French injunction. The Court explained the distinction between judgment and enforcement as follows:

> *"… it is a well established principle of English law that the English Courts will not enforce performance of an English law governed contract that requires a party thereto to perform actions, the performance of which would be illegal under*

> *the law of the county of their place of performance [:] Ralli Bros v Compania Naviera Sota y Aznar … However I consider that there is a distinction to be drawn between a judgment which determines what, as a matter of contractual obligation, a party is obliged to do and the enforcement of any payment obligation under that judgment. In this case, as a matter of contractual obligation Calyon is obliged to pay to AES the sum of €96,604,166.83. I see no reason why this court cannot express a judgment in those terms. What the French injunctions do is to prevent Calyon from currently complying with their obligations under the Bond or that judgment. What Ralli Bros establishes is that the English court will not, in such circumstances, require Calyon to act in a manner which is illegal under French law because of the existence of the injunctions*."

In *Ralli Bros*, a final payment for a cargo of jute was to be paid on receipt of the cargo in Barcelona. However, prior to receipt, a Spanish decree capped the price which could lawfully be paid for jute. Owing to this fact, the final payment was not able to be made in full. The English Court of Appeal concluded that the decree provided a defence to the receivers of the cargo. In doing so, the court approved the following passage from Dicey's work on Conflicts of Laws: "*A contract … is, in general, invalid in so far as … the performance of it is unlawful by the law of the country where the contract is to be performed*".

This principle does not apply in all cases where payment or performance of a contract is prohibited by a foreign law. The principle applies only where it is foreign performance which is prohibited by the law applicable to the place of performance. For this reason the English Court of Appeal in *Kleinwort v Ungarische Baumwolle Industrie Aktiengesellschaft* refused to uphold a restraint upon payment imposed by Hungary where payment was to be made in London. Similarly, in *Power Curber International Ltd v National Bank of Kuwait SAK*, the English Court of Appeal refused to stay judgment under a Letter of Credit in circumstances where payment had been prevented by injunctive orders from the Kuwaiti courts (the Local Jurisdiction). This was on the basis (among other things) that the place of performance of the Letter of Credit was in the United States (where the advising bank was located).

The place of performance

These principles mean that the place of payment for a on-demand guarantee is of some importance. If the place of payment is in England, or anywhere other than the Local Jurisdiction, an English court will be more likely to permit its judgment to be enforced in opposition to any orders made by courts in the Local Jurisdiction. If the place of payment is the Local Jurisdiction, however, an English court may be bound to suspend enforcement of any judgment whilst enforcement is prohibited by any orders made by courts in the Local Jurisdiction.

There is, of course, nothing to prevent the parties from agreeing a place of payment within the guarantee itself. The Model Form of on-demand guarantee issued by the ICC in 2010 makes specific provision for the parties to stipulate a place of payment. It is still common, however, for on-demand guarantees to remain silent as to place of payment. For example, the form of on-demand guarantee accompanying the FIDIC 1st Edition contracts make no reference to place of payment. The 2nd Edition form now incorporates the ICC's Uniform Rules for Demand Guarantees 2010 Revision (the "URDG"), which provides that the place of payment is to be the branch or office of the financial institution which issued the guarantee.

In the absence of an express stipulation, English law as to the place of payment has not been entirely clear. The only previous case directly on point is *Britten Norman Ltd (In Liquidation) v State Ownership Fund of Romania*. In that case, an on-demand English law guarantee was issued by an English bank in favour of a Romanian entity. A demand was made which requested payment to a Romanian bank account. The court rejected the suggestion that the place of payment was Romania:

> "*Until a demand was made, Barclays was under no actual liability to SOF. Its liability was only a potential liability. When the demand was made, in conformity with the terms of the Letter of Guarantee, Barclays' potential liability crystallised into an actual liability. That liability, absent any contractual term as to the place of payment, was to make payment at the place where the demand was made and where the liability crystallised. The fact that SOF, in its demand, requested that payment should be made into a stipulated account at a Romanian bank was simply an administrative, or mechanical, request, and not a contractual requirement. It would have been perfectly possible for SOF to have stipulated for payment in Romania, but it did not do so. While it is true that, in English law, a debtor is under an obligation to seek out his creditor in order to make payment of his debt, so that Barclays was under an obligation to seek out SOF, that obligation has little to do with the place of payment under a document such as the Letter of Guarantee. In my judgment, therefore, … the place of payment under the Letter of Guarantee was England.*"

This reasoning had, however, subsequently been queried in *Commercial Marine Piling v Pierse Contracting*. Although that case concerned a guarantee without a demand requirement, the court noted that the reasoning in *Britten Norman* may be at odds with a previous Court of Appeal decision in which the usual rule that a debtor must seek out its creditor was applied to a demand guarantee.

Litasco SA v Banque El Amana SA

In the first of the three cases decided last year, a Standby Letter of Credit (the "**SLC**") was issued in favour of Litasco SA ("**Litasco**") by a Mauritian bank as security for a loan. When a default under the loan occurred, Litasco made a demand for payment under the SLC.

Litasco was based in Switzerland and requested payment into a Swiss bank account. The SLC contained an English law and exclusive jurisdiction clause.

After a lengthy period of delay, Litasco sought to enforce payment through English proceedings. However, by that time an injunction had been issued by a Mauritian court preventing payment under the SLC by the bank.

The court rejected the application of the *Ralli Bros* principle on three grounds:

1. The principle applies only to legislation or regulations of a legislative authority, not to foreign court orders. The court considered that the *Ralli Bros* principle was part of those English conflict of laws rules used to determine the governing law, whereas separate rules applied to the recognition of judgments. To extend the principle to foreign court orders "*would be inconsistent with the well-established rules on the recognition of foreign court decisions*." The court's judgment indicates that Counsel had not been able to find any previous cases where the *Ralli Bros* principle had been applied in relation to a foreign court order as opposed to foreign legislation or legislative acts. The *AES-3C Maritza* case appears to have been overlooked in this regard.

2. The court relied upon the qualification to the principle that "*a party seeking to rely on the Ralli Bros doctrine may be precluded from doing so if they could have done something to avoid illegality in the place of performance*" (quoted from the Court of Appeal's decision in *Celestial Aviation Services Limited v Unicredit Bank GmbH*). In this case, the delays in Litasco seeking enforcement meant that the injunction was granted by the Mauritian court more than two years after the demand was made. The bank could have paid the demand during that period without the risk of illegality.

3. The principle only applies where performance is illegal in the contractual place of performance. In this regard, the court applied the general rule that a debtor must seek out the creditor to find that the place of performance was the place where payment was to be received i.e. Switzerland. Payment was not illegal in Switzerland. The *Britten Norman* case was not cited to the court and appears to have been overlooked in the court's consideration of the contractual place of performance.

4. It was not sufficient, as the bank argued, that contractual performance "*would necessarily require an act to be done in a place where it would be unlawful to carry out that act*" i.e. that acts necessary to send the funds would be required in Mauritius in breach of the injunction. In the court's judgment, it was only acts which would be illegal at the place of performance (i.e. Switzerland) which were relevant for the purpose of the *Ralli Bros* principle.

LLC Eurochem North-West-2 v Societe Generale SA

This case concerned six English-law, on-demand bonds, collectively valued at over €280 million, issued by Societe Generale ("**SocGen**") and ING (in France and Italy respectively) in favour of LLC EuroChem North-West-2 ("**EuroChem**"), a Russian entity, in connection with the construction of a fertiliser plant in Russia. Following the Russian invasion of Ukraine in February 2022, the European Union imposed sanctions on Mr Andrey Melnichenko, the founder of the EuroChem Group, and subsequently on his wife. These sanctions prohibited the provision of funds or economic resources to the Melnichenkos or entities they owned or controlled.

After the imposition of sanctions, EuroChem made demands under the bonds, but the banks refused to pay, contending that payment would be unlawful under the EU sanctions. EuroChem brought proceedings to enforce the bonds in England

The English Commercial Court agreed with the banks that payment under the bonds would be illegal in both France and Italy. The relevant authorities – the *Direction Générale du Trésor* in France and the *Comitato di Sicurezza Finanziaria* in Italy – had determined that the bonds were frozen under EU sanctions (Regulation 269). Payment would also breach Article 11 of Regulation 833. Any act of payment by the banks in these jurisdictions would therefore be unlawful, exposing them to potential criminal liability.

This left a question as to the place of performance of the bonds. The ING bond had incorporated the URDG 2010 rules which specify the location of the bank as the place for payment. The SocGen bond was silent on the question, however. EuroChem argued that Russia was the place of performance for this bond, relying on the presumption that a debtor must seek out the creditor and its recent adoption in the *Litasco* case. Disagreeing with the *Litasco* decision, the court rejected this argument, relying instead on *Britten Norman* and pre-existing authority as to the place for payment under Letters of Credit. In the court's judgment, there was not:

"any material difference between letters of credit and on-demand bonds. In both situations, there is an autonomous obligation to pay, which arises upon the presentation of specified documents to the issuer. Such payment is intended to be immediate, which is why it is commonplace to speak of payment 'against' documents. In days gone by, such payment would have been effected by handing over physical currency, at the bank's counter, in exchange for the documents. The fact that payment now occurs virtually, by way of a stream of electrons, cannot alter, and should not obscure, the nature of the transaction.*

> *The state of the law in this area is not wholly satisfactory. However, on balance I prefer the line of authority [dealing with Letters of Credit] leading up to Britten Norman …, in part because it has the stronger and more recent support from the Court of Appeal, and in part because it seems to me to reflect better the reality of on-demand instruments. Payment is intended to be the direct and immediate consequence of the demand. Absent any contractual indication to the contrary, the place for the demand is the obvious place for payment. This seems to me to apply to on-demand bonds no less than it does to letters of credit."*

As a result of this finding, the place of payment under the SocGen bond was Paris and, since payment was illegal under French law, the *Ralli Bros* principle applied.

Of note, the court considered that it would have arrived at the same outcome even if the place of performance for the SocGen bond was Russia. Disagreeing again with *Litasco*, the court noted that in such a scenario it:

> *"would not have accepted that no element of performance, but only preparatory steps, had to be taken in Paris and Milan. In the context of on-demand bonds, (i) the making of the demands for payment and (ii) the issuer's response to such demands are both crucial. Even if these actions are treated as separate from payment, they are still essential to the obligations under such bonds and their performance. They are what it means to honour the obligations under an on-demand bond."*

This is a particularly significant finding, effectively meaning that Local Jurisdiction injunctions would always engage the *Ralli Bros* principle regardless of where the proper place of payment was taken to be.

Beneathco DMCC v RJ O'Brien Ltd

Beneathco DMCC ("**Beneathco**"), a Dubai commodities trader, held approximately US$16.5 million in a client account with UK broker RJ O'Brien Ltd ("**RJOL**") following derivatives trading. On 23 January 2020, the US Office of Foreign Assets Control designated Beneathco as a Specially Designated National in connection with Iran-related sanctions. After Beneathco instructed RJOL to transfer the funds to UAE bank accounts, RJOL refused, citing US sanctions concerns.

Separately, proceedings were brought against RJOL in the US by relatives of Yitzchak Weinstock, who was killed by Hamas in 1993. Seeking to enforce a default judgment against Iran, they argued that Beneathco was an instrumentality of Iran and that the US$16.5 million held by RJOL was therefore available for execution. In August 2025, the US District Court ordered RJOL to turn over the funds. RJOL appealed, and in September 2025 the order was stayed pending appeal, subject to a requirement that the funds not be disbursed pending further order of the court.

Beneathco brought proceedings against RJOL in England. RJOL claimed that the *Ralli Bros* principle was engaged because a transfer of funds to the UAE would require the use of the US banking system. Such a transfer would be illegal within the US due to the sanctions and/or the Weinstock proceedings.

The English Commercial Court accepted RJOL's defence with regard to the US sanctions but not in relation to the Weinstock proceedings. As regards the Weinstock proceedings, the court adopted the reasoning in *Litasco* as follows:

> *"I respectfully consider [the] decision [in Litasco] was correct … I do not consider that the Ralli Bros principle, nor any similar principle of public policy, extends to court orders. The Ralli Bros principle is based upon comity … The respect given, as a matter of comity, to the sovereign acts of a state within its territory, including executive acts, does not extend equally to court decisions …"*

Once again, the *AES-3C Maritza* case does not appear to have been cited to the court.

Conclusions and implications

The above cases give rise, unfortunately, to a significant amount of uncertainty over the scope of the *Ralli Bros* principle as applied to foreign court injunctions against English law on-demand bonds or guarantees. It can be seen that three of the four issues considered in *Litasco* remain contentious:

1. Whilst both *Litasco* and *Beneathco* held that foreign court orders fall outside the scope of the *Ralli Bros* principle, neither decision referred to *AES-3C Maritza* where the principle was applied to a French court order. The distinction cited in *Litasco* and *Beneathco* between conflict of laws principles and the recognition of foreign judgments may also require further examination. Comity is an operative principle both in conflict of laws matters and in the recognition of foreign judgments under English law. The application of the *Ralli Bros* principle to a foreign court order would also give a more limited effect to that order than would full recognition i.e. it gives effect to the order only insofar as it concerns performance of a contract within the foreign state. As also noted by the UK Supreme Court in *Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela*: "*within most modern states sovereign power is shared among the legislative, executive and judicial branches of government and it cannot be assumed that the conduct of the executive is the sole manifestation of sovereign power or that it should necessarily prevail over the position taken by the legislature or the judiciary.*"
2. *Litasco a*nd *Eurochem* disagree as to the correct approach to determining the place of performance for an on-demand guarantee. The court in *Eurochem* followed *Britten Norman* in determining that the on-demand, "against documents", nature of an on-demand guarantee means that the place of performance is in the country where the issuer has its office. Litasco applied the traditional rule that the debtor must seek out its creditor to determine that the place of performance was the country where the beneficiary has its office, although it appears that *Britten Norman* was not cited to the court in *Litasco*.
3. *Litasco* and *Beneathco* disagree as to whether, even if the place of performance is elsewhere than the country of the issuer, the principle still applies to acts in the Local Jurisdiction necessary for the issuer to arrange for payment to be made. The *Litasco* court found that acts of performance outside the contractual place of performance did not fall within the principle, whereas in *Beneathco* the court appeared to accept that the place of performance could be split across two jurisdictions for a single payment. The *Beneathco* position, if correct, is likely to mean that Local Jurisdiction injunctions will almost always engage the *Ralli Bros* principle regardless of any stipulated place of payment. It may also be of wider application and apply to payments more generally under commercial contracts.

The uncertainty created by these cases can be mitigated to some extent for Owners by specifying a place of payment in any form of guarantee agreed with their Contractor. It will suffice for the guarantee to specify that payment be made to a bank account in England or in any other jurisdiction foreign to the issuing bank. Alternatively, the guarantee might simply state that the beneficiary/employer is entitled to specify a bank account to which payment must be made in its demand. Such precautions ought to avoid the debate over *Britten Norman* and the contractual place of performance, but will still leave the question raised in *Beneathco* as to arrangements necessary for payment in the Local Jurisdiction.

References: *Ralli Brothers v Compañia Naviera Sota Y Aznar* [1920] 2 KB 287; *Kleinwort v Ungarische Baumwolle Industrie Aktiengesellschaft [1939] 2 K.B. 678; Power Curber International v National Bank of Kuwait* [1981] 1 WLR 1233; *Britten Norman Ltd (In Liquidation) v State Ownership Fund of Romania* [2000] Lloyd's Rep Bank 315; *Commercial Marine Piling v Pierse Contracting* [2009] EWHC 2241; *AES-3C Maritza East 1 Eood v Crédit Agricole Corporate and Investment Bank* [2011] EWHC 123; *Celestial Aviation Services Limited v Unicredit Bank GmbH, London Branch* [2024] EWCA Civ 628; *Litasco SA v Banque El Amana SA* [2025] EWHC 312; *LLC Eurochem North-West-2 v Societe Generale SA* [2025] EWHC 1938 (Comm); *Beneathco DMCC v R.J. O'Brien Ltd* [2025] EWHC 3079 (Comm)

Good faith obligations in joint venture agreements

A decision of the UK's Technology and Construction Court last year has considered the interpretation of express good faith obligations in a joint venture context. The case provides a rare example of such obligations being shown to have been breached and an even rarer example of a claim for such a breach failing for the absence of any provable loss. The principles set out in this case are likely to be of relevance in other disputes over express good faith clauses and may cause some joint venture parties to seek enhancements to express good faith obligations within their joint venture agreements.

Good faith obligations and joint venture agreements

English law does not imply obligations of good faith generally into commercial contracts, unlike many civil law systems. However, such obligations are implied into certain specific classes of contract, such as insurance contracts. There is currently a debate as to whether "relational contracts" are another such class of contract into which good faith obligations will readily be implied. Such contracts are said to be ones which "*involve a longer term relationship between the parties [to] which they make a substantial commitment*" *(Yam Seng v ITC)*. In *Sheikh Tahnoon v Kent*, an informal joint venture was categorised by Leggatt J (now a Justice of the Supreme Court) as "*a classic instance of a relational contract*". Obligations of good faith were implied as a consequence.

Although other first instance English decisions have supported the implication of such terms for relational contracts, doubts have also been cast as to the strength of such a rule. In the only appellate decision commenting on the issue, *Globe Motors v TRW*, the Court of Appeal commented that, "*even in the case of such agreements, … the position will depend on the terms of the particular contract", and that, "an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.*"

Perhaps as a result of these developments, and the unsettled state of the law, many joint venture agreements now include express good faith obligations, as do many standard UK forms of contracts such as the NEC and JCT contracts. As noted in *Hewitt on Joint Ventures* (8th Ed), the consequence is:

"it is likely that the number of claims involving good faith will continue to escalate. Many will simply be put forward as claims of last resort in disputes when specific provisions in the contract do not assist. Yet, good faith and fair dealing are concepts that at root seem entirely appropriate to very many joint venture relationships and their application in this area will continue to be ripe for further judicial analysis and development."

The case discussed in this article is a recent example of just such a case where express good faith obligations in a joint venture were found to have been breached.

Matière SAS v ABM Precast Solutions

Matière and ABM formed a joint venture to bid for sub-contract work in relation to the High-Speed 2 rail project ("**HS2**"). The work was for the manufacture, supply and installation of three cut-and-cover tunnels along the HS2 route. Matière was to provide design and installation services, whilst ABM would be responsible for the manufacture of the tunnels themselves. The joint venture was unincorporated and was not financially integrated, meaning that each party would take whatever profit was made on their part of the works.

Both parties entered into a Professional Services Contract (the "**PSC**") with the main contractor to assist in the preparation of stage two proposals for submission to the employer. Just prior to this contract, ABM and Matière entered into a Consortium Agreement containing the following clause 3.1:

"ABM and Matière shall co-operate and collaborate with one another in accordance with the terms of this Agreement and in the course of their performance of their obligations pursuant to any associated PSC each of ABM and Matière shall act in good faith toward the other and use reasonable endeavours to forward the interests of the co-operative enterprise."

The original proposal made by the two parties involved the construction by ABM of a bespoke factory at Scunthorpe to allow it to manufacture the pre-cast concrete required for the tunnels. ABM's existing factory was not big enough to accommodate the proposed work and the construction of a new factory was part of its broader business expansion plans.

The main contractor expressed concerns to Matière over the proposal for the Scunthorpe factory, citing cost implications, but later also expressed concerns about ABM as a contracting party. The main contractor wished to maintain Matière's role on the project, however. Matière then began working with the main contractor on two strategies. The first, "Plan B", was to reduce the scope of ABM's work by producing the pre-cast concrete at other sites. The second, "Plan C", was to replace ABM entirely.

Matière worked on these two strategies without ABM's knowledge. As part of Plan B, it attempted to persuade ABM to abandon the Scunthorpe factory proposal. ABM was unwilling to compromise over the factory plans and ultimately the main contractor terminated the PSC. Matière entered into a new PSC with the main contractor on its own the following month.

ABM claimed that Matière's conduct in pursuing Plans B and C without ABM's knowledge was a breach of the good faith obligations in clause 3.1 of the Consortium Agreement.

The express good faith obligations

The court emphasised the heavily contextual nature of good faith clauses and summarised the following principles of interpretation from previous cases:

- The core meaning of a duty of good faith is to act honestly. However, bad faith may include conduct which would be regarded as commercially unacceptable to reasonable and honest people, even if not necessarily dishonest.
- The content of the duty is heavily conditioned by its context. When considering the interpretation of an express good faith clause in context, cases from other areas of law and commerce turning on their own particular facts may be of limited value and should be treated with considerable caution.
- An obligation of good faith might comprehend fidelity to the bargain between the parties or adherence to the spirit of the agreement where the common purpose and aims of the parties could be objectively ascertained from the express or implied terms of the contract. In such cases, the obligation might be said to prohibit a "*cynical resort to the black letter"* or conduct which *"undermines the bargain entered or the substance of the contractual benefit bargained for*".

The court considered that all of the above good faith manifestations were included within clause 3.1:

"I am satisfied that Clause 3.1 contained a requirement that each of ABM and Matière would act honestly with each other and would not conduct themselves in a manner which would be regarded as commercially unacceptable to reasonable and honest people. I am also satisfied that this is a contract in which the obligation includes keeping fidelity to the bargain. That is because the common purpose and aim of the parties is apparent from the other terms of the contract, namely the requirement to submit a joint bid to [the main contractor] that formed part of the overall Services and which complied with the terms of the PSC."

The court also rejected a submission that merely acting in self-interest or without fidelity to the bargain would not amount to a breach of the obligation unless the effect was to undermine or substantially reduce the value of the contract. In the court's view:

> *"in circumstances where fidelity to the bargain, or adherence to the spirit of the agreement, falls within the ambit of the good faith obligation, a relevant consideration may be whether the action complained of might, at the time, be expected to render the contract worthless or less valuable. Consideration of the subsequent actual effect would not be material to the question of breach."*

The court accepted a separate submission by Matière that the scope of clause 3.1 was limited to the performance of the parties' obligations under the PSC and did not extend to the entire collaboration over the project. However, this did not mean that the process of negotiation and bid preparation as between the parties and with the main contractor fell outside the clause. Such activities were indistinguishable from the preparation of the stage two proposals required by the PSC.

Breach upheld but no loss proved

Although Plans B and C had been instigated by the main contractor, Matière was nevertheless held to be in breach of its good faith obligations in actively co-operating, without ABM's knowledge, in those strategies. The court considered that Matière's conduct was either dishonest or was of a type that would be regarded as commercially unacceptable to reasonable and honest people. The court also found that Matière did not keep fidelity to its bargain with ABM and that its actions had the potential to render that bargain worthless or significantly less valuable.

Although successful on breach, ABM's claim failed on causation. ABM had claimed for the loss of a chance that the joint venture would have secured a sub-contract with the main contractor. Whilst the joint venture had a reasonable chance of such work at the point the PSC had been entered into, those chances became non-existent in the lead up to the main contractor's termination for reasons other than Matière's breach. In particular, the main contractor was the moving force behind Plans B and C and Matière had merely been doing its bidding in the hope of retaining a unilateral sub-contract in the event the joint venture was not awarded the work. Various other factors mentioned in the termination notice also meant that the main contractor was unlikely to have proceeded with the joint venture. ABM also appeared to have been unable to fund the construction of the Scunthorpe factory in any event.

Conclusions

This decision provides a helpful analysis of the approach to be taken to the interpretation of express good faith obligations and provides a rare example of a breach of such a clause being upheld. The decision illustrates the complex issues which often beset such claims. In particular:

— The relevance of implied terms. Whilst not an issue which arose in this case, the existence of express good faith obligations may not always rule out the application of implied good faith obligations. One previous case (*Sheikh Tahnoon v Kent*) has suggested that implied good faith obligations in joint venture agreements may arise "in law". Terms implied in law do not depend on a case-by-case analysis and can apply to fill any gaps left by express terms covering the same ground. Whether this suggestion is followed in subsequent cases remains to be seen.

— The extent of the express good faith obligations. In this case, the obligations were held to be limited to a sub-set of the parties' overall commercial relationship (i.e. the performance of obligations under the PSC).

— The content of the good faith obligations. Do they merely require honesty or do they also prohibit behaviour commercially unacceptable to reasonable and honest people? Do they go even further and require fidelity to the bargain?

— Do the facts support an allegation of breach? Allegations of a breach of good faith usually require a broad assessment of events often over many years. The court's analysis of the relevant facts in the *Matière* case extended over 172 paragraphs.

— Has the breach caused any loss? As *Matière* demonstrates, proving a breach of good faith does not automatically provide a remedy. Proving loss will often require a claimant to engage in complex counter-factual exercises designed to establish the chances of certain outcomes occurring in the absence of the breach. However, a breach of good faith within a joint venture setting rarely occurs without events first putting strain on the commercial relationship. These events may have been likely to prevent the venture from being successful regardless of any breach of good faith.

Matière appears to have been faced with a difficult decision in this case. It had committed itself to a joint venture partner who became unwilling to compromise over the initial joint venture proposals despite mounting evidence that those proposals would not be accepted. Faced with pressure from the main contractor, Matière had to choose between complying with its good faith obligations and in all likelihood losing any chance of work from the main contractor in relation to the project. Alternatively, it could act to preserve its relationship with the main contractor by breaching its good faith obligations toward its joint venture partner. Ultimately, Matière's decision to breach good faith appears to have been commercially prudent. It was able to continue working with the main contractor and successfully defend a claim from its joint venture partner.

The outcome in this case may cause joint venture parties to consider strengthening good faith clauses within their joint venture agreements to avoid situations where one of the joint venture partners finds itself commercially incentivised to act in bad faith. Careful drafting will be needed if such clauses are to provide a remedy where none could be found in the present case.

References: Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB); Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396; Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent [2018] EWHC 333 (Comm); Matière SAS v ABM Precast Solutions Ltd [2025] EWHC 1434 (TCC).

The FIDIC time-bar: an Indian perspective

Clause 20.1 of the FIDIC suite of contracts (1st and 2nd Editions) contains a strict 28 day time-bar for the notification of claims. Whilst the wording of the clause is clear, the ability of employers to overcome otherwise meritorious claims through reliance on the time-bar is frequently less than straight-forward in practice. An arbitration award reported last year in relation to a large Indian infrastructure project provides an interesting example of clause 20.1 being sidestepped by an experienced arbitral tribunal.

Claims notification under the FIDIC form

Clause 20.1 of the FIDIC 1st Edition contracts require a Contractor who considers itself entitled to an extension of time or any additional payment to give a notice describing the "*event or circumstance giving rise to the claim.*" The notice must be given within 28 days after the Contractor *"became aware, or would have become aware, of the event or circumstance."*. The clause also makes clear that if a notice is not given within this period the "*Time for Completion shall not be extended [and] the Contractor shall not be entitled to additional payment*".

Clause 20.1 also requires a fully detailed claim to be provided within a further 14 days (56 days under the 2nd Edition), but there is no express indication that a failure to do so will invalidate the claim.

Clause 20.2.1 of the FIDIC 2nd Edition contains similar provisions requiring notice within 28 days, but is even more emphatic in stating that, in addition to the Time for Completion not being extended and there being no entitlement to additional payment, a failure to comply shall discharge the Employer "*from any liability in connection with the event or circumstance giving rise to the Claim*".

Somewhat paradoxically, despite the stronger language in the 2nd Edition, a Contractor who has failed to give a notice on time is also given the ability to submit a fully detailed claim and include an explanation as to why "*late submission [of the notice] is justified*". The Engineer is then required to agree or determine "*whether or not the Notice of Claim shall be treated as a valid Notice*" taking into account the explanation given in the fully detailed claim. The 2nd Edition cites three circumstances which might may be taken into account by the Engineer for this purpose (such as prejudice to the Employer due to the late submission) but these are said expressly to "*not be binding*".

These provisions leave significant ambiguity over whether the 28 day notice requirement in the 2nd Edition is a strict time-bar or whether in certain circumstances a Contractor who fails to notify on time might be contractually entitled to disapply the time-bar. On one view, if the Employer has already been discharged from liability in relation to the Claim, there is no rational basis on which the Engineer can decide to disapply the time-bar and resurrect the Claim; his power to do so might be interpreted as one to be exercised purely in its capacity as the Employer's agent if so instructed. Some support for this position may come from the pre-release version of the 2nd Edition Yellow Book which included a separate clause (clause 20.3) which permitted the Contractor to apply to the DAB for a decision that "*in all the circumstances, it is fair and reasonable that the late submission be accepted*". This clause was deleted in the final 2nd Edition versions and no fair and reasonable standard or any other objective criteria are now stated which might provide a basis for the making of a rational determination by the Engineer as to the disapplication of the time-bar. Weighing against these points, however, is the express requirement for the Engineer to include a decision on the point in its agreement or determination under clause 3.7, that clause requiring the Engineer to "*act neutrally between the Parties and [to] not be deemed to act for the Employer*".

It should also be noted that a new time-bar linked to one part of the fully detailed claim (the statement of legal basis) has been included in the 2nd Edition. This time-bar is subject to the same ambiguity which applies to the notification time-bar as to whether disapplication of the time-bar can be claimed as a matter of contractual entitlement in certain circumstances.

The English law approach to clause 20.1

Compliance with clause 20.1 of the FIDIC 1st Edition has been accepted by the UK courts as a condition precedent to recovery. This was said to be "clear" in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* and was confirmed earlier this year by the UK Privy Council in *Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago* (the Privy Council is comprised of judges from the UK's highest court). The Privy Council commented on both the 1st Edition and 2nd Edition versions as follows:

> "*The language of clause 20.1 of the FIDIC conditions is in classic condition precedent form: 'if the Contractor fails to give notice within 28 days of it becoming apparent that a claim had arisen...the Contractor shall not be entitled to additional payment and the Employer shall be discharged of any further liability...' (emphasis supplied). Clauses which require a specified provision to be fulfilled before a corresponding right or obligation arises are commonly construed as conditions precedent … The defining feature of a condition precedent is dependency between the requirement and the relief; one must be conditional upon the other … The link between the two contractual steps must usually be expressed in terms of obligation, that X must necessarily lead to Y: … The Board considers that all those features were present in clause 20.1.*
>
> *Clause 20.1 of the FIDIC 1999 Form was treated as a condition precedent to payment … in Obrascon Huarte Lain SA v Attorney General for Gibraltar … In addition, at para 20-014 of their book Understanding the FIDIC Red and Yellow Books, 3rd ed (2018), Jeremy Glover and Simon Hughes KC describe clause 20.1 as a condition precedent, correctly noting that 'parties must understand that compliance with the notice provisions is intended to be a condition precedent to recovery. Non-compliance therefore potentially provides either party with a complete defence to any claim that is commenced outside the prescribed time period.' Although that comment is in respect of the version of clause 20.1 in the 2017 FIDIC Form, the structure and much of the wording of clause 20.1 remains the same as the 1999 Form: although the 2017 version has a slightly more flexible series of provisions than those with which this appeal is concerned, it is still a condition precedent.*"

Despite the strength of the English law position, practitioners often report a greater reluctance to uphold the clause 20.1 time-bar in other jurisdictions and by arbitral tribunals. A recent arbitration decision in respect of a large infrastructure project in India provides insight into the basis on which tribunals may seek to avoid a strict application of the clause.

Dedicated Freight Corridor Corporation of India Ltd v Express Freight Consortium

Dedicated Freight Corridor Corporation of India Ltd ("**DFCCIL**") entered into a FIDIC 1st Edition Yellow Book contract with the Express Freight Consortium (the "**Consortium**"), comprising Mitsui, Ircon and Tata Projects, for the construction of railway works in India. Indian law applied to the contract.

The Consortium claimed for additional payment as a result of increases in the minimum wage applicable to the works. The claim was rejected both on substantive grounds and also because it was not notified within 28 days as required by clause 20.1.

A three-person arbitral tribunal was formed, comprised of retired Indian judges. The clause 20.1 defence was rejected for three reasons:

— The notice requirement was directory only and not mandatory (despite the express words to the contrary).

- Even if it was mandatory it was void due to section 28 of the Indian Contract Act.
- In any case, the impact of the wage increase was continuing so that there was a continuing or recurring cause of action.

There is some support for the first point in the Indian cases. A recent decision of the Supreme Court of India (India's highest court) appeared to take the same view in relation to a time-bar clause requiring claims for extra work to be detailed in monthly payment applications: *Chandigarh Construction Co Pvt Ltd vs State Of Punjab*. A failure to do so was said to amount to a deemed waiver of any claims not included. The Court noted that:

> "*The said requirement will have to be construed as being put in the agreement so as to ensure that the additional work has actually been done, the claim is put forth along with details so that baseless claim is not made at a distant point in time when it will not be possible to determine. Though the Clause also indicates that if such claim is not made, it would amount to waiver, in a circumstance where the claim is ultimately put forth in the forum where an adjudication is made and based on the material if the adjudicating authority is satisfied that the actual work had been done and the contractor being entitled to the extra amount spent by him to carry out the work in an appropriate manner, it would not be just and proper to deny such claim only on the ground that it had not been indicated strictly in the manner as provided in the contract specially keeping in view the nature of work undertaken.*"

As regards section 28 of the Indian Contract Act, this provides that

"1 Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent."

However, existing Indian case law suggests that this section does not prevent time-bars which extinguish a claim if it is not notified or pursued within a certain period. For example, a clause in an insurance policy stating that claims would be forfeited if not brought within a certain period of time did not offend the section: *Vulcan Insurance Co v Maharaj Singh*.

The tribunal's reliance on what was said to be the continuing impact of the wage increase is a commonly used tactic to overcome the time-bar. An analogous point was made by the English court in *Obrascon*, where it was held that an extension of time claim need not be notified within 28 days of the relevant event causing delay, but could be notified within 28 days of when the event actually impacted the programme.

Conclusion

The tribunal's decision in this case shows the difficulties which can arise when attempting to rely on claims notification time-bars to refute otherwise valid claims, even with a clause as clearly worded as clause 20.1 of the FIDIC form. Although the English courts tend to take a robust approach to such time-bars, the same is not always true in other parts of the common-law world, and rarely so in civil law jurisdictions.

Note: the record of the arbitration award in this case comes from an enforcement decision of the Singapore International Commercial Court in *DOI v DOJ* [2025] SGHC(I) 15 where the award was set aside for reasons unrelated to clause 20.1.

References: *Vulcan Insurance Co v Maharaj Singh*, AIR 1976 SC 287 (294); *Chandigarh Construction Co Pvt Ltd vs State Of Punjab* 2020 INSC 187; Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC); *DOI v DOJ* [2025] SGHC(I) 15; Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago [2026] UKPC 2.

Do variation clauses permit the suspension or acceleration of construction works?

A decision of the English Technology and Construction Court last year has found that a variation clause entitled an employer to postpone the commencement of construction work to an unspecified future date. Variation clauses often contain wording permitting the timing of work to be varied, but this appears to be the first time an English court has considered such a provision. The broad interpretation given by the court highlights the risks of including such wording within a variation power.

Variations as to timing

Construction contracts generally contain one or more of the following types of clauses which permit an employer to regulate the timing of the works:

— Clauses which permit an employer to instruct the contractor to recover existing delays to the works. Such a right is provided in the FIDIC 1st Edition contracts in relation to delays which are the contractor's responsibility. The 2nd Edition contracts expand this power to include delays for which the contractor is entitled to an extension of time.

— Clauses which allow an employer to call for an acceleration proposal from the contractor, which may then be accepted by the employer. The NEC3 and NEC4 ECC contracts provide an example of such a power (although in both the contractor may decline to provide a proposal).

— Suspension clauses, enabling an employer to pause the carrying out of the works, exist in many standard form contracts including FIDIC, LOGIC, IChemE and ICC contracts, but not in the NEC.

— Broadly worded variation clauses, which allow an employer to vary the timing of the Works. For example, the FIDIC 1st Edition contracts permit the instruction of variations as to the "*sequence or timing of the execution of the Works*". Similar powers are included in the IChemE, ICC and LOGIC contracts, with narrower wording in the NEC forms.

Case law on the interpretation of such clauses is rare, particularly with regard to broadly worded variation clauses. It is sometimes said that such clauses should not be given too literal an interpretation so as to confer an unqualified right to instruct acceleration. For example, the writers of *FIDIC Contracts: Law and Practice* contend that the FIDIC 1st Edition variation power quoted above "*does not give the Engineer the power to instruct the Contractor to accelerate to complete the Works or a Section before the Time for Completion*".

Grain Communications Ltd v Shepherd Groundworks Ltd

Shepherd Groundworks Ltd ("**Shepherd**") and Grain Communications Ltd ("**GCL**") were parties to a framework agreement for construction works relating to wireless telecommunication. Under the framework agreement, GCL could issue a work order instructing Shepherd to undertake certain works, which Shepherd was able to accept or decline. The parties had previously entered into 68 work orders under the same framework agreement. Under the work order terms and conditions, GCL had the power to vary the work, which was defined as "*any addition to, omission from or other change in the Works or the period or order in which they are to be carried out*".

The day before the commencement of work under a work order, GCL informed Shepherd that it was not to proceed. The next day, GCL confirmed in an email that it was unlikely Shepherd would be able to commence works before the end of the year and it would "*keep in touch […] regarding our programme for the Works under these Work Orders and […] let you know when anything changes"*.

Shepherd commenced adjudication proceedings and obtained a decision entitling it to recover loss of profit and/or mobilisation and demobilisation costs. The adjudicator found that GCL's email had amounted to an unjustified cancellation of the work order. GCL brought TCC proceedings to overturn the adjudicator's decision.

Variation upheld

The TCC held that the variation provisions permitted GCL to postpone commencement of the works and that the telephone discussion and follow up email were "*all that was required*" to instruct a variation. In the court's view, the adjudicator had failed to recognise that the variation provisions expressly permitted the "*period*" in which the works were to be carried out to be changed. As GCL had noted that it still intended to continue with the work order, there was no cancellation but only a change in the period for carrying out the works. The court also rejected the need for any implied restriction on the variation power, noting that this was not necessary to give business efficacy to the contract and would contradict the express wording of the variation provisions.

Conclusion and implications

This is a significant decision which appears to be the only English case to have considered a variation power in relation to the timing of works. In contrast to the adjudicator, it is evident that the court adopted a broad and literal approach to the language of the variation provision. There are a number of ways in which this language could have been more narrowly interpreted. For example:

— The "*period … in which [the works] are to be carried out*" could have referred only to the duration of the works and not their commencement date.

— Or if a change in the commencement date were thought to be intended, a change to the "*period*" of the works in that sense could have required a new commencement date to be instructed and not for the works merely to be suspended pending further instruction.

— Support for a narrower interpretation could have been drawn from the fact that the literal meaning of the clause would permit the instruction of acceleration, which is unlikely to have been intended.

The court's decision, therefore, highlights the risk in agreeing to include such broad language within a variation clause. The wording in the present case was found to effectively confer a right of suspension and raises a question as to whether the same approach would have also permitted an instruction to accelerate the works by reducing the period in which the works were to be carried out.

Parties considering such language within their contracts would be well advised to clarify the operation of such wording and, where rights of suspension and/or acceleration are intended, to include specific clauses dealing with those issues like those noted at the beginning of this article.

References: FIDIC Contracts: Law and Practice, Baker et al. 1st Ed (2009); Grain Communications Ltd v Shepherd Groundworks Ltd [2024] EWHC 3067 (TCC).

Direct payments to subcontractors: a guide for employers

A decision from the Hong Kong High Court last year highlights the risks involved in making direct payments to subcontractors. The law in this area is complex and employers who make such payments without careful advice risk being required to pay twice over. This article considers the approach taken by the Hong Kong court and provides an overview of the options available to employers who find themselves wishing to make such payments.

Paying subcontractors directly

Employers can sometimes find themselves wishing to make direct payments to subcontractors engaged by their contractor. This might be the case if a payment dispute arises at subcontract level or if the contractor suffers cashflow difficulties. Subcontractors may threaten to terminate or suspend work in such circumstances and the employer may feel that direct payments are necessary to keep the project afloat.

Although the commercial rationale for such payments is clear, they pose a number of legal issues depending on whether the payments are with, or without, the agreement of the main contractor. Where there is no agreement, the employer will usually wish to recover such payments from the main contractor, but attempts at recovery may be vigorously contested. If no recovery can be made, the employer may wish to reclaim the sums paid back from the subcontractor. The subcontractor may resist such attempts and/or may be unable to repay such sums in the absence of any security taken by the employer.

Separate issues arise where direct payments have been agreed to by the main contractor, whether on an ad-hoc basis or as part of the original contract terms agreed with the employer. Such an arrangement can be vulnerable to challenge in the event of the main contractor's insolvency. The basis on which such challenges can be brought is illustrated by the Hong Kong decision discussed below.

Hsin Chong Construction (Asia) Ltd (in liq) v Wong Po Kee Ltd

Hsin Chong Construction ("**HCC**") agreed to carry out certain works for Capital Court Ltd ("**CCL**"). Subsequently, a supplementary agreement was executed permitting CCL to make direct payments to certain of HCC's subcontractors, on the basis that such payments would be *"deemed to have been paid via [HCC]"* and that HCC waived *"any claims against [CCL] that [HCC] has not received any amount in connection with the payments to the … Sub-Contractors*". Notably, the subcontractors were not parties to this agreement and were only notified of the arrangement by letters from HCC.

CCL made a number of payments under this arrangement after HCC was placed into liquidation. HCC's liquidators demanded the return of these sums, arguing that such payments were void under Hong Kong insolvency law.

The Hong Kong High Court held that the subcontractors were required to return the money to the liquidators, despite being paid directly by CCL. This was on the basis that:

1. HCC's right to receive payments from CCL was not varied by the supplementary agreement.
2. The subcontractors were not parties to the supplementary agreement and the payments they received were to be regarded as coming directly from HCC, which under Hong Kong insolvency law, could not be permitted post-liquidation

.
The Court contrasted the case with one where a tripartite agreement had been reached between an employer, contractor and subcontractors resulting in the contractor giving up rights to payment in return for the employer agreeing to pay the subcontractors directly – effectively "*cutting out*" the contractor from the payment chain *(Golden Sand Marble Factory Ltd v Easy Success Enterprises Ltd)*. This was permissible as the agreement was reached prior to the contractor's liquidation and payments made after the liquidation did not involve any dealings with the contractor's rights or property.

The English position

In the UK, the only authority that has dealt with a similar question is from the early 20th century. In *Re Wilkinson*, a clause in a construction contract provided: "*If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to [certain sub-contractors], he shall have power if he thinks fit to order direct payment to them.*"

The contractor was declared bankrupt, which prompted the engineer to make an order for direct payment by the employer under this clause (i.e. after bankruptcy). The order and the subsequent payment were upheld on the basis that the clause was an irrevocable authority from the contractor to re-direct payments which would otherwise be made to it.

The decision in *Re Wilkinson* would require reconsideration today in light of modern insolvency law and the pari passu principle. The decision has been heavily criticised in academic writings, and was rejected in a recent Northern Irish case: *Re McLaughlin & Harvey Plc (in liq).*

The position under English law is therefore uncertain, but may well prove to be similar to that reached by the Hong Kong court in this case.

Ways to manage subcontractor payments

Employers seeking to safeguard their interests when direct payments to subcontractors are necessary should consider the following mechanisms.

Tri-partite methods

As in the *Golden Sand* case noted above, this model involves establishing a direct payment relationship between the employer and subcontractor and effectively cuts the main contractor out of the payment chain. Such an agreement may be difficult to achieve, however, when considering the competing interests and priorities of all three parties.

Bespoke amendments

Various amendments to standard contractual provisions can be made to better protect an employer's ability to make direct payments to subcontractors. For example, clearly drafted clauses that permit the employer to cut out the contractor and establish a direct payment relationship with a subcontractor where there is reasonable evidence of non-payment.

Sub-contractor assignments

The employer may take an assignment of a subcontractor's entitlement to payment by the contractor in exchange for making direct payment to the subcontractor. The employer may then seek to enforce the subcontractor's assigned claim against the contractor, such as by setting-off the claim against amounts due under the main contract.

Such an approach is not without difficulties, however. The main contractor is likely to put the employer to proof as to the assigned claim and the employer will usually know very little about any disputed claims at subcontract level. It may, therefore, struggle to prove that the contractor was liable to pay such sums to the subcontractor. The employer might protect against this risk by obtaining the subcontractor's agreement to lend such assistance as may be required in the enforcement of the assigned claims against the contractor. However, the subcontractor may be unwilling to provide such assistance or may not do so in a sufficiently timely or fulsome way.

Breach of contract and restitutionary claims

Absent any of the above methods, employers who feel compelled to make direct payments to subcontractors may seek to recover those payments from the contractor by alleging a breach of contract. Construction contracts often include clauses requiring contractors to properly manage their supply chain and to ensure that payments are made to subcontractors when due. Alternatively, employers may potentially have rights to claim in restitution on the basis that payments made directly to subcontractors have conferred a benefit on the main contractor (i.e. by satisfying the contractor's payment obligations).

Such issues are not straightforward and the law in this area is far from certain. If employers are unable to recover direct payments by these means, they risk being required to make payment a second time to the main contractor. For a real life example of such a scenario, please see the article on this topic in the 2020 edition of this *Annual Review*.

Conclusions and implications

The making of direct payments to subcontractors can be a helpful tool for employers to manage supply-chain issues and ensure the timely completion of a project. Various methods exist to ensure that direct payments can be made, and recovered, by employers. However, careful advice is needed to ensure that an employer does not end up paying twice, once to subcontractors and again to its main contractor.

References: *Wilkinson Ex parte Fowler* [1905] 2 K.B. 713; *Re McLaughlin & Harvey Plc (In Liquidation)* [1996] 86 BLR 1; *Golden Sand Marble Factory Ltd v Easy Success Enterprises Ltd* [1999] 2 HKC 356; Joint and Several Liquidators of Hsin Chong Construction (Asia) Ltd v Wong Po Kee Ltd [2025] HKCFI 1020

International English Law Construction Contacts

Adrian Bell
Managing Partner
T +44 20 7367 3558
E adrian.bell@cms-cmno.com

Emma Schaafsma (Kratochvilova)
Partner, Co-Head of ICE Disputes (London)
T +44 20 7367 2316
E emma.schaafsmakratochvilova@cms-cmno.com

Phillip Ashley
Partner, ICE Disputes (London)
T +44 20 7367 3728
E phillip.ashley@cms-cmno.com

Sarah Grenfell
Partner, ICE Disputes (London)
T +44 20 7367 3549
E sarah.grenfell@cms-cmno.com

Aidan Steensma
Of Counsel, ICE Disputes (London)
T +44 20 7367 2137
E aidan.steensma@cms-cmno.com

Greg Sibbald
Partner, ICE Disputes (Dubai)
T +971 4 374 2858
E greg.sibbald@cms-cmno.com

Lynette Chew
Partner, ICE Disputes (Singapore)
T +65 6422 2840
E lynette.chew@cms-holbornasia.com

Glenn Haley
Partner, ICE Disputes (Hong Kong)
T +852 2533 7883
E glenn.haley@cms-hk.com

Ilan Freiman
Partner, ICE Disputes (Sydney & Hong Kong)
T +61 493 853024
E Ilan.Freiman@cms-cmno.com

Steven Williams
Partner, Co-Head of ICE Disputes (London)
T +44 20 7524 6713
E steven.williams@cms-cmno.com

Matthew Taylor
Partner, ICE Disputes (London)
T +44 20 7524 6341
E matthew.taylor@cms-cmno.com

Sunil Mawkin
Partner, ICE Disputes (London)
T +44 20 7367 2391
E sunil.mawkin@cms-cmno.com

Philip Norman
Partner, ICE Disputes (London)
T +44 20 7067 3311
E philip.norman@cms-cmno.com

Mohammed Aldowish
Partner, ICE Disputes (Riyadh, Saudi Arabia)
T +966 11488 6739
E mohammed.aldowish@cms-cmno.com

Kelvin Aw
Partner, ICE Disputes (Singapore)
T +65 6422 2841
E kelvin.aw@cms-holbornasia.com

Asya Jamaludin
Partner, ICE Disputes (Singapore)
T +65 6439 3490
E asya.jamaludin@cms-cmno.com

Jeremie Witt
Partner, ICE Disputes (London & Brisbane)
T +61 7 3184 9111
E jeremie.witt@cms-cmno.com

Damien Watkin
Partner, ICE Disputes (Abu Dhabi)
T +971 58 211 8580
E damian.watkin@cms-cmno.com

CMS offices

The Americas

Bogotá
Lima
Mexico City
Santiago de Chile
São Paulo
Silicon Valley*

Europe

Aberdeen
Amsterdam
Antwerp
Barcelona
Belgrade
Bergen
Berlin
Bratislava
Bristol
Brussels
Bucharest
Budapest
Cologne
Dublin
Duesseldorf
Edinburgh
Frankfurt
Funchal
Geneva
Glasgow
Gothenburg
Hamburg
Istanbul
Kyiv
Leipzig
Lisbon
Liverpool
Ljubljana
London
Luxembourg
Lyon
Madrid
Manchester
Milan
Monaco
Munich
Oslo
Paris
Podgorica
Poznan
Prague
Reading
Rome
Sarajevo
Sheffield
Skopje
Sofia
Stavanger
Stockholm
Strasbourg
Stuttgart
Tirana
Vienna
Warsaw
Zagreb
Zurich

Africa

Casablanca
Ebene
Johannesburg
Luanda
Maputo
Mombasa
Nairobi

Middle East

Abu Dhabi
Dubai
Muscat
Riyadh
Tel Aviv

Asia-Pacific

Beijing
Bengaluru
Brisbane
Chennai
Gurugram
Hong Kong
Hyderabad
Mumbai
New Delhi
Shanghai
Singapore
Sydney

* Representative Office

CMS Legal Updates subscription service

Sign up now for the free online email alert service delivering commentary, analyses and insights from CMS experts on the legal issues affecting your business, directly to your inbox.
cms.law/subscription

CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

2608-0210952 - 6