

Keating Legal Update

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Welcome

to the latest edition of the Keating Legal Update

In this issue, we are pleased to bring you a further overview of recent developments across our core practice areas.

We would like to open this edition of Keating Legal Update by extending a warm welcome to Mark Barbour-Smith as Chief Executive Officer of Keating Chambers, effective from 15 June 2026. Mark's appointment reflects Keating Chambers' commitment to strengthening its strategic leadership and client service. The Executive Committee, members of Chambers and staff look forward to working with Mark, as he focuses on strategic planning, business development, marketing, operations and the continued enhancement of our client offering.

This edition includes articles on performance bonds, by Sean Wilken KC, payment notices and pay less notices by Abdul Jinadu and guest contributor Tim Mack of Jackson-Moore Associates and retention in construction contracts by Sean Wilken KC and Sarah Williams. Youcef Boussabaine has also prepared a case analysis looking at termination in light of *Providence v Hexagon*. Together, these contributions reflect the range and depth of work undertaken by our members of Chambers and offer insight into some of the key issues currently shaping the construction, infrastructure and energy sectors.

As usual, we have also included a summary of the most recent case updates involving members of Chambers. In addition, we are delighted to feature a Q&A with one of our newest tenants, Courtney Burrell-Eade, offering an insight into life at Keating Chambers and Courtney's background and practice since accepting the offer of tenancy with us last year.

Over the past few months, Keating Chambers has continued to contribute actively to industry dialogue and professional development through a series of seminars, webinars, publications and international engagements. This month, we are delighted to once again be participating in London International Disputes Week, as well as hosting a PFI seminar in London. Looking forward, we are planning our second BSA Symposium to take place in autumn 2026. These events reflect our ongoing commitment to knowledge-sharing and thought leadership across the sectors in which we operate.

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Sean Wilken KC¹

CR Construction v Barclays / Northern Gateway: The Latest Word on Performance Bonds

In *CR Construction (UK) Company Ltd v Barclays Bank Ltd & Northern Gateway (FEC) No 7 Ltd*² (“*CR Construction*”), the TCC most recently considered the bases on which a call on a performance bond could be blocked by an injunction.

The facts were not unusual for a call on a performance bond. Northern Gateway (“FEC”) was the Employer in relation to a development in Manchester – Victoria Riverside. FEC engaged CR Construction (UK) Company Ltd (“CR”) as the Contractor on the development under a 2016 JCT Design and Build Contract (“the Contract”). As is usual, FEC sought and obtained a performance bond (“the Bond”) provided by Barclays Bank Ltd (“Barclays”) in respect of CR’s performance under the Contract.³

The Bond’s operative clause (clause 1) stated that Bond would respond to debt or damages unpaid by CR with Barclays making payment on receipt of the requisite notice. The notice was as stipulated at clause 5.3:

“Any demand made by the Employer under this Deed must be accompanied by either:

- (a) what purports to be a certified copy of (i) a judgment of a court; (ii) an arbitrator’s award; or (iii) a decision*

¹ Sean was instructed by Phil Withey and Jake Parker-Bishop at Addleshaw Goddard for Northern Gateway.

² [2026] EWHC 202 (TCC).

³ The Bond here was a hybrid and not the usual JCT wording.

of an adjudicator, in each case against the Contractor in favour of the Employer under the Construction Contract; or

(b) a certificate from the Employer that is purported to be counter signed by the Employer's Agent, purportedly based on the non-performance of the Contractor, to confirm the Contractor's breach, and any one of which shall be conclusive evidence for the purposes of this Deed as to any liability of the Contractor to which such judgment, or award or decision or certification relates."

The Bond further provided that its operation (and therefore payment) was not impacted by termination of the Contract.

It was common ground that CR failed to meet Sectional Completion dates (though the causes of that failure were and are firmly in dispute). As a result, liquidated damages were certified by the Employer's Agent – Arcadis. CR neither paid nor challenged the liquidated damages and eventually a call was made on the Bond. In the meantime, CR's employment as Contractor under the Contract had been terminated. CR alleged that this termination of CR's employment under the Contract was in fact a repudiatory breach, a repudiatory breach which, after some delay, CR purported to accept.

As a result, of the call, CR sought an injunction against Barclays. FEC was neither included in the application for an injunction nor was FEC served or provided with any papers. When FEC complained and sought copies of the papers and potentially to be joined to any application for an injunction, CR refused. Thus, an oddity was created by which the party whose security was at issue and who actually knew about the development at issue was, if CR was to have its way, excluded from any application or hearing.

Unsurprisingly, FEC objected to that course of action and sought to be heard (a course of action that Barclays supported). After some considerable debate, CR consented to FEC being joined as an intervenor.

At the hearing, CR raised many and varied alleged bases for an injunction – so much so that some of the subsequent commentary has pointed out that the case could be an object lesson in the difficulties in obtaining an injunction.

FEC and Barclays, unsurprisingly, focussed on the wording of the Bond and in particular clause 5.3. Clause 5.3, they said, once complied with,⁴ operated as notice under clause 1 and the Bond responded as a "hybrid" on demand bond. That was and is an entirely orthodox position and one which the Court accepted. That on its own, as both Barclays and FEC submitted, was sufficient to defeat CR's claim.⁵ The injunction application therefore failed: none of the alleged bases for an injunction succeeded. All of that is as per the long-established authorities – *Harbottle, Edward Owen, Bolvinter*⁶ – a bond in this format is to be treated as cash.

There are, however, two points about *CR Construction* that are unusual and require, I would suggest, some further expansion. The first is the role or otherwise of FEC. The second is the discussion of autonomy.

“Instruments such as bonds are used to regulate cash flow on default such that the beneficiary is paid without debating the underlying dispute.”

As to the first, the Bond was FEC's security and, if successful, the injunction application would have stripped FEC of that security. Further, instruments such as bonds are used to regulate cash flow on default such that the beneficiary is paid without debating the underlying dispute. FEC by exclusion would be deprived of its right to seek to protect its cashflow.⁷ FEC therefore submitted that it was entitled to be present. The learned judge accepted that submission and in particular in relation to costs.⁸

⁴ As to which see *Oval (717) Ltd v Aegon Insurance Company (UK) Ltd* (1997) 85 B.L.R. 97; *IE Contractors Ltd v Lloyds Bank* [1989] 2 Lloyd's Rep. 205 at 207 but *cf Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep. 146 at 159; *AES-3C Maritza East 1 EOOD v Credit Agricole Corporate & Investment Bank* [2011] EWHC 123 (bond does not require same level of precision as a letter of credit); or a literal approach to the demand requirements may be rejected if that approach would strip the security of effect – *Seele Middle East FZE v Raiffeslandesbank* [2014] EWHC 343.

⁵ These elements of the case have been considered in several articles in the industry press and are not repeated here.

⁶ [1978] QB 146, 155G-156B; [1978] QB 159 at 171; [1984] 1 WLR 392, 393 respectively.

⁷ See judgment at [75].

⁸ Although there is a line of authority (mainly derived from the public law context) that a successful intervenor is not automatically entitled to their costs, here FEC was entitled to its costs as FEC had an interest – that under the Bond – to protect.

The learned judge was manifestly right so to do. The beneficiary's (here FEC) and the surety's (here Barclays) interests are not aligned.⁹ The surety will be interested in its reputation as someone who does or does not pay on an otherwise valid instrument¹⁰ and therefore on market and reputational risks in a wider context than that purely of the instrument at issue. The beneficiary will be concerned about its security, its cashflow and whether the beneficiary is protected on the project(s) at issue. Further, as indicated above, the beneficiary will know whether that which the defaulting party now says is correct *per se* or as a representation of the parties' various contentions – the surety will not. There are therefore principled and pragmatic reasons why the beneficiary should be joined and should be present at any application.

As to the second, it is established that financial instruments like letters of credit and bonds are autonomous from the underlying dispute. Thus, determining liability on the instrument – provided the instrument's requirements are met¹¹ – is not dependent on deciding the underlying merits of the dispute: the instrument is said to be autonomous. For this reason, a consideration of the underlying merits will, in the usual case, not be grounds for granting an injunction.

