Keating Legal Update

WINTER 2025

In this issue...

KEATING
CHAMBERS

Welcome

to the latest edition of the Keating Legal Update

> As we approach the close of another busy year, we are delighted to present the Winter 2025 edition of Keating Legal Update.
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> This issue brings together a curated selection of articles and insights that reflect the ever-evolving landscape of the areas of law in which we practice.

Inside, you will find commentary on the Subsidy Control Act 2022 and PFI, as well as a Q&A with one of our newest tenants, Connie Trendle, who shares reflections on joining chambers after a successful pupillage. We're also pleased to feature an article by Practice Manager Rosina Thomas, offering practical perspectives from our team.

We are proud to announce that Sarah Hannaford KC has been appointed as Head of Chambers. With this news we extend our heartfelt thanks to Alexander Nissen KC for guiding us through a successful chapter and look forward to Sarah continuing our vision of excellence and innovation as we embark on the next stage of Keating Chambers' journey.

This season has been filled with highlights for individual members and the set, including the sold-out Construction Law in Africa Conference in Johannesburg, co-hosted with Pinsent Masons, and our inaugural Building Safety Act Symposium in London. As festive celebrations bring us together, we're also looking ahead to a busy calendar of events and international engagements in early 2026.

We are thrilled to celebrate the achievements of the set in 2025. Keating Chambers was named Arbitrators Set of the Year at the Legal 500 UK Bar Awards and Construction Set of the Year at the Chambers & Partners UK Bar Awards. We're also looking forward to the upcoming Legal 500 MENA Awards in Dubai this February, where we have both set and individual nominations across a range of categories.

We hope you find this edition both informative and engaging. Thank you for your continued support, and from all of us at Keating Chambers, we wish you a very Merry Christmas and a Happy New Year!

Contents

When does a public loan amount to an unlawful subsidy?

Overview of the Subsidy Control Act 2022 ("SCA")

UK subsidy control law is the successor of EU state aid law. It is designed to ensure that public bodies do not distort competition by subsidising certain economic operators ('enterprises'), typically national operators, over others save where necessary to address market failures or achieve strategic public objectives. Although this is a post-Brexit law, it is still driven by international treaty obligations, particularly the Trade and Cooperation Agreement with the EU.

Simon Taylor

Courtney Burrell-Eade

The SCA came into force on 4 January 2023. Pursuant to section 2(1), the SCA applies to financial assistance which:

"(a) is given, directly or indirectly, from public resources by a public authority,

(b) confers an economic advantage on one or more enterprises,

(c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and

(d) has, or is capable of having, an effect on—

(i) competition or investment within the United Kingdom …"

Public financial assistance which confers an economic advantage may take various forms, including grants, over-compensation for a public service contract or loans below market rates. Under section 3(2), a loan or other financial assistance is not treated as conferring an economic advantage on the recipient ("**enterprise**") unless "the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms that might reasonably have been expected to have been available on the market". This is called the commercial market operator ("**CMO**") test. If a loan, for example, fails the CMO test because it is at an interest rate below that which the market would demand, it will be treated as conferring an economic advantage under section 2(1)(b).

Where the four section 2 criteria for a subsidy are met, the public authority must satisfy itself that it has complied with certain principles before providing it (unless there is a specified exemption). These are set out in section 12 and Schedule 1 and include:

- The need to pursue a specific policy objective in order to remedy an identified market failure or address an equity rationale.
- Proportionality of the subsidy to its specific policy objective.
- Subsidies should be designed to bring about a change of economic behaviour of the beneficiary.
- Subsidies should not normally compensate for the costs the beneficiary would have funded in any event.
- The objective cannot be achieved through other, less distortive, means.
- The need to minimise any negative effects on competition and investment within the United Kingdom.
- The beneficial effects of the subsidy should outweigh any negative effects, e.g. effects on competition and investment within the United Kingdom, and international trade and investment.

If a subsidy is given without satisfying these principles, an interested party, such as a competitor, can apply to the Competition Appeal Tribunal ("**CAT**") under section 70 to seek what is effectively a judicial review of the subsidy decision. This can lead to orders requiring the repayment of the subsidy.

However, if a loan or equity investment meet the CMO test and is thus on commercial market terms, it is not treated as a subsidy and there is no need for the public authority to satisfy itself of the Schedule 1 principles.

Aubrey Weis v Greater Manchester Combined Authority [2025] CAT 41

So far only a handful of cases have been brought under section 70. Aubrey Weis is only the second published CAT judgment in the area. It addresses key questions as to the definition of a subsidy, timing of review applications and the application of the CMO principle.

Mr Weis, a property developer, challenged two residential developer loans totalling £140 million granted by the Greater Manchester Combined Authority ("**GMCA**") to the Renaker Group under the Greater Manchester Housing Investment Loan Fund ("**GMHILF**").

Mr Weis argued the loans would not have been granted by a commercial operator, were on non-market terms and distorted the Manchester property development market. He sought a declaration of unlawfulness and an order quashing the loans.

The CAT set out the due diligence and multi-layered governance process followed before awarding GMHILF loans. It explained that loans were priced by reference to the minimum State Aid reference rate (set by the European Commission in its Reference Rate Communication) and a risk margin is then applied. A cross check is then made against the rates set out in the Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations SI 2022 No 1182 (the "**2022 Regulations**"). The 2022 Regulations provides a mechanism for calculating the market interest rate of a loan to a person according to whether they have a strong, good or satisfactory level of credit worthiness, determined by reference to credit ratings.

The CAT set out redacted extracts from the GMCA's decision making process, showing reference to credit rating, security provided, financial ratios, the assessment of various risks and cross checks made against the 2022 Regulations. The GMCA approved the loans in principle on 22 March 2024, although a later report (finalised in November 2024) entitled the Interest Rate Setting Proposal ("**IRSP**") provided a further risk analysis and concluded that it was compliant with the 2022 Regulations.

The CAT then summarised the legal framework, identified the issues and set out its decision.

Legal Principles

The CMO principle was summarised in Sky Blue Sports & Leisure Limited v Coventry City Council [2014] EWHC 2089 (Admin), a case under the state aid rules:

- The court assesses objectively whether a rational private investor, creditor or vendor might have entered into the transaction in the same circumstances on the same terms, having regard to the foreseeability of obtaining a return and leaving aside all social and policy considerations.
- The comparator is a rational private operator with similar characteristics to the public authority. For example if the authority is a shareholder in the beneficiary the comparator investor would be assumed also to be an investor and this may mean that he is guided by long term objectives.
- Public authorities have a wide margin of judgment, given the spectrum of commercial responses.
- In practice, state aid arises only where no rational operator would have entered into the transaction on those terms.

Applications under section 70 are determined by the application of ordinary judicial review principles:

- Decision-makers must consider only relevant matters and exclude irrelevant ones.
- They must take reasonable steps to inform themselves of relevant information adequately.
- A decision is irrational if it falls outside the range of reasonable outcomes or there is a demonstrable flaw in the reasoning, such as significant reliance on irrelevant factors, unsupported reasoning or a serious logical or methodological error.
- The view of officers or third parties are irrelevant unless they were communicated to the decision maker and taken into account during the decision-making process.

The United Kingdom Subsidy Control Regime statutory guidance (the "**Guidance**") published in January 2025 supplements this. Annex 1, Limb B2 states that:

- If there is any doubt as to whether financial assistance confers an economic advantage, public authorities should carry out a detailed analysis of the market in question.
- The CMO analysis will consider the market at the time at which the financial assistance is given. Policy considerations will not be relevant.
- Public authorities should obtain sufficient evidence, such as benchmarking, profitability analysis or third-party reports, to demonstrate that financial assistance could have been provided in the market by a private operator on the same terms.
- Compliance may be shown by using evidence that is specific to the financial assistance in question. For example, where financial assistance is given at the same time and on the same terms as a significant investment by a private operator ('pari passu' investment). Other evidence-based assessments may be undertaken, including the use of benchmarking and profitability analysis.
- Any evaluation of compliance with the CMO should be undertaken with input from experts with appropriate skills and experience. In cases where the commercial assessment is not straightforward, it is recommended that the public authorities commission a reputable third party to conduct a report as evidence.

The GMCA had a duty to have regard to the Guidance and apply it unless there was good reason to depart from it. The CAT also referred to the 2022 Regulations and the Commission reference rate.

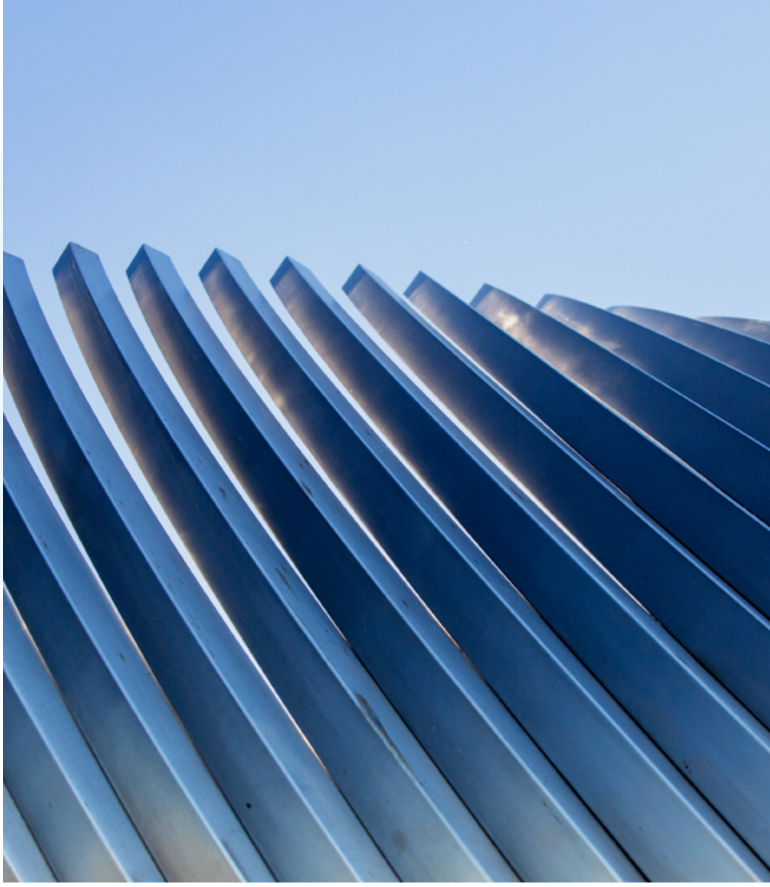
Issues

Although seven grounds were raised, the CAT distilled them into three key issues:

a. Has a subsidy decision been made by the Respondent within the meaning of section 70 of the Act? If so, when was the decision taken?

b. Would a CMO have approved the loans, and did the rates of interest and other charges applied reflect the market rate?

c. Did GMCA breach its duty of candour?



Decision

The CAT dismissed the appeal, finding the loans were granted on commercial terms and thus did not constitute subsidies within the meaning of section 2(1)(b). The process followed was held to be a rational one and not inherently defective, with various layers of governance and due diligence conducted by officers experienced in making lending decisions.

a. When was the subsidy decision made?

Under section 70(7) a subsidy decision means a decision to give a subsidy (as defined in section 2(1). Section 2(5) treats financial assistance as "given" where an enforceable right is acquired.

However, the CAT held that a section 70 application does not require assistance to have been given under section 2(5). Although enforceable rights arose only in November 2024, the relevant decision was made on 22 March 2024 when the GMCA approved the loans in principle.

b. Would a CMO have approved the loans?

Yes. The CAT found the loans would have been approved by a CMO and were on market terms. Key factors included:

- The terms, security for and conditions of the loans.
- GMCA's awareness of the need to comply with the CMO principle and section 3(2) of the SCA.
- While the GMCA did not conduct any profitability or benchmarking analysis, nor obtain any third-party report (routes suggested by the Guidance), the CAT was satisfied that the GMCA could reasonably conclude that there was no subsidy base on the extensive experience of its lending team and various governance bodies.
- While the IRSP post-dated the loan decision it reflected the thinking of the investment team as to why the rates were appropriate, which informed the papers before the GMCA at the time of the decision.
- GMCA's recent experience in lending for other Renaker schemes on a club basis where there was an independent report on the market.
- Analysis under the 2022 Regulations produced a low reference rate (5.3%) and was not used as the basis for the pricing of the loans. The rates ultimately adopted were in excess of that calculation and took into account the Commission's Reference Rate Communication.
- The final rates in all the circumstances were within what the CAT would expect to be available on the market and reflected the low-risk nature of the lending, given the terms, security and conditions.

c. Did the GMCA breach its duty of candour in the appeal?

The CAT dismissed claims that the GMCA breached its duty of candour.

- While a February 2024 meeting between the GMCA and Renaker was not addressed in witness statements, the existence of the meeting was disclosed and the CAT was confident that if any notes had been made, they would have been produced.
- The GMCA had made available a considerable volume of documentation and provide witness statements and the suggestion that the witness statements of the Director of Strategic Finance & Investment of GMCA with operational responsibility for the GMHILF were unsubstantiated and/or misleading was rejected. No application had been made to cross examine that witness and there was no reason to believe that her statements were misleading or untruthful.

However, this case may differ from other potential subsidy cases such as equity investments or below market sales as there are specific rules set out in the 2022 Regulations and the EU Reference Rate Communication for loans. Demonstrating compliance with these requirements was not sufficient in itself to satisfy the CMO principle but took the GMCA a long way. In addition, the GMCA had a sophisticated governance process and significant expertise on the market. Public authorities should assume that in most cases the Guidance ought to be followed rigorously and prepare an evidence-based case showing that the CMO principle, if relied on, is satisfied.

Thirdly, the CAT clarified that the trigger point for a section 70 challenge is once the decision to give financial assistance is made, even if enforceable rights have not yet arisen. Interested parties should be alert that time will start to run once a decision to give the subsidy has been made, not once the subsidy has been given. The rules on time limits are set out in section 71 of the SCA 2022. There is a one-month period after the date when the interested party first knew, or ought to have known, of the making of the subsidy decision within which it needs either to make a pre action information request or submit a notice of appeal.

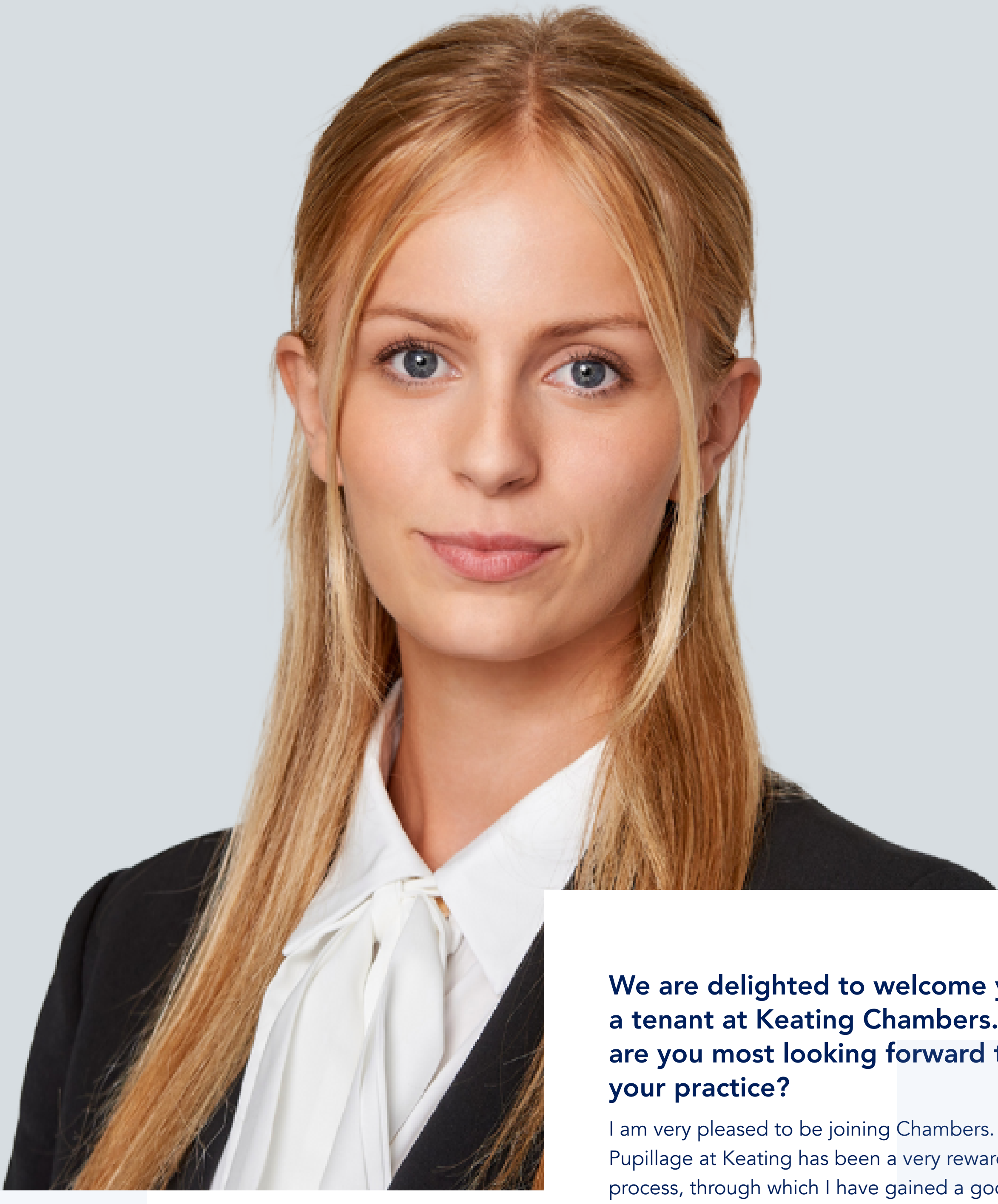
Fourthly, an applicant alleging breach of the duty of candour based on a suggestion that a witness is making unsubstantiated and misleading statements may wish to seek permission to conduct cross examination to make good that allegation. Annex 1 to the judgment contains a detailed rebuttal by the GMCA of the specific allegations made and this was accepted by the CAT without hearing live evidence.

Finally

it is notable that while the CAT acknowledged that a principle of judicial review is that matters and opinions are irrelevant unless they were communicated to the decision maker and taken into account during the decision-making process, but referred extensively to the IRSP, which was not finalised until some eight months after the subsidy decision was taken. The CAT was satisfied that the investment team and decision makers were mindful of the considerations set out in the IRSP, which was an evolving document, when the decision was taken. But possibly this is another matter which could have been tested by cross examination. It would be prudent as a general rule for public authorities to ensure that any supporting reports and documentation are put before the decision-maker before the potential subsidy decision is made.

By way of a post-script, the Court of Appeal on 28 October 2025 granted permission to appeal on all grounds, namely:

- Failure to apply established principles of judicial review in reviewing the respondent's decision to grant financial assistance.
- Error in law in concluding that the respondent had lawful regard to the statutory guidance on providing a subsidy where there was said to be no evidence that the relevant decision-making body had any such regard.
- Interpretation and application of the EU Commission Reference Rate Communication.
- Failure to take into account relevant considerations, including the terms of comparative commercial loan, concentration of risk in respect of the SPV's beneficial owner and the respondent's reliance (to obtain exemption from affordable housing requirements) on projections that the scheme was unviable / high risk.



Connie Trendle

Q&A

We are delighted to welcome you as a tenant at Keating Chambers. What are you most looking forward to in your practice?

I am very pleased to be joining Chambers. Pupillage at Keating has been a very rewarding process, through which I have gained a good insight into practice. As I develop my own practice, I hope to strike a good balance between cases in my own right and acting as a junior for other members of chambers. The former are a great opportunity for growing advocacy skills, and it is exciting to be able to take on a matter independently at this early stage of my career. The latter allows for exposure to high value matters, and I look forward to tackling the complexity of such cases and continuing to learn from members of chambers. In addition, I look forward to the new responsibility of providing advice on the general strategy of cases.

During your time at university, you successfully represented a student in the School Exclusion Project. How did that experience shape your views on advocacy?

This experience was very insightful, it taught me that good advocacy is not limited to performance at the final hearing, but begins from the moment you connect with the client. In a School Exclusion Project case, the matter is usually very sensitive and personal. It is important to develop a good rapport with the client, support them through the process, and distil their legal case from the personal reality of the difficult situation they find themselves in. Despite the different context, those skills are transferable to my work at Keating, and I have observed the importance of understanding and distilling the case with the client and witnesses at an early stage to encourage the latter success of the claim.

> I look forward to tackling the complexity of such cases and continuing to learn from members of chambers.

What drew you to specialise in construction and commercial law?

I applied to Keating whilst in my third year of university, so my initial focus was on the areas of law that I enjoyed the most, namely, contract and tort. The disputes that come to Keating, whilst in the context of a specialist industry, breed top contract and tort law cases. Whilst construction itself wasn't something I knew much about before coming to Keating, I was enticed by the opportunity to delve into technical issues which I have found add an interesting dimension to the disputes.

Can you share some of the most valuable lessons or insights you've gained during your pupillage?

I learnt so much during pupillage at Keating, so I will give my top three lessons. First, be exacting with the applicable test and equally exacting with your answer. Often you will have an intuitive answer to a legal question that is broadly correct, but spending the time to critique and better that answer allows you to present your point robustly. Second, preparation. The more preparation that you do, the more helpful you can be to your client and to the judge, which leads to quick and clear resolution of points. Third, become well versed in the technical matter yourself before you start drafting. In order to draft a technical matter you need to have a thorough understanding of the technical issue. This means taking the time to gain a thorough understanding, and avoiding merely assuming the expert's own opinion without understanding the steps they have taken to reach their conclusions.

Are there particular types of work or cases that you find especially engaging?

I particularly enjoy giving merits-based advice alongside drafting work in construction, engineering, and energy related disputes; in particular, those which involve contractual interpretation, delay, and/or negligence. I like taking the time to review and understand the factual complexity, and to develop strong legal analysis against that factual background. I can see the value in cementing the factual and legal analysis at an early stage, and translating that analysis into strong drafting of the claim.

Outside of chambers, how do you like to spend your time?

I am a big fan of netball and a keen player, so that is usually what I am doing outside of chambers. I also like to cook and eat out. I am currently working my way through a long list of restaurants in London to find the best places.

Key Cases

A selection of reported cases involving members of Keating Chambers.

John Sisk and Son Ltd v Capital & Centric (Rose) Ltd [2025] EWHC 594 (TCC)

The case concerned a project to design and construct two new residential buildings, together with the repair and refurbishment of two listed mills and associated works. Sisk was the contractor and C&C the employer. The contract was based on a JCT Design and Build Contract 2016, but with extensive amendments.

Clause 2.42 allocated risks relating to the existing site and structures to Sisk, subject to Item 2 of the 'Contract Clarifications'. Item 2 provided that C&C would ensure the existing buildings/works and obtain a warranty as to the suitability of the proposed works. A dispute arose as to whether the risk for the existing structures lay with Sisk or C&C. An adjudicator had previously found that the risk rested solely with Sisk.

The High Court ruled in favour of Sisk. It held that, on the proper construction of the contract, the risk of unsuitability of the existing structures, including their ability to support and facilitate the proposed works, lay with C&C. The Court found that the words "employer risk", when read against the column heading and the clarifications, supported this interpretation.

Simon Hargreaves KC acted for the Claimant.
Abdul Jinadu acted for the Defendant.

Toppan Holdings Ltd v Augusta 2008 LLP [2025] EWHC 1691 (TCC)

Augusta 2008 LLP (formerly Simply Construct") designed and built a luxury care home in Mill Hill, London. Toppan is the landlord and Abbey the tenant and operator. After the care home opened, fire safety defects were identified. Simply failed to carry out remedial works. Toppan incurred the costs of remedial works and associated professional fees, which it recovered by adjudication prior to trial. Toppan also lost a valuable offer to sell the care home, which resulted in abortive legal costs, associated losses and finance charges. Abbey sustained loss of profits during the remedial works.

At trial Toppan claimed its unrecovered losses on the aborted sale, abortive legal costs and associated losses. Abbey claimed its lost trading profits, abortive legal costs and overdraft charges. Judgment for the Claimants: £6.4 million inclusive of damages, interest and costs. The Claimants beat their Part 36 offer. The case turned on the evidence and the cross-examination. There is useful discussion of awards for loss of profits, remoteness of damage, and finance charges.

Tom Owen KC acted for the Claimants.

Vitsoe Ltd v Waugh Thistleton Architects Ltd [2025] EWHC 850 (TCC)

The claimant, a furniture manufacturer and distributor, engaged the defendant, an architectural services firm, in connection with the construction of its new headquarters, office and distribution facility in 2016. The project was procured via a construction management route. The roof panels of the facility were constructed using cross-laminated timber ("**CLT**"), which became wetted during construction following a sustained period of rainfall around Christmas 2016. Consequently, the CLT roof panels began to rot and decay, and had to be repaired and/or replaced.

The claimant brought proceedings for the allegedly negligent provision of architectural services, asserting inadequate designs in respect of moisture protection to the CLT roof panels and seeking remedial costs of £4,405,403.

HH Judge Martin Bowdery rejected the claim, holding that the scope of duties did not extend as the claimant contended. He found that the architect, as the designer, was obliged to provide design information, which it did through drawings and detailed specifications. The responsibility for completing detailed designs lay with the trade contractors. The architect was not under a duty to protect the roof works.

William Webb KC and Thomas Saunders acted for the Claimant.

URS Corp Ltd v BDW Trading Ltd [2025] UKSC 21

This was the first time that the Building Safety Act 2022 ("BSA") had been considered by the Supreme Court. BDW Trading Ltd, a major property developer, discovered in late 2019 that two high-rise residential developments (the "**Developments**") it had built contained design defects. The structural designs had been provided by URS Corporation Ltd, a firm of consultant engineers.

Between 2020 and 2021, BDW carried out remedial works on the Developments. By that time, it no longer held any proprietary interest in them, no claims had been made against it by owners or occupiers, and any such claims would have been time-barred. In March 2020, BDW nevertheless brought proceedings in negligence against URS to recover the costs of the remedial works.

In October 2021, following a trial of preliminary issues, Fraser J held that (i) URS's duty of care covered the claimed losses (save for reputational damage); (ii) those losses were recoverable in principle; (iii) they were not too remote; (iv) issues of causation and mitigation should be decided at trial; and (v) BDW's claim should not be struck out.

In June 2022, section 135 of the BSA came into force, retrospectively extending the limitation period for accrued claims under section 1 of the Defective Premises Act 1972 ("DPA") from 6 to 30 years. Section 1 imposes a duty on developers and consultants to construct dwellings properly. Relying on this change, BDW successfully applied to amend its pleadings to add claims under section 1 DPA and the Civil Liability (Contribution) Act 1978.

URS appealed both the preliminary issues decision and the amendment order. In July 2023, the Court of Appeal unanimously dismissed those appeals. The Supreme Court granted URS permission to appeal on four grounds but unanimously dismissed the appeal in its entirety.

Simon Hargreaves KC, David Sheard and Thomas Saunders acted for the Respondent.

Triathlon Homes LLP v Stratford Village Development Partnership [2025] EWCA Civ 846

This appeal concerns the first major case in which the First-tier Tribunal considered applications for a remediation contribution order ("**RCO**") under section 124 of the Building Safety Act 2022 ("**BSA**"). The RCOs require the Appellants, Stratford Village Development Partnership ("**SVDP**") and Get Living plc ("**Get Living**"), to pay substantial sums towards the costs of remedying fire safety defects in the external walls of five residential blocks in the East Village Estate in Stratford, East London. SVDP was the original developer of the estate, and Get Living is now effectively its owner.

The RCOs were made on the application of the First Respondent, Triathlon Homes LLP ("Triathlon"). Triathlon is a provider of social housing and has long leasehold interests in the social housing units in the blocks. Responsibility for managing the estate rests with the Second Respondent, East Village Management Ltd ("**EVML**"). EVML has incurred costs in engaging contractors to carry out the works required to remedy the fire safety defects.

Absent the BSA, Triathlon would have been liable to contribute to the costs incurred by EVML through its service charges. However, it is common ground that one effect of the BSA is that Triathlon is no longer required to make such payments. The principal effect of the RCOs is therefore to require SVDP and Get Living to pay EVML the costs that Triathlon would otherwise have borne.

There were two grounds of appeal, both of which were dismissed. Ground 1 was that the FTT erred in concluding that it was just and equitable to make RCOs against SVDP and Get Living in ten respects. Nugee LJ addressed each

of the ten sub-grounds in turn and rejected them all. Ground 2 was that the FTT was wrong to conclude that an RCO could be made in respect of costs incurred before section 124 came into force on 28 June 2022. The Court of Appeal agreed with the FTT. Passages from the Supreme Court decision in URS v BDW were found to support giving section 124 retrospective effect.

Jonathan Selby KC acted for the Appellants. Alexander Nissen KC acted for the First Respondent.

Wilson James Ltd v Tate Gallery Trustees [2025] 7 WLUK 320

The claimant had a contract to provide security services for the Defendant at various locations and had been doing so since about 2000. The defendant had begun a procurement process for security and visitor engagement assistance at its four locations. The contract was for 36 months and was worth about £27 million. Contractors were invited to tender at the end of 2024; the Claimant and another tenderer were invited to make final offers in January 2025. The Claimant was told that it had been unsuccessful and that the contract had been awarded to the other tenderer.

In February 2025, the claimant alleged breaches of the Public Contracts Regulations 2015 during the tender exercise and issued proceedings, leading to the automatic suspension of the new contract under Regulation 95. The Defendant denied any breach and applied to lift the suspension under Regulation 96.

The Court granted the Defendant's application to lift the automatic suspension, finding that damages would be an adequate remedy for the claimant as the unsuccessful tenderer. The Claimant's application for an expedited trial was refused, as the Court found no sufficient reason to justify expediting the claim.

Rhodri Williams KC and Ben Graff acted for the Defendant.

Keep Chiswell Green v Secretary of State for Housing, Communities and Local Government [2025] EWCA Civ 958

This appeal concerned a decision by the Secretary of State ("**the SoS**") to accept the recommendations of a planning inspector and grant planning permission for two large-scale residential developments in the green belt.

The local planning authority had refused planning permission for the developments because they were inappropriate in the green belt. The developers appealed, and after an inquiry the planning inspector recommended approval. Although he accepted that the developments would harm the green belt, he concluded that the local housing need amounted to very special circumstances justifying permission.

Lord Banner KC successfully acted for Cala Homes (Chiltern) Ltd in the Court of Appeal, resisting an appeal by Keep Chiswell Green.

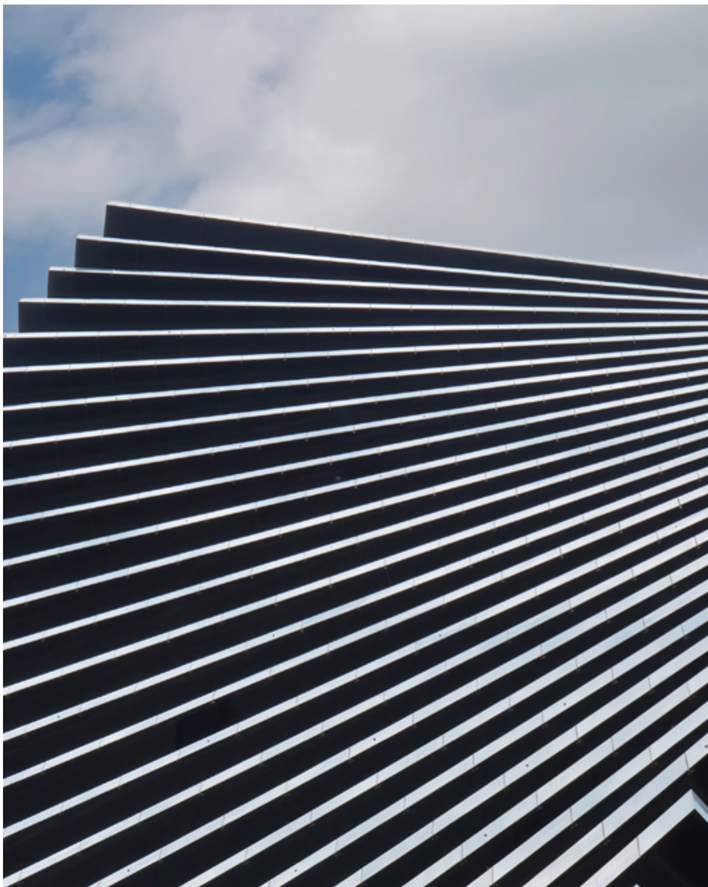
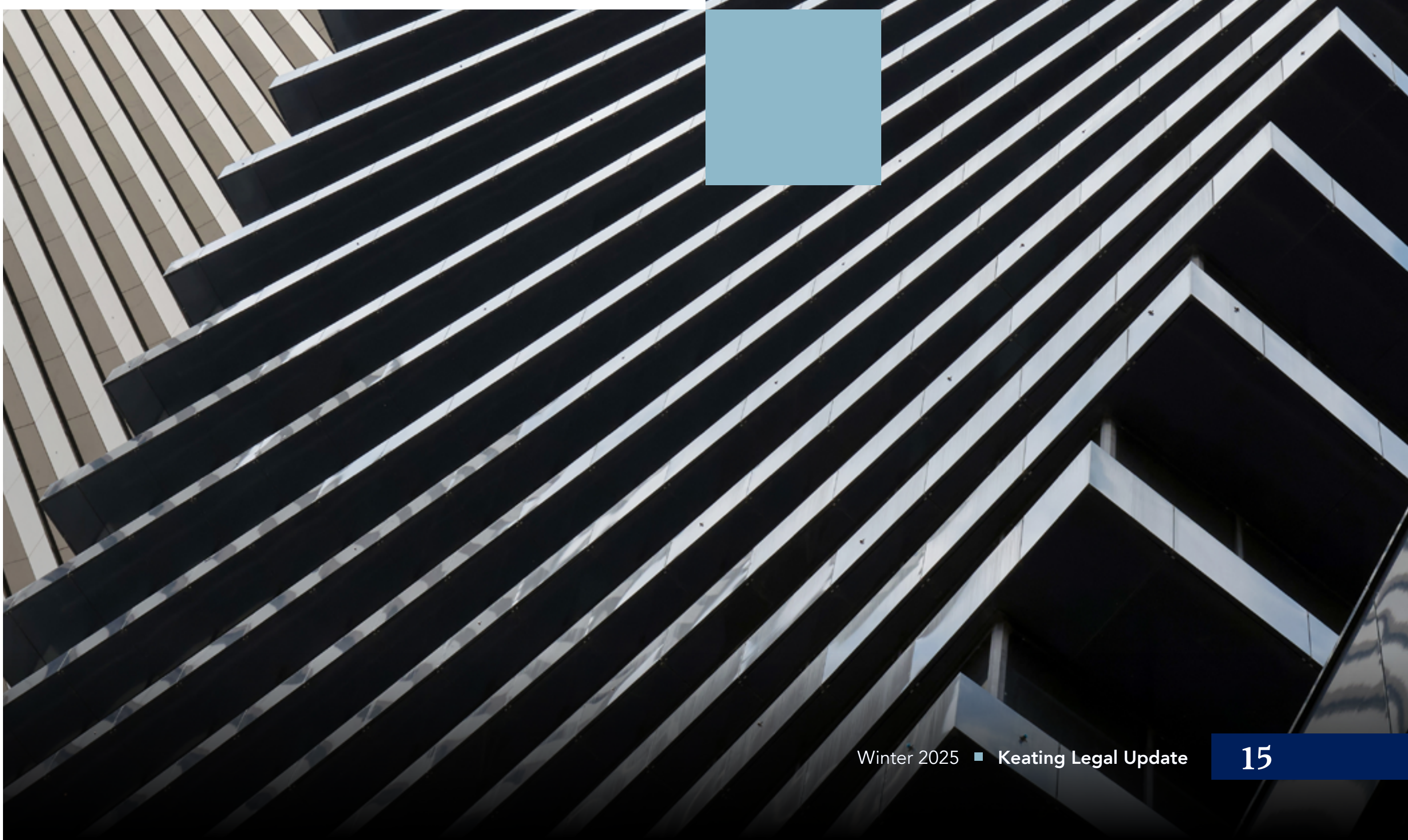
Buckinghamshire Council v FCC Buckinghamshire Ltd [2025] EWCA Civ 921

This appeal concerned the interpretation of a long-term waste management contract between Buckinghamshire Council and FCC Buckinghamshire Limited ("FCCB"). Under the contract, FCCB was required to receive and process household waste for which the Council was responsible. FCCB built and operated an energy from waste plant ("**Greatmoor**") and two waste transfer stations. FCCB was permitted to use these facilities to handle waste from other sources ("**third-party waste**"). The Council was entitled to a share of the resulting "third-party income", defined as income from third parties associated with the project. FCCB could deduct from such income the costs "directly incurred" to generate that income, provided that such costs were specifically and solely related to the generation of third-party income, and not the costs of handling or processing the third-party waste.

FCCB entered into a sub-contract with FCC Recycling Limited ("**FCCR**"), under which FCCR would supply third-party waste to FCCB. FCCR entered into a contract with Luton Borough Council to provide waste management services, with payment by way of a unitary charge. In an earlier set of proceedings, O'Farrell J concluded that third party income included income received by FCC affiliates from the North London Waste Authority and Hertfordshire County Council for handling waste that was disposed of at Greatmoor. That decision had not been challenged by way of appeal.

In the second set of proceedings, HHJ Stephen Davies found that (a) FCCB was entitled to deduct its haulage costs from income shared with the Council but had not established that any of its other costs were "directly incurred"; and (b) a proportion of the unitary charge that FCCB received from Luton constituted third party income to be shared with the Council. On appeal, FCCB argued that HHJ Stephen Davies had misconstrued costs "directly incurred" and had wrongly treated the unitary charge received from Luton as third-party income. Buckinghamshire cross-appealed, challenging the deductibility of haulage costs. The Court of Appeal dismissed FCCB's appeal and allowed Buckinghamshire's appeal. For construction practitioners, the interesting point lies in the analysis of "directly incurred" and "direct costs", concepts often relevant in construction contracts. However, caution is needed when applying this reasoning to differently worded contracts.

Justin Mort KC, John McMillan and Tom Coulson acted for the Claimant

Sean Wilken KC

Back to the future? Prospective issues in PFI / PPP – revisited[1]

It may seem hard to believe for some but on 12 November 2019, PFI turned 27 years old.[2] Quite apart from amounting to depressing evidence for those of us who have been in practice almost throughout that time as to the time that has passed, this anniversary is important for another reason. It means that the time is approaching for many of the assets created under the first generation of PFI projects to be handed back, as Sean Wilken QC discusses in this article.

[1] This article has its origin in a roundtable kindly hosted by DLA Piper; Affinitext and the Partnership Bulletin. The views and errors are my own and no one else's.

[2] PFI was announced in the then Chancellor of the Exchequer's Autumn Statement – see: https://publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1146/1146.pdf

[3] I use the term Concession for the rest of this article as this represents the more extreme case.

Editor's Note (2025): This article was originally written in 2019, however, its analysis of the complexities surrounding handback in PFI / PPP projects is highly relevant today, as many first-generation projects reach the end of their lifecycle. Readers should consider the passage of time when interpreting references to the age of the PFI model or the political, economic and legal context.

For most of us involved in disputes, our caseload over the years has involved the issues arising in procuring the project, obstacles to the asset being created (in the case of the Birmingham North Relief Road or the M6 Toll Road as it is now known, dealing with planning and protestors) and then defects in either the construction or operation of the asset. The idea that there might be a valuable asset to be handed at the end of the Concession Period has rarely crossed our minds. This is the case even though the whole point of the PFI / PPP system was to generate a valuable asset for future use at the private sector's risk.

As handback approaches, however, there will undoubtedly be disputes. The purpose of this Note is to discuss what type of disputes they might be and how we as litigators can best assist in the effective resolution of those disputes.

Obviously the provisions for handback will depend on whether this is a Project or Concession Agreement[3], the asset, the scale and length of the Concession and the respective bargaining positions of the parties at the original tender. One result of that is that handback and the issues associated with it can take a myriad of forms. That means, of course, it is difficult to draw out general principles and much will turn on the terms of the particular Concession.

This article does not therefore address any specific case or agreement wording. Nor does it offer an answer to a particular problem. The article instead addresses the range of issues that may arise breaking them down, for present purposes, into the following: what will be handed back; to whom and with what short / long term issues.

What will be handed back

Where the asset is a discrete building without tenants or leaseholders and where the Concessionaire holds the freehold free and clear, then, perhaps, it could be said that it is easy to identify what is being handed back.

Yet, even here, issues may arise:

- What will happen about the fixtures and fittings?
- How will provision be made for the transfer of staff under TUPE / the ARD? What is the undertaking being transferred?
- What happens to the know-how acquired over the life of the Concession?
- What provision has been made for any goodwill associated with the asset?
- What will happen to the data associated with the Concession?

Often, of course, the asset will not be a discrete building, the asset can include:

- Multiple structures on different sites which may have different forms of land tenure;
- Structures where, for example, the Concessionaire holds the freehold but there are numerous long term leases which will outlast the life of the Concession;
- Structures where the Concession owns the freehold but the asset is actually a leasehold asset;
- Assets on fragmented sites or sites with complex and fragmented title.

In each case, thought will have to be given to unbundling and then rebundling the asset – in fact and law – valuing that asset if there is an end of Concession payment to be made; and then seeing what, if any, market value the asset has.

None of the above are necessarily straightforward and it is easy to see how, without adequate preparation, there could be pitfalls.

To whom will the asset be handed

As to what will in fact happen much depends on the political complexion of the country at the time of handback and, of course, the state of the government's finances. That said, there are three options:

- A return to State ownership;
- A further concession period;
- Variants of outright sale, some form of sale and leaseback and so on.

> There are pragmatic difficulties in simply returning the asset to State ownership.

All things being politically equal, a return to State ownership will may well entail a capital cost on the part of Government and the only way to avoid that would be some form of renationalisation legislation. Here, depending on the compensation paid (or not paid) there may obviously be issues over valuation and, ultimately, if there is a State deprivation of property disputes under Article 1, Protocol 1 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998. Such complications aside, there are pragmatic difficulties in simply returning the asset to State ownership. In circumstances where the state has divested itself of the staff – both in terms of the staff associated with the asset but also in terms of monitoring, oversight, know-how and long term planning – how the returning asset will be cost effectively managed must be open to question.

The second will in theory attract the various forms of procurement regulations. Further, if there is any doubt over the asset being transferred, the state in which it is being transferred and the life cycle, that will complicate the tender process – both in terms of scope and price. Further still, provision would again have to be made for know-how, data and so on.

The third is a straightforward asset sale. It has the virtue of simplicity but could leave many questions unanswered – as to the nature of the rights retained and leased back; the costs and the long term future of the project.

Short and long tail liabilities

State and value of the asset(s)

With a short term single asset, the issue will be one of survey. Where there are multiple assets, this problem will be more logistically complicated.

Perhaps two of the thorniest problems will be surveys of a complicated estate of assets where there are differing assets in differing conditions.

Not only will there be the logistical issue of simply having the time and capability to carry out surveys (which will require forward planning) but there will also be two potential points of principle.

First, does the estate have a value greater than the sum of its parts? If so, how is that to be calculated? What is to happen if the estate has been viewed as a whole whilst within the PFI / PPP Scheme but government has different plans for it? The value to the State may be less if the government is to fragment it or to use it differently. The value invested by the PFI / PPP remains, however, the same.

The second problem is the operation of the compensation provisions (if any) or retention fund (if any).

As far as the compensation provisions are concerned, here one can see issues of principle – do the provisions allow for unbundling? What allowance does the formulation allow for intangibles associated with the assets (good will etc)? What provisions are made for the whole being greater than the sum of its parts? What account is taken of the possible difference between the value to the State and the accrued cost / value to the PFI / PPP entity?

As far as the retention fund is concerned, the size and allocation of the fund will depend on the surveys and whatever view is taken of the lifecycle of the asset or estate. Again there will be scope for differing views.

The final and most difficult problem will be how does one value those projects that have been historically "problematic" or poorly performing?

Here there are two scenarios – where the project has turned the corner and the problems have been resolved and where the project has not.

In the first, there is obviously the question of has the project in fact turned the corner. The more complicated issue is how does one value a historically difficult or damaged project? There will be a series of imponderables here – was the project problematic due to financial issues – cashflow; loss of profit; the need for additional equity? Or was it due to defects in the structures – latent or otherwise? Or were there problems with the service provided? In each case, there will be differential impacts on the value of the project.

In the second, an obvious issue is whether the fact that a less than perfect asset or estate is being returned to the State at the end of the life of the project was ever envisaged by the parties. After all the whole intent of concessions was that the State would receive something valuable at the end of life. Thus the parties may never have addressed the question of how an asset which has some but not the envisaged value will arise.

Lifecycle / Longevity

There will be two main issues here

First, what to do with an asset whose planned lifecycle is close to that of the Concession Agreement itself. Where the planned and actual lifecycle are the same, then there should be no issue. The Concession was for the life of the agreement and is being handed back on that basis. Where, however, the actual lifestyle is longer than the planned lifestyle (due to, for example, advances in technology or effective maintenance and upgrading during the concession), the parties may well not have intended that the Concessionaire would receive compensation. If that is clearly expressed in the wording, then the Concessionaire will simply have to absorb that fact. If it is not clearly expressed, however, there will be debates over how the compensation provisions are to be operated.

Second, inherent within PFI financial models are assumptions as to the spend over the life of the project – including what, if anything, will be spent on the repair, upgrading or replacement of assets under the Concession Agreement. In terms of the actual repair, upgrading and replacement, there will obviously be room for the exercise of commercial judgment – both in terms of that which is in fact necessary and, as the Concession draws to a close, that which the Concessionaire is willing to spend thereby reducing profit on an asset which is in any event transferring back.

These are all issues on which there is room for disagreement between the State and the Concessionaire. A Concessionaire may have acted perfectly legitimately but the State has unrealistic expectations as to what will be handed back. Alternatively, the State may legitimately suspect that there has been insufficient spend in the final years of the project. There is then the third possibility of a legitimate spend but with latent defects or problems which impact on the future lifecycle of the asset.

Disputes and dispute resolution

As can be seen, handback could give rise to questions of principle, of process and of quantification. With sufficient advance planning, it is to be hoped that the parties will allow sufficient time to work out their differences well in advance so that there can be a smooth and non-contentious handover.

> It is worth remembering that the Dispute Resolution Procedures in the Concession Agreement can often be the start rather than the end of the means to resolve a debate.

That does, however, require sufficient advance planning. That planning must also take account of the possibilities that the parties may, perfectly legitimately, not agree. In that process, the parties may need both to realise that they harmoniously can agree to disagree and use the Dispute Resolution Procedures in the Agreement to resolve the points of difference in the most cost effective and efficient fashion possible.

In that process, it is worth remembering that the Dispute Resolution Procedures in the Concession Agreement can often be the start rather than the end of the means to resolve a debate. The Dispute Resolution Procedures may provide, for example, for an Expert Determination.

> Handback will pose many challenges irrespective of the type of PFI / PPP arrangement and whether that project has been successful or not. Those challenges will be logistical,

This could be a snap, contentious determination or one where the parties had agreed what should be decided and how. On top of that, the parties might decide to put that Determination within an overall mediation or negotiation structure to resolve all the issues between them.

The important points for the parties to realise are that a) there are a number of means of resolving these difficult issues which can be tailored to the Concession Agreement, the project and the issues and which will avoid cost and time; and b) the resolution of disputes need not be antagonistic or contrary to a solid ongoing relationship between the parties. Indeed, the more parties realise that there are genuine differences of opinion between them which can be usefully resolved (as opposed to some zero sum game), the more efficient the process of resolving those disputes will be.

Conclusion

Handback will pose many challenges irrespective of the type of PFI / PPP arrangement and whether that project has been successful or not. Those challenges will be logistical, financial and legal – if not an interplay of all three. Given these challenges and the amounts at stake and even the possibility that some decisions will be very political, it is reasonable to expect at least one party will have unilateral recourse to dispute resolution procedures. That may turn what should be an agreed declaratory process into an unnecessarily contentious process.

Rosina Thomas: How the role in chambers has changed and where it will go

Rosina Thomas, Practice Manager

After completing my A-levels, I quickly realised that university wasn't the path for me. I've always been a practical learner and the thought of sitting through more lessons and completing further coursework just didn't appeal to me.

Still, even in today's world, there's a lingering pressure, an almost automatic assumption, that university is the only way to achieve success. But as I've come to learn first-hand, that simply isn't true.

One evening, while sitting around the dinner table with my family, probably halfway through a roast dinner, talk turned to my future. My family pointed out that I'd basically been our unofficial PA for years. My aunt then mentioned a friend of hers who worked as a Barristers' Clerk. I'd never heard of the role before, and to be honest, it sounded a bit mysterious. But after speaking to her friend and doing some digging, I found myself genuinely intrigued. It seemed like the perfect blend of organisation, responsibility,and fast-paced work.

I reached out to a recruitment agency, hoping to get my foot in the door—but was met with the all-too-familiar line: "There aren't any vacancies at the moment." It was disheartening, but I stayed hopeful. Thankfully, they kept me in mind, and not long after (I was half way up Chancery Lane), they called to say there was an interview opportunity that same day at 5RB. I had about ten minutes to research what clerking actually involved (turns out it's not a one-size-fits-all job) and learn what 5RB specialised in. With barely enough time to feel nervous, I walked into that interview and some how, got the job.

I started in February 2020, completely new to the world of clerking. From day one, I was welcomed by another junior female clerk who showed me the ropes and helped me settle in. We clicked instantly and have been best friends ever since. Although the more senior clerks and the Heads of Chambers were all male, I never once felt out of place or unheard. I was treated with respect, given responsibility, and made to feel like a valued part of the team.

But just a few weeks in, the world turned upside down. COVID-19 hit, and like so many others, I found myself working from home. As a brand-new Junior Clerk with little experience and a steep learning curve ahead of me, it was tough. I couldn't perform many of my usual tasks remotely, and I worried about falling behind. However, by July 2020, I was back in London, supporting Chambers during one of the biggest media trials of the time… yes, it was the Depp v Heard case it was truly one of the most remarkable experiences of my career. Even at such an early stage in my clerking journey, it provided an incredible platform for learning and growth. The level of responsibility I was entrusted with, particularly during such an unprecedented time, was both challenging and rewarding. I gained firsthand experience in liaising with high-profile clients and navigating the complexities of sensitive litigation. It was a steep learning curve, but one that significantly accelerated my development, I was even photographed and made it into the national newspapers most days. It was surreal, empty corridors, masked faces, but the barristers who were in Chambers were genuinely grateful for the help. That sense of appreciation and teamwork from all levels meant the world to me.

As things gradually returned to normal, my responsibilities began to grow. I started managing day-to-day practice operations and worked closely with Georgina Gills, who had worked her way up through the ranks. She became a real role model for me. I could see myself in her position one day and that belief gave me purpose.

The old-school clerking culture I had heard about the one of long boozy lunches and male-dominated offices was fading. At 5RB, diversity and equality weren't just buzzwords; they were embedded in the culture. Work was fairly allocated, regular diversity training was the norm, and people genuinely cared about inclusion. It was refreshing and motivating to be part of a Chambers that was actively evolving.

After three fulfilling years at 5RB, I was ready for a new challenge. I joined Keating Chambers, a leading set specialising in construction law, a field historically seen as male dominated. I expected to feel like a minority, but I was pleasantly surprised. The gender split in the staffing team, at all levels, was nearly even. I joined as an Assistant Practice Manager and found myself working closely alongside another female practice manager and a great clerking team that was not only highly skilled but also incredibly supportive.

> I had entered a profession I knew nothing about, grown into it through curiosity and resilience, and carved out a space where I felt confident and capable with the opportunities and high-level training Keating provide. As a young woman in this field, that's something I'm incredibly proud of.

Soon after I joined, one of the female Practice Managers went on maternity leave, the first clerk at Keating to do so. Her seamless return to work thereafter, supported by flexible hours and the option to work from home, sent a powerful message: this is a profession that's finally catching up to the needs of modern working women. This in turn results in a higher level of retention in the staffing team.

At Keating, 18 of our 74 members are women, nearly a quarter of Chambers. This proportion continues to grow year on year, driven by the increasing number of women successfully completing pupillage and becoming tenants. This trend reflects broader developments at the Bar, where the flexibility of a self-employed practice, combined support by strong clerking teams, makes it entirely possible to balance a busy and demanding practice with family life, for those who choose that path.

After just a year at Keating, I was promoted. That moment felt surreal, less because of the title, and more because of what it represented. I had entered a profession I knew nothing about, grown into it through curiosity and resilience, and carved out a space where I felt confident and capable with the opportunities and high-level training Keating provide. As a young woman in this field, that's something I'm incredibly proud of.

Of course, not everything is perfect. There are still subtle challenges. Imposter syndrome creeps in sometimes, especially when speaking to more traditional solicitors who might assume the "Practice Manager" must be a man. I've answered calls where the person on the other end asks to speak to the manager, and when I say, "That's me," there's a beat of surprise in their voice. Then there are some who breeze through the clerks' room with a cheerful "Hi chaps!" a harmless habit, I'm sure, but one that hints at the days when clerking was an all-male domain. Things like that don't bother me too much, but they do highlight how far we've come and how much further we can still go.

Despite this, I can confidently say that going into clerking has been one of the most rewarding decisions I've ever made. It's a career filled with variety, structure, growth, and above all, fantastic people. No two days are the same, and the transferable skills I've gained are invaluable.

In fact, I used to joke that I'd never start a clerking dynasty but never say never. My younger brother has now joined the profession as a junior clerk, proudly following in my footsteps. Watching him begin his own journey fills me with pride, and it's a reminder of just how far I've come.

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