What *CR Construction* discusses is what autonomy may mean as against the surety and the beneficiary. As against the surety, the Court held, as per long-standing authority, the only ground on which a surety can be precluded against paying on an instrument (if the wording so provides) is fraud.¹² Fraud undermines and removes autonomy. Thus, a surety, where the instrument wording so provides, can only have an injunction granted against it if there is strong evidence of fraud of which the surety is aware.¹³

Fraud was not substantively alleged in *CR Construction* and so the claim against Barclays was bound to fail. As FEC was not a party – at CR's instigation – no injunction could be granted against FEC in any event.¹⁴

What the Court did, however, was to consider whether autonomy meant the same in relation to the beneficiary



as it did in relation to the surety. Applying *Simon Carves Ltd v Ensus UK Ltd*,¹⁵ the Court stated that the instrument was less autonomous in relation to the beneficiary than it was in relation to the surety.¹⁶ Thus, a beneficiary might be precluded from calling on an instrument if there was a clear contractual stipulation between the beneficiary and the defaulting party¹⁷ precluding the beneficiary from so calling. Fraud was thus not the only ground on which an injunction could be granted as against a beneficiary.

In *CR Construction*, the argument was hopeless. The JCT 2016 Design and Build contains no stipulation against calling on an instrument, the Contract did not so provide and CR could point to no such stipulation. Thus, any consideration could be said to be *obiter*. That said, however, this possible erosion of autonomy requires some consideration.

It must be remembered that both the surety and the beneficiary are parties to the instrument at issue and

⁹ Even if they agree on the proper construction of the instrument.

¹⁰ For the balance of this article as I am dealing with the general position (which would include letters of credit) I refer to the document at issue as an instrument rather than a bond.

¹¹ Bearing in mind those may require some form of decision as to the merits – see *Yuanda (UK) Co Ltd v Multiplex Construction Europe Limited* [2020] BLR 320.

¹² See [9 – 10].

¹³ See *Bolivinter supra*.

¹⁴ See [11]. The Court then went on to hold that a claim against FEC would have failed in any event – see [11] and [13 ff].

¹⁵ [2011] EWHC 657 (TCC). The proposition has been explained as follows: *It is clear from these authorities that an Injunction restraining a beneficiary from enforcing payment under an on demand bond will*

be granted only where it is shown either that the demand would be in breach of an express condition precedent to the right to demand payment or in breach of an implied obligation to similar effect providing such an implied term can be shown to the enhanced standard or it can be shown to the enhanced evidential standard that any demand is fraudulent unless (perhaps) an injunction has been sought before any question of enforcement arose. Shapoorji Pallonji & Company Private Ltd v Yumn Ltd & Anor [2021] EWHC 862 at [23].

¹⁶ There is an argument as to whether this statement is *obiter*, the Court having held that the application failed against Barclays and there was no application as against FEC.



there are reciprocal provisions (pay and be paid). Due, however, to the differing approaches to autonomy, the same reciprocity and the same wording (to pay and be paid) mean differing things to each party. Where there is a contractual stipulation in relation to a call on the instrument and assuming the surety is unaware of that stipulation, the surety is obliged to pay but the beneficiary is not entitled to receive. That is odd and is quite capable of creating uncertainty in relation to instruments whose sole purpose, it might be said, is certainty.

Factually, it is possible that where there is a contractual stipulation against calling on the instrument, the beneficiary (if it is aware of that stipulation) is acting in bad faith in making a call. If the surety is aware of that bad faith, then the fraud exception to autonomy would apply. There is no difficulty in this case.

Assume, however, that is not the case – what is the basis for the imbalance?¹⁸

There are, it seems to me, two answers.¹⁹

First, at common law, it is well established that if X claims on an instrument, the instrument pays but the loss in fact suffered is less than the amount paid, then X must make restitution.²⁰ Here, X by calling on the instrument is in breach of contract and the damages will be the amount called.²¹ X would be required to pay those damages or to repay the amount called. Thus, there would be the call and then a claim for instant repayment. Any money would, in essence, go round in a circle. The courts avoid that outcome by the concept of circuity of action; the action which starts the circle is blocked.²² Here, therefore, the beneficiary's call would likewise be blocked.

The second would be that equity would assist the defaulting party. A beneficiary calling on an instrument when it was clearly barred from so doing would not have clean hands. Similarly, the balance of convenience would hardly favour a beneficiary in those circumstances.²³ An injunction could therefore lie.²⁴

¹⁷ Which would have been CR here if there had been such a stipulation which there was not.

¹⁸ If there is one – see the point about the cases on point being *obiter*.

¹⁹ I put on one side the point that in many of cases, the discussion over the contractual bar is *obiter* – see eg *Simon Carves* itself; *Doosan Babcock Ltd v Comercializadora de Equipos y Materiales mabe Limitada* [2014] BLR 33.

²⁰ See eg *Cargill International SA v Bangladesh Sugar and Food Industries Corpn* [1998] 1 WLR 469.

²¹ The defaulting party is obliged to pay the surety all and any amounts paid under the call either by debit from the defaulting party's bank account or some other financial instrument.

²² *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; *The Brede* [1973] 2 Lloyd's Rep 333; *Post Office v Hampshire CC* [1980] 124; *Magdeev v Tsetkov* [2019] EWHC 1557.

²³ It has to be borne in mind, however, that it will remain very difficult for a defaulting party to show that the balance of convenience favours it – see *Harbottle (Mercantile) Ltd v National Westminster Bank* [1978] Q.B. 146 at 155.

²⁴ It must be noted, however, that interim injunctions granted in *Simon Carves* cases often do not survive further scrutiny – see eg *Sirius International Insurance Co v FAI General Insurance Ltd* [2003] 1 WLR 2214.

Payment Notices and Pay Less Notice: TCC Errors in 2025?



Abdul-Lateef Jinadu



Tim Mack, Partner at
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Following judgments in *Placefirst Construction Limited v Car Construction (North East) Limited¹* and *RBH Building Contractors Ltd v James²*,² this article considers the courts' decisions and their potential implications.

Despite the payment notice and pay less notice being born out of amendments to the Construction Act ['Amended Act'],³ which came into force in October 2011,⁴ over 14 years later they remain a source of debate. This is in no small part due to provisions within the Amended Act which permit the party receiving payment (payee) to serve a default payment notice which determines the amount due in payment to them, i.e. provisions for self-certification.

Prior to amendment of the Construction Act ['Unamended Act'], the paying party (payer) was required by the Unamended Act to give notice of the amount due in payment within 5 days of the due date,⁵ then allowed to give notice of the intention to withhold payment not

less than the prescribed period before the final date for payment.⁶ The withholding notice provided the payer with the opportunity to state the amount they wished to set off or abate from the amount which had been notified in payment (without re-stating the amount due in payment); it was required to specify the grounds for withholding and amount attributable to each ground. The notice requirements under the Unamended Act were simple and readily understood.

On the other hand, the Amended Act requires the contract to provide for either the payer, a specified person (such as a third party contract administrator) or payee to give notice of the amount due in payment within 5 days of the due date (the payment notice),⁷ but then permits the payer or specified person to serve a pay less notice which revises the amount due in payment not less than the prescribed period before the final date for payment.⁸ Both payment notices and any pay less notice are required to set out the sum due and basis on which it is calculated.⁹

While a payment notice is required to value the works to the due date,¹⁰ a pay less notice is required to value the works on the date that it is given.¹¹

¹ [2025] EWHC 100 (TCC); [2025] B.L.R. 175.

² [2025] EWHC 2005 (TCC); [2025] B.L.R. 517.

³ The 'Construction Act' being the colloquial term for the Housing Grants, Construction and Regeneration Act 1996, amendments were made to this act pursuant to the Local Democracy, Economic Development and Construction Act 2009.

⁴ Amendments to the Construction Act came into force pursuant to The Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 2) (England) Order 2011 on 01 October 2011.

⁵ Whilst the language of the Unamended Act is that of a payment notice, this name was given in the heading of sections 110A & 110B of the Amended Act.

⁶ In lieu of the parties agreeing the prescribed period, section 111(3) provided that this period was provided by the Scheme for Construction Contracts (being the seven day period provided by paragraph 10 in Part II of the Scheme for Construction Contracts Regulations 1998).

⁷ Section 110A(1).

⁸ Section 111.

⁹ Sections 110A(2) & 110A(3) for payment notices and section 111(4) for a pay less notice.

¹⁰ Sections 110A(2) & 110A(3).

¹¹ Section 111(4).

It is apt to note that the requirement for a payment notice is set in mandatory terms (“shall”),¹² whereas, the right to issue a pay less notice is set in discretionary terms (“may”).¹³

In contrast to a withholding notice under the Unamended Act, a pay less notice is not simply provided to confirm the amount being set off or deducted, it can also deploy the payer’s revised valuation of the works.¹⁴

To the extent that a payer fails to provide a payment notice which the contract requires them to provide, the Amended Act dictates that an application for payment from the payee – being an application which is permitted by the contract and which notifies the payer of the sum considered to be due and basis on which it is calculated – will serve for the purpose of a payment notice (thereby providing a default payment notice).¹⁵

Crucially, section 110B of the Amended Act provides that an application cannot serve as a default payment notice until such time as the payer has failed to provide a payment notice, i.e. it cannot determine the notified sum until the payer has failed to comply with their mandatory obligation to serve a payment notice within 5 days of the due date.¹⁶ It follows that an application cannot specify the sum due until such time as it becomes a default payment notice.

On the basis that the payer has not provided a payment notice and the payee has not provided a valid application (within the above terms), at any time after the payment notice should have been given, the Amended Act provides under section 110B(2) for the payee to give a default payment notice setting out the sum due and basis on which it is calculated – thereby providing an alternative basis for a default payment notice.

While the notified sum provided by a default payment notice can – in the same manner as a payment notice – be revised by a pay less notice from the payer or specified person,¹⁷ in lieu of a pay less notice, a default payment notice determines the amount due in payment.

The focus of payment provisions under the Amended Act, which are undoubtedly convoluted,¹⁸ is to determine the notified sum. The notified sum is firstly to be determined by way of a mandatory payment notice or default payment notice in lieu,¹⁹ and may subsequently be altered by a discretionary pay less notice.²⁰

¹² Section 110A(1).

¹³ Section 111(3).

¹⁴ *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC); [2015] B.L.R. 704 [32] (Akenhead J).

¹⁵ Section 110B(4).

¹⁶ Section 110B(4)(b) dictates that the application is to be regarded as a notice given pursuant to section 110B(2), being a notice which cannot be given unless and until the payer has failed to serve a payment notice in accordance with section 110A.



“The regime under the Amended Act depends on the issue of a series of notices in sequence.”

The requirement to serve notices in sequence is demonstrated by section 111(3) providing for the payer or specified person giving notice of the intention to pay less than the notified sum and section 111(4)(a) requiring that a pay less notice specifies the sum due on the date the notice is served. It therefore follows that if the intention is to pay less than the notified sum, that sum must first be established by a payment notice or default payment notice.

The nature of notices under the Amended Act was helpfully explained by Joanna Smith J in *Advance JV v Enisca Limited*;²¹ it being specifically noted at paragraph 36:

“This regime depends on the issue of a series of notices whereby the payer becomes liable to pay “the notified sum”. It is therefore necessary to identify the notice which, by trumping all others, contains “the notified sum” (section 111(2)). It is then possible to pay less than the notified sum (section 111(3)) subject to compliance with the requirements set out in the Act...”

¹⁷ Section 111(3).

¹⁸ When referring to payment provisions under the Amended Act in *Henia* (n 14), Akenhead J noted at paragraph 14: “These statutory requirements have led to unnecessarily complex provisions...”.

¹⁹ Consistent with section 111(2).

²⁰ As provided by section 111(6).

²¹ *Advance JV (A Joint Venture Between Balfour Beatty Group Limited, MWH Treatment Limited) v Enisca Limited* [2022] EWHC 1152 (TCC); [2022] B.L.R. 605.

The courts have provided guidance on the interpretation of notices; this guidance was again helpfully summarised by Joanna Smith J in *Advance JV v Enisca*.²² It has been firmly established that each notice must be in substance, form and intent the notice it purports to be.²³ Notices must be also be free from ambiguity.²⁴

It is clear that the principles that apply to the construction of the underlying contract also apply to notices; they must be construed objectively because the issue is how a reasonable recipient (in the relevant objective contextual scene) would have understood the notice.²⁵ While the purpose of a notice is relevant,²⁶ it has also been made clear that a notice cannot be condemned on grounds which are artificial and contrived.²⁷

It was also explained by Coulson J (as he then was) at paragraph 29 in *Grove v S&T*:²⁸

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

At this point, it should be uncontroversial to state – by virtue of the payment regime in the Amended Act providing for a payment notice, default payment notice and pay less notice – that the intention was to create distinct and separate notices which are to be served in

series. With payment notices being required in mandatory terms to determine the notified sum and pay less notices being permitted in discretionary to revise the notified sum on the day it is given.

In context of these statutory requirements, the judgments in *Placefirst* and *RBH* are considered in turn below.

Placefirst

In *Placefirst*, Car (the payee) had provided an application for payment and, rather than responding with a payment notice, Placefirst (the payer) responded with a pay less notice. Placefirst’s pay less notice was however provided 7 days after the application has been served (on the Interim Valuation Date), being before both the due date and last day for Placefirst to issue a payment notice (which was required within 5 days of the due date).²⁹

An adjudicator had decided that Car’s application provided a default payment notice and that Placefirst had failed to provide either a payment notice or valid pay less notice; a decision which Car sought to enforce and Placefirst brought Part 8 proceedings to resist.³⁰

In consideration of amendments to the JCT, HHJ Stephen Davies decided that the contract permitted Car to serve a payment notice pursuant to section 110A(3) in accordance with section 111(2)(b) by way of an application.³¹

The application was required to include: “a statement of the sum that [CAR] considers to be due to him...at the date when the relevant interim payment shall be calculated and the basis on which that sum is calculated”.³² The date when the interim payment was to be calculated was not explained, however, the judge decided that the provisions were compliant with the requirements of section 110A(3) and within the provisions of section 111(2)(b) because the valuation was not prospective.³³

HHJ Stephen Davies found that the amended terms of the JCT Design and Build Sub-Contract 2016 “substantially followed” the payment provision under the Amended Act,³⁴ and that Placefirst were required to give a payment notice not later than five days after the due date.³⁵

²² *ibid* [46] & [47]; this analysis has been adopted as a correct formulation of the law in *Placefirst* (n 1) [38] and *RBH* [49].

²³ *Henia* (n14) [17]; *Jawaby Property Investment Limited v The Interiors Group Limited* [2016] EWHC 557 (TCC); [2016] B.L.R. 328 [43] & [59] (Carr J); *Advance JV v Enisca* (n 21) [46] & [47] (Joanna Smith J).

²⁴ *Henia* (n14) [17]; *Jawaby* (n 23) [59]; *Advance JV v Enisca* (n 21) [47].

²⁵ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749, 767 (Lord Steyn); *Jawaby* (n 23) [43]; *Grove Developments Ltd v S&T (UK) Limited* [2018] EWHC 123 (TCC); [2018] Bus. L.R. 954 [21] (Coulson J); *Advance JV v Enisca* (n 21) [47].

²⁶ *Mannai* (n 25) 768; *Advance JV v Enisca* (n 21) [47].

²⁷ *Thomas Vale Construction Plc v Brookside Syston Limited* [2006] EWHC 3637 (TCC) [43] (HHJ Frances Kirkham); *Grove v S&T* (n 25) [26].

²⁸ (n 25).

²⁹ (n 1) [23].

³⁰ (n 1) [2] & [3].

³¹ (n 1) [49] & [52].

³² (n 1) [52a.].

³³ (n 1) [52b.].

³⁴ (n 1) [20].

³⁵ (n 1) [23].

“The Amended Act does not provide for both parties to give a payment notice.”

Given that an application was required under the contract to be submitted no later than the 25th day of the month,³⁶ being before the Interim Valuation Date (which was the last day of the month),³⁷ contrary to the judge’s findings, valuations provided by an application may have been intended to be prospective.³⁸

On the basis that the judge had already found that Placefirst (the payer) were required to give a payment notice,³⁹ a reading of section 110A(1) should have made it clear that either the payer or payee are to give a payment notice.⁴⁰ The Amended Act does not provide for both parties to give a payment notice, as demonstrated by the “or” in section 110A(1)(a); there is no provision for ‘and/or’, which would be required to give effect to the judge’s findings. Nor does the Amended Act provide a hierarchy between notices under section 111(2),⁴¹ which would be required if both the payer and payee were permitted to give a payment notice.⁴² Both sections 110A(1) and 111(2) indicate that two payment notices are not anticipated.

In order to resolve the difficulty presented by his findings, i.e. the contract purportedly allowing for a payment notice by both the payer and payee, without considering section 110A(5) on the implications of the contract failing to comply with section 110A(1), the judge went on to express that Car’s payment notice “would not have the effect of a payment notice unless and until Placefirst had failed to give a valid payer’s payment notice”.⁴³

Notwithstanding his finding that Car’s payment notice could not serve for that purpose unless and until Placefirst’s were in breach of their obligations to serve a payment notice, the judge found that Car’s application was a payment notice on the date it was served. Thereby determining that Placefirst’s pay less notice served after the notified sum had been determined within the provisions of section 111(2)(b) and valid, i.e. that Placefirst’s pay less notice was served within the provisions of section 111(5)(b).

In the authors’ opinion and with all due respect to the learned judge, the judge’s findings are unsustainable and wrong. The correct answer to the questions raised in this case are found within the provisions of the Amended Act; section 110A(1) simply does not provide for both the payer and payee to provide a payment notice. The difficulty with the judge’s findings is demonstrated by his implication of terms for when the payee’s notice will have effect, which give primacy to the payer’s notice. To the extent that the contract provided for two payment notices, which appears doubtful,⁴⁴ it would be contrary to the Amended Act, with the effect that the provisions of the Scheme would apply to the exclusion of offending terms in accordance with section 110A(5).

Despite reaching this conclusion, HHJ Stephen Davies went to consider an alternative finding that Car’s application became a default payment notice pursuant to section 110B, which determined the notified sum pursuant to section 111(2)(c). Given that these considerations are not essential to his decision, this dicta was obiter.

Again, in order to validate Placefirst’s pay less notice, despite accepting that a default notice provided by an application pursuant to section 110B(4) “will only become a [default] payment notice after the time for the payer to give a payment notice has elapsed” [emphasis added],⁴⁵ HHJ Stephen Davies found that an application does not transmute into a payment notice when the payer fails to provide a payment notice.⁴⁶

³⁶ (n 1) [22].

³⁷ (n 1) [21].

³⁸ Under the unamended JCT Design and Build Sub-Contract, clause 4.9 provides for interim payments to be valued to the Interim Valuation Date; consistent with applications being required no later than the 25th day of the month (as noted at paragraph 22 of *Placefirst*) and Interim Valuation Date being the last day of the month (as noted at paragraph 22 of *Placefirst*), applications may have been required to be value the works prospectively.

³⁹ (n 1) [23].

⁴⁰ That section 110A(1) provides for either the payer or payee to provide a payment notice appears to have been understood by HHJ Stephen Davies at paragraph 46 of his judgment.

⁴¹ Noting that a notice under section 111(2)(c) could only be provided if there was a default (as provided by section 110B).

⁴² Notwithstanding the point that this would lead to a battle of forms which parliament cannot sensibly have intended.

⁴³ (n 1) [52c].

⁴⁴ Whilst clause 4.6 of the JCT Design and Build Sub-Contract 2016 was amended to provide that the application was to be valued to state the sum due “at the date when the relevant interim payment shall be calculated” (which is set out at paragraph 52a. of this judgment), in context of the form of contract anticipating the sum due being calculated at the Interim Valuation Date under clause 4.9. In this context, the contract being amended to clarify this point must be unsurprising and does not support an application being a payee payment notice at the time it is served.

⁴⁵ (n 1) [61].

⁴⁶ (n 1) [60] & [61].



Conversely, he found that Car's application was a default payment notice on the date that it was served. Thereby determining that Placefirst's pay less notice was served after the default payment notice in accordance with the requirements of section 111(5)(b).

In reaching this conclusion the judge classified an application as "an advance payment notification"⁴⁷ and indicated that section 110B provides for an application to be "regarded as being a section 110A(3) notice".⁴⁸

When justifying his conclusion, the judge considered Car's submission – such that their application cannot be deemed to be a default payment notice under section 110B until Placefirst had failed to provide a payment notice – to be ingenious.⁴⁹

The learned judge found that Car's submission could not be supported based on a literal interpretation of the Amended Act and that there was no compelling reason why a payer should not be able to issue a pay less notice prior to the last date for them to issue a payment notice.⁵⁰

In the authors' opinion and again with all due respect to the learned judge, the judge's obiter findings on this point are again wrong. It is the authors' opinion that Car's submission was correct based on the status of an application prior to Placefirst's failure to serve a payment notice, along within a commonsense and literal reading of section 110B. The authors also consider there to be compelling reasons why a payer should not be permitted to serve a pay less notice prior to their default in failing to issue a payment notice.

Firstly, given that section 110B(4) refers to notice of "the sum that payee considers will become due", the judge's finding that an application is an advance payment notification gives too much weight to its status prior to the payer's breach of their mandatory obligation to provide a payment notice.

In context of the status afforded to an application in *Placefirst*, it is relevant to note that HHJ Stephen Davies noted at paragraph 75 of his illuminating judgment in *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL)*:⁵¹

"In my view a payment application cannot sensibly be described as a "notice". It could, I can see, be described as a "request", in the sense that there is little difference in substance between an application for payment and a request for payment..."

The terms of contract in *Lidl v 3CL*, alike the contract in *Placefirst*, dictated that an application would provide a default payment notice in the event that the payer failed to serve a payment notice.⁵²

HHJ Stephen Davies went on to conclude at paragraph 77 of *Lidl v 3CL* – on the basis that there was no condition precedent requiring service by hand, mail or courier with a copy transmitted by email and delivered, sent or transmitted to the address for the recipient's communications⁵³ – that an application was to fall within the category of a request. While the authors concur with HHJ Stephen Davies analysis in *Lidl v 3CL*, on this basis, an application cannot be considered to be a notice (i.e. default payment notice) on the date it is served.

Secondly, given that an application cannot serve as a default payment notice unless and until the payer was in breach of their mandatory obligation to provide a payment notice,⁵⁴ as a matter of commonsense, it cannot be deemed to be a default payment notice on the date that the application is given. The commonsense approach is that a default payment notice is deemed to be given following the payer's breach in failing to provide a payment notice, i.e. that it does in fact transmute into a default payment notice **following** the payer's breach (once the terms of the conditional terms are met).

Thirdly, based on a literal reading of sections 110B, section 110B(2) states in clear terms that a default payment notice can be served "at any time after the date"

⁴⁷ (n 1) [55].

⁴⁸ (n 1) [60].

⁴⁹ (n 1) [58] & [59]; there is an error in the final sentence of Car's case set in paragraph 58, which suggests that an application becomes an "effective payless notice", this should correctly state "default payment notice".

⁵⁰ (n 1) [60] & [61].

⁵¹ [2023] EWHC 2243 (TCC); [2023] B.L.R. 629.

⁵² This being consistent with the terms of clause 7.4.3(h) in the contract between *Lidl* and *3CL* (n 51), which is set out in Appendix 1 of this judgment.

⁵³ (n 51) [70] & [76].

⁵⁴ HHJ Stephen Davies stated at paragraph 61 of his judgment in *Placefirst* (n 1) that "...it is true that the interim payment application will only become a payment notice after the time for the payer to give a payment notice has elapsed..."

by which a payer was required to serve a payment notice in accordance with section 110B(1). It is therefore clear that a default payment notice cannot be served in accordance with section 110B(2) unless and until a payer has failed to provide a payment notice.

While an application can serve as a default payment notice under section 110B(4), notwithstanding the point that it is to be regarded as a notice complying with section 110A(3), it is also to be regarded as given pursuant to section 110B(2). Given that section 110B(2) expressly provides for a default payment notice to be given after a payer has failed to provide a payment notice, it simply cannot be regarded as a default payment notice on the date it is served; an application must correctly, as averred by Car, be deemed to be a default payment notice when the payer fails, in breach of contract, to provide a mandatory payment notice.

Furthermore, to the extent that parliament had intended for an application to serve as a default payment notice on the date it was served, there would have been no reason to include the words “*given pursuant to subsection (2)*” in section 110B(4). In order to support the judge’s conclusion, these words must actually be ignored.

Fourthly, contrary to the judge’s assertion of there being no compelling reason why a payer cannot serve a pay less notice before serving a payment notice, there is undoubtedly a compelling reason why a payer should not be permitted to issue a pay less notice prior to their default in issuing a payment notice. Consistent with the findings of Joanna Smith J in *Advance JV v Enisca*,⁵⁵ the regime under the Amended Act depends on the issue of a series of notices in sequence; to the extent that a payer could simply serve a pay less notice in response to an application, that fails to recognise the correct sequence of notices and in effect allows the payer to benefit from breach of their mandatory obligation to provide a payment notice.

Furthermore, to the extent that parliament had intended that a payer could elect to treat an application as a payment notice, that would be stated in the Amended Act. Conversely, section 110A(1) provides in mandatory terms for a construction contract to provide for either the payer or payee to issue a payment notice. In *Placefirst*, the parties had expressly agreed that Placefirst (the payee) would provide the payment notice and they failed to do so.

Moreover, consistent with the provisions of section 111(3), which provide that the payer or specified person may give a “*notice of the intention to pay less than the notified sum*”, given that an application cannot be deemed to

determine the notified sum on the date it is given, unless and until an application can be regarded as determining the notified sum, a pay less notice cannot be referable to it within the terms of section 111(3). Thus a pay less notice can only be provided once the application serves for the purpose of a default payment notice, which can only occur if the payer’s fails to serve a payment notice in accordance with section 110A.

“The logical reason why a payment notice should be served first is simply the fact that this is what the Amended Act expressly requires.”

In justification of his findings, the judge asserted that “*the payer may be perfectly happy with the interim payment application as such, but may also wish to make a specific deduction from the valuation in his payless notice*”,⁵⁶ and suggested that “*there is no logical reason why a payless notice should not be given before the time for giving a payment notice has elapsed*”.⁵⁷ This approach being justified by the judge on the basis that there is no difference of substance between a payment notice and pay less notice, along with the payer having discretion as to whether to serve both a payment notice and pay less notice or one or the other.⁵⁸

With respect, consistent with there being no difference in substance between a payment notice and pay less notice under the Amended Act, as accepted by the judge, to the extent that the payer simply wished to make specific deductions from an application, that does not justify a payer failing to comply with their mandatory obligation to serve a payment notice. The logical reason why a payment notice should be served first is simply the fact that this is what the Amended Act expressly requires.

As to the payer having discretion as whether to serve a payment notice and/or pay less notice, the payer’s only discretion relates to the right to serve a pay less notice. Whilst the act makes provision for a default payment notice in the event of a payer’s breach of their mandatory obligations to provide a payment notice, it is simply wrong to classify this obligation in discretionary terms.

⁵⁵ (n 21).

⁵⁷ (n 1) [63].

⁵⁶ (n 1) [62].

⁵⁸ (n 1) [63].

The judge went on to assert that his findings can be justified on the basis that the object of the Construction Act was to improve cash flow, i.e. on policy grounds, asserting that “if the payer had to wait until the interim payment application was deemed to have become a payee notice, that would potentially prevent the payee from obtaining an earlier payment of the amount which the payer included in its payless notice”.⁵⁹ Again, with respect, these finding wholly fail to understand that the issue of a pay less notice does not affect the final date for payment, the only provision within the Amended Act that would serve to delay the final date for payment is the requirement to serve a default payment notice after the payer has failed to comply with their mandatory obligation to serve a payment notice under section 110B(2), resulting in a delay to the final date for payment within the terms of section 110B(3). In none of the scenarios in this case were the provisions of section 110B(3) engaged.

While HHJ Stephen Davies judgment in *Placefirst* may have avoided a windfall (the adjudicator having found that £867,031.36 was due in payment), which may have weighed in the learned judge’s findings, in the authors view, this element of his judgment relaxes or wrongly interprets the provisions of section 110B and was wrongly decided.

It is therefore submitted, whether or not a default payment notice is considered to be desirable or warranted (which is a wider debate), that the facts in *Placefirst* and provisions of the Amended Act do not support a finding that the pay less notice was validly served.

The judge went on to consider a further alternative that Placefirst gave a payment notice, finding that “there is no reason in principle why a payment notice and a payless notice cannot be served at the same time under cover of the same letter or email or other communication”,⁶⁰ and concluding that Placefirst served both a payment notice and pay less notice at the same time.⁶¹

HHJ Stephen Davies noted that Placefirst’s email of 31 July 2024, which he found to provide both a payment notice and pay less notice, stated:⁶²

“Please find the attached Payless Notice and Valuation 30 to support, in relation to your AFP 30 received on 24 July 2024. In consideration of the delays to the sub-contact works there is a balance due in the sum of (£22,812.15)” [emphasis added].

Car’s primary contention appears to be that Placefirst’s worksheet “could not objectively have been intended and understood as a payment notice”.⁶³

“It cannot be said that Placefirst’s purported payment notice was free from ambiguity.”

The judge noted that the excel workbook titled “Valuation 30.xlsm” included a “summary” worksheet which set out the gross valuation and amount due in payment,⁶⁴ along with a ‘payment certificate’ worksheet which contained a more detailed breakdown than the summary.⁶⁵

In the authors opinion, while the workbook titled “Valuation 30.xlsm” appears to have the substance and form of a payment notice, it is clear from the covering email provided by Placefirst that they lacked the requisite intent to serve a pay less notice. The language of Placefirst’s email makes it clear that that the excel workbook titled “Valuation 30.xlsm” was provided to “support” their pay less notice. Objectively, it must have been intended to provide the basis on which the sum considered to be due in Placefirst’s pay less notice was calculated (as section 111(4) requires).

Furthermore, on the basis that section 111(5) dictates that a pay less notice cannot be given before the notified sum has been determined, the provisions of section 111 cannot be read in a manner which permits the service of a payment notice and pay less notice precisely at the same time. Consistent with the findings of Joanna Smith J in *Advance JV v Enisca*, it is again noted that the regime under the Amended Act depends on a series of notices in sequence, dictating that a pay less notice must be served after a payment notice.

It is additionally relevant to note, as demonstrated by Placefirst’s alternative propositions as to what constituted the payment notice – i.e. that “the payment notice comprised either the email itself, or the email read with the summary worksheet or with the sub-contractor payment certificate, or the summary worksheet by itself, or the sub-contractor payment certificate worksheet by itself”⁶⁶ – that it cannot be said that Placefirst’s purported payment notice was free from ambiguity.

Alike the judge’s obiter findings on the validity of Placefirst’s pay less notice and again with all due respect to the learned judge, his obiter findings in respect Placefirst purportedly serving a payment notice are considered to be wrong.

It is respectfully submitted that *Placefirst* should be a case confined to its own facts and that HHJ Stephen Davies obiter findings should not be followed.

⁵⁹ (n 1) [63].

⁶⁰ (n 1) [69].

⁶¹ (n 1) [85].

⁶² (n 1) [31].

⁶³ (n 1) [72].

⁶⁴ (n 1) [30], [33] & [34].

⁶⁵ (n 1) [35].

⁶⁶ (n 1) [70].



RBH

In *RBH*, Deputy High Court Judge Neil Moody KC found that there was a realistic prospect that the contract was with a residential occupier, thereby findings that the adjudicator lacked jurisdiction and declined to enforce the adjudicator's decision.⁶⁷ These findings are not considered controversial and provided a complete defence to the enforcement proceedings brought under CPR Part 24.⁶⁸

In response to James' claim under CPR Part 8 that the adjudicator was wrong and that James has served a valid pay less notice,⁶⁹ Deputy High Court Judge Neil Moody KC went on to consider whether James has served a valid pay less notice. It is made clear that the judge had been asked to decide whether James had served a valid pay less notice regardless of his findings in respect of the enforcement proceedings.⁷⁰

It is also apt to note, given that the contract was found to have been made orally with limited terms,⁷¹ to the extent that the Amended Act was not statutorily implied because the residential occupier exception under section 106 was engaged (as the judge had found), there could be no requirement for the service of a pay less notice in accordance with section 111. In this context, Neil Moody KC's consideration of the Part 8 claim is obiter.

James' purported pay less notice is set out verbatim at paragraph 7 and includes a clear statement at the head of this document "*Notice of intention to withhold payment*"; this letter went on to explain:

"We write in connection with the Application for Payment dated 18 November 2024... and hereby notify of you of our intention to withhold payment of the sum claimed. We intend to withhold payment of £663,016.16 and accordingly intend to make payment of £0."

This letter went on to set out the grounds for withholding and specifically in respect of seven of the eleven identified grounds for withhold the amount attributable to that ground. The total of identified amounts being the sum of £295,622.97, i.e. some £367,393.19 less than the amount claimed in RBH's application. Notwithstanding this discrepancy, the amount stated in James' purported pay less notice was stated to be £nil.

Consistent with the stated intent in their notice, it is clear that James intended to serve a withholding notice, i.e. a notice which stated the amount they wished to set off or abate from the amount which had been notified in payment.

Despite their intention to provide a withholding notice, on the basis that it provides the amount due and basis on which it is calculated (as section 111(4) of the Amended Act

⁶⁷ (n 2) [45].

⁶⁸ These findings were supported on appeal: *RBH Building Contractors Ltd v James* [2026] EWCA Civ 511 [18]-[67] (Coulson LJ).

⁶⁹ (n 2) [2].

⁷⁰ (n 2) [18] & [46].

⁷¹ (n 2) [5].

requires), there can be nothing wrong in principle with a pay less notice simply explaining deductions from the notified sum in the format of a withholding notice.⁷² Therefore, to this extent, seeking to condemn the purported pay less notice simply on the basis that it is a withholding notice could be construed as artificial and contrived.⁷³

Furthermore, whilst James' purported pay less notice does not expressly state that RBH's application is accepted to provide the notified sum, it is clearly implied by stating the intention to withhold payment from it. It therefore does not appear unreasonable, circumstanced as the parties were in the contextual scene, to accept that reference to the application in James' purported pay less notice indicates that sums are being withheld from the notified sum thereby provided.

Conversely, while it is established that the basis on which the sum due may be specified by reference to another "clearly-identified document" (which is not attached),⁷⁴ in the authors' opinion, it cannot be correct to retrospectively add sums to identified grounds for withholding in order to support the calculation for deductions amounting to £663,016.16 in a pay less notice (as accepted by the judge in *RBH*).

In this case, there are simply no figures which could support the suggested withholding of some £663,016.16 in James' purported pay less notice. In this regard, the judge expressed at paragraph 55 that **"I do not accept that the letter had to set out an arithmetical calculation in order to amount to a valid payless notice" and that this would "read into the statute an additional requirement that does not appear in section 111 and would be to take an overly prescriptive approach"**.

Given that both a payment notice and pay less notice are required to specify the sum due and basis on which it is calculated, it is difficult to see how the failure to provide an arithmetical calculation (which supports the sum stated as due) can be excused – this must be required to set out the basis on which the sum due is calculated.

In contrast to the judge's findings, this must be a case within the guidance provided by Lord Bannatyne in *Muir Construction Limited v Kapital Residential Limited*,⁷⁵ which was set out with approval by Coulson J in *Grove v S&T*:⁷⁶

"From none of the information provided could the reasonable recipient work out the basis on which the zero sum figure was calculated. There is no calculation put forward which would allow the reasonable recipient to understand how that figure is arrived at..." [emphasis added].

Before considering findings on appeal, it is worth remembering, given that the adopted format is that of a withholding notice, that the Unamended Act required a withholding notice to specify the grounds for withholding and amount attributable to each ground. Therefore, while Sir Peter Coulson expressed the view that *"a withholding notice is now a payless notice, but the basic requirements of such a notice seem to remain unchanged"*,⁷⁷ if the notice provided by James did not meet the requirements for a withholding notice, it cannot sensibly be found to meet the requirements for a pay less notice.

It is therefore difficult to see how simply identifying the grounds for withholding payment, without the amount attributable to each ground, can specify the basis on which the sum is calculated (as the Amended Act requires).

While the judge considered himself able to interrogate the application in order to retrospectively add sums to identified grounds for withholding, the authors consider this action to be improving the notice to provide sums which are simply not provided and calculation which this document does not permit.

It is therefore pertinent to note Coulson J's (as he then was) findings in *Letchworth Roofing Company v Sterling Building Company*,⁷⁸ wherein it was explained that *"a withholding notice will stand or fall on its contents and cannot be subsequently improved or amended"*.⁷⁹

The nature of improvement to the James' purported pay less notice is demonstrated by the table at paragraph 53 of the Neil Moody KC's judgment; this table makes reference to the location of sums within RBH's application which are simply not provided in James' pay less notice. These include reference to multiple lines (i.e. multiple items) within the spreadsheet provided as part of RBH's application for items where no sum was identified in the withholding notice.

⁷² This being a practical view in the terms suggested by Coulson J at paragraph 24 in *Grove v S&T* (n 25), in reliance on his findings at paragraph 14 in *Windglass Windows Ltd v Capital Skyline Construction Ltd* [2009] EWHC 2022 (TCC); 126 Con. L.R. 118.

⁷³ Alternatively, consistent with findings of Mr Alexander Nissen QS (sitting as Deputy High Court Judge) at paragraph 58 in *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Limited* [2017] EWHC (TCC), *"intention must be derived from the manner in which it would have informed the reasonable recipient"*, dictating an intention to serve a pay less notice.

⁷⁴ *Grove v S&T* (n 25) [34]; as approved on appeal: *S&T (UK) Limited v Grove Developments Limited* [2018] EWCA Civ 2448; [2019] Bus. L.R. 1847 [46]-[59] (Sir Rupert Jackson).

⁷⁵ [2017] CSOH 132.

⁷⁶ (n 25) [31].

⁷⁷ Lord Justice Coulson, *Coulson on Construction Adjudication* (4th edn, OUP 2018), para 3.04.

⁷⁸ [2009] EWHC 1119 (TCC); [2009] C.I.L.L. 2717.

⁷⁹ *ibid* [22].

A withholding notice will stand or fall on its contents and cannot be subsequently improved or amended.”

It is also apt to note the findings of Deputy High Court Judge Simon Lofthouse KC regarding the basis of calculation for a payment notice, which applies equally to a pay less notice,⁸⁰ at paragraph 29 of *Laing O'Rourke Delivery Limited v Shepperton Studios Limited*:⁸¹

“...what is not required or envisaged when considering the validity of such notices is an enquiry into the detail passing between employer and contractor to see if, regardless of the failure to comply with the contractual requirements, the contractor was nonetheless aware of the breakdown.”

It cannot be for the recipient to guess which items and values were intended to be included, but were not in fact specified as included in terms of value or clear reference. While it is plainly a matter of fact and degree, the authors respectfully submit that James' purported pay less notice did not comply with the requirements of the Amended Act and that this obiter part of Neil Moody KC's judgment was wrongly decided.

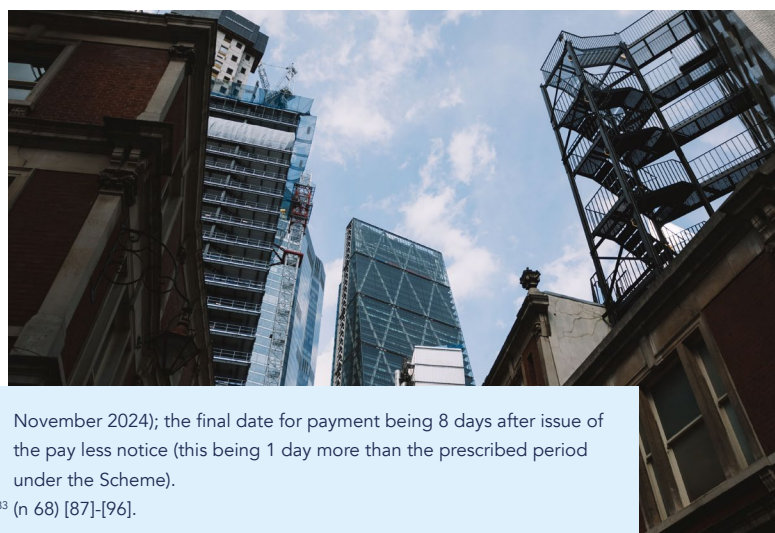
In contrast to the view expressed above, Coulson LJ found on appeal that the pay less notice was valid.

It is apt to note, when setting out principles from authorities, that Coulson LJ expressed at paragraph 85 of his judgment:

“In summary, the content of payment notices and payless notices should be considered in a common-sense way. They should not be allowed to become tick box exercises, or traps for the unwary. In reality, the question is a simple one. Does the payment notice explain in a tolerably clear way what is due and why? Does the payless notice explain, also in a tolerably clear way, what (if any) part of the payment notice is said to be due, and why less is being paid than has been sought? It is tempting to regard everything else as lawyerly over-complication.”

Then, in reaching his decision, Coulson LJ expressed that the payment application (being the default payment notice) was an unsatisfactory document and in effect a final account claim (which provided relevant background); that the letter providing the pay less notice had the requisite substance and was tolerably clear why the entirety of the sum claimed was being withheld (there being nothing to the point that it referred to withholding); that the identification of grounds for withholding required considerable drilling down into the spreadsheet provided with the payment application, and that RBH having to scabble through the spreadsheet to work out the complaints and their value arose from the sketchy nature of their application; as the party preparing the spreadsheet provided with the payment application, RBH must be taken to have known the value of disputed line items (this again being part of the relevant context); that the timing of the payment application (which had clearly taken some time to prepare and came without warning) and James only having just over a fortnight to prepare a response to what was a final account claim was an unreasonably short period,⁸² which led to a conclusion that this was a smash and grab claim (this again forming part of the relevant background); while the value of disputed items was £1.2m (which provided the maximum potential dispute), it was not necessary to counterclaim any balance when asserting that nothing was due to RBH; that the pay less notice provided a clear and unequivocal agenda for adjudication and did exactly what it was supposed to do; and that it was very important that payment notices and payless notices do not become a technical battleground where a party seeks a potentially unfair advantage by relying on the short time periods to recover or withhold sums that could not be justified on a detailed analysis.⁸³

With due deference to the findings of Coulson LJ, it appears that the courts are advocating a more purposive approach to the interpretation of payment notices and pay less notices, which appears to reflect wider considerations on the desirability of smash and grab claims.



⁸⁰ *Grove v S&T* (n 25) [27] (Coulson J); *RBH v James* (n 68) [82] (Coulson LJ).

⁸¹ [2026] EWHC 612 (TCC).

⁸² There were 9 days between the date of the payment application (18 November 2024) and the letter providing the pay less notice (27

November 2024); the final date for payment being 8 days after issue of the pay less notice (this being 1 day more than the prescribed period under the Scheme).

⁸³ (n 68) [87]-[96].



Key Cases

A selection of reported cases involving members of Keating Chambers.

Galliford Try Construction Ltd v Arcadis Consulting (UK) Ltd [2025] EWHC 3002 (TCC)

This case concerned applications to extend a stay of proceedings and time for service of the Claim Form and Particulars of Claim in relation to the design and construction of a multi-million-pound city centre library and history centre for the University of Worcester. Under a Building Contract dated 29 January 2010, the Claimant managed the financing, design, construction, and commissioning of the project. Protective proceedings were issued on 26 January 2024, and the Court granted a stay to 22 February 2025. A consent order set a timetable for compliance with the Pre-Action Protocol, including a Without Prejudice meeting originally scheduled by 22 November 2024, later postponed to 31 March 2025.

The Defendants argued that the stay expired and the Claimant failed to serve the Claim Form by 26 February 2025. The key issues were whether the parties' agreement to postpone the meeting implied an extension of the stay and whether an extension of time for service was justified.

The TCC refused the applications, holding there was no agreement to extend the stay, and any such agreement would not comply with CPR r. 2.11. Postponing the meeting alone did not evidence agreement to a stay. Under CPR r. 7.6(3), a stay required a court order, and the retrospective extension request failed. The Court lacked jurisdiction to extend time, and the Claim Form was struck out.

James Thompson acted for the Claimant. James Frampton acted for the Second Defendant. Peter Brogden acted for the Third Defendant.

CR Construction (UK) Co Ltd v Barclays Bank Plc [2026] EWHC 202 (TCC)

Sean Wilken KC acted for the successful Intervener. Please refer to the article on page 04 for a full analysis.

Vivid Housing Ltd v Allianz Global Corporate & Specialty SE [2025] EWHC 3315 (TCC)

This case concerned an application by Allianz for summary judgment in a claim brought by Vivid Housing Ltd under a housing warranty insurance policy. Vivid is the freehold owner of an 82-flat development insured under a policy issued by Building LifePlans Ltd acting as cover-holder for Allianz. The policy provided 12 years of cover from 22 May 2008 and indemnified the insured for the cost of repairing or replacing the premises where a defect caused destruction, physical damage or the threat of imminent destruction or damage requiring immediate remedial measures during the policy period.

Vivid alleged five categories of defects: combustible Rockpanel cladding, missing vertical cavity barriers, missing or defective horizontal cavity barriers, defective cladding bracketry and construction debris within cavities. It claimed these defects created a risk of fire spread and potential physical damage. Allianz argued that the policy only covered defects posing a real and imminent threat of destruction or damage requiring immediate remedial action, and that none of the alleged defects met this threshold.

The court refused summary judgment in relation to the cladding, cavity barrier and debris defects, finding Vivid had a realistic prospect of showing that, as of 2019,

there was a sufficiently serious and imminent risk of fire. However, summary judgment was granted for the bracketry defect because there was no evidence that cladding detachment posed an imminent risk of damage. Allianz has since been granted permission to appeal.

Charlie Thompson acted for the successful Claimant / Respondent.



Darchem Engineering Ltd v Bouygues Travaux Publics [2026] EWHC 220 (TCC)

The Claimant sought summary judgment to enforce an adjudication decision awarding £23,944,012. The dispute arose under a subcontract relating to the manufacture, delivery, installation and testing of stainless-steel pools, pits and tanks for the Hinkley Point C nuclear power station.

The subcontract was entered into between two unincorporated joint ventures (JVs). The main contractor JV comprised Bouygues Travaux Publics and Laing O'Rourke Delivery Limited, operating as BYLOR. The subcontractor JV comprised Darchem and Framatome Limited, operating as EDEL.

Darchem commenced three adjudications alone, stating it was acting jointly and severally as the subcontractor under the subcontract. The adjudicator rejected jurisdictional objections and awarded Darchem £23.9 million. In enforcement proceedings, the defendant argued that Darchem had no right to commence adjudication in its own name because it was not itself a party to the subcontract.

The court dismissed the enforcement claim. It held that the subcontract was between the two JVs as entities, not their individual members. The term "Party" referred to the JV itself unless expressly stated otherwise. As Darchem alone was not a party to the subcontract, it had no authority to commence adjudication, and the adjudicator lacked jurisdiction.

Paul Buckingham KC and James Frampton acted for the Claimants.

Edgewater (Stevenage) Ltd v Grey GR Ltd Partnership [2026] UKUT 18 (LC)

This case concerned an appeal against a First-tier Tribunal ("FTT") decision to make a remediation contribution order ("RCO") under the Building Safety Act 2022 ("BSA") in relation to Vista Tower, a 16-storey residential building in Stevenage. After the Grenfell Tower tragedy, investigations revealed significant fire safety defects in the external walls of the building. The freehold owner applied for an RCO to recover the cost of remedial works estimated at over £13 million.

In January 2025, the FTT ordered 76 corporate respondents associated with the developer to pay £13,262,119.08 jointly and severally towards the remediation costs. The appellants challenged the decision on four grounds. They argued that the FTT lacked jurisdiction to impose joint and several liability, that it had wrongly applied the "just and equitable" test and eroded principles of separate corporate identity, that it had misinterpreted the meaning of a "building safety risk" and that it had wrongly included the full cost of replacing part of the external wall system and related professional fees.

The appeal was dismissed on all grounds. The court held that section 124 of the BSA permits joint and several liability where appropriate and that the FTT had correctly exercised its broad discretion in determining what was just and equitable. It also confirmed that "building safety risk" includes any qualifying risk under the Act and that the remediation works and associated costs were reasonably supported by the evidence.

Simon Hughes KC acted for the Greenwood Appellants in the Upper Tribunal appeal. The Appellants have been granted permission to appeal on all grounds.

GS Woodland Court GP 1 Ltd v RGCM Ltd [2026] EWHC 351 (TCC)

The case concerned an application by Woodland to adjourn a June 2026 trial relating to alleged fire safety defects in a student accommodation development in Islington. The defendants included RGCM Limited and companies within Unite Group. Woodland claimed £35 million for remedial works, including a £19.7 million mitigation scheme to address safety defects and achieve compliance with building regulations.

The development qualified as a higher-risk building under the Building Safety Act 2022, requiring approval from the Building Safety Regulator before remedial works could proceed. In October 2025, the regulator rejected Woodland's proposed scheme due to insufficient information and significant fire safety concerns.

The court refused a full adjournment but ordered a split trial. It held that the regulator's rejection undermined

Woodland's ability to quantify its loss, making it unfair to proceed on quantum. However, liability issues were sufficiently developed to proceed. A split trial was the most practical solution, allowing progress while avoiding significant delay, as a full adjournment would likely postpone the case until mid-2027.

Jonathan Selby KC acted for the Fourth & Fifth Defendants.

SRCL Ltd (t/a Stericycle) v NHS South Yorkshire Integrated Care Board [2025] EWHC 2964 (TCC)

The case concerned applications by 22 NHS Integrated Care Boards (ICBs) to lift the automatic suspension on awarding clinical waste contracts to SharpSmart Ltd and Personnel Hygiene Services Ltd, following a challenge by the unsuccessful bidder, SRCL. SRCL also sought expedition of the trial. The procurements, valued by SRCL at £168 million, related to clinical waste services across multiple regions.

The court granted the applications to lift the suspension and dismissed the expedition request. It held that damages would be an adequate remedy for SRCL, as the contracts were not unique or prestigious, and any lost profits could be quantified. Claims of business disruption or loss of competitiveness were unconvincing.

Conversely, damages would not adequately compensate the ICBs, as suspension would delay service improvements and create uncertainty in maintaining existing services. The balance of convenience also favoured lifting the suspension to avoid disruption and ensure timely implementation of the new contracts.

Rhodri Williams KC and Tom Walker acted for the successful Interested Party.

CG Fry & Son Ltd v Secretary of State for Housing, Communities and Local Government [2025] UKSC 35

This Supreme Court appeal concerned the interaction between environmental protection and planning law in a large residential development near the River Tone, affecting the Somerset Levels and Moors Ramsar Site. The developer had obtained outline planning permission in 2015, with later reserved matters approval for part of the scheme. Following new advice from Natural England in 2020 on phosphate pollution, the local planning authority, Wiltshire Council refused to discharge conditions, requiring an "appropriate assessment" under the Conservation of Habitats and Species Regulations 2017, which they considered was extended to Ramsar sites by the National Planning Policy Framework. The developer appealed under s.78 of the Town and Country Planning Act 1990 and the Inspector agreed with the Council,

dismissing the appeal. The developer then brought a claim for statutory review under s.288 of the 1990 Act.

The High Court and Court of Appeal upheld the approach of the Inspector and the Council. However, the Supreme Court disagreed and allowed the developer's appeal. It held that, whilst under the Habitats Regulations an appropriate assessment would have been required in relation to a European habitat site protected under those Regulations, it was not required in relation to a Ramsar site as the Government could not extend the law through policy to make legally relevant considerations which were otherwise legally irrelevant at the discharge of conditions stage.

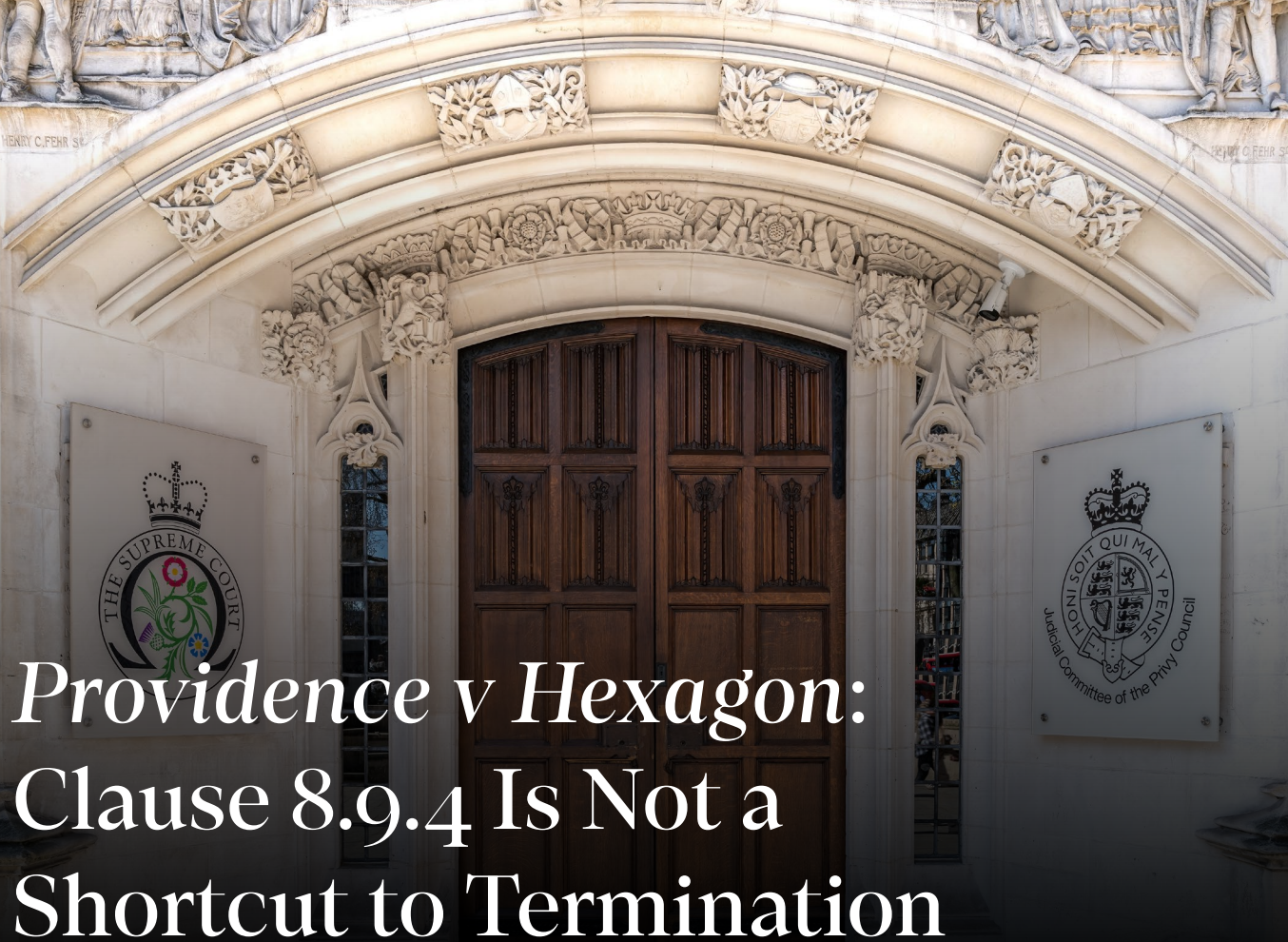
Lord Banner KC acted for the successful Appellant.

Tullow Ghana Ltd v Vallourec Oil and Gas France SAS [2025] EWHC 3059 (Comm)

This judgment concerns certain preliminary issues in an ongoing contractual dispute between an oil field operator and a supplier of tubular products relating to allegedly defective tubing used in offshore water injection wells in Ghana. The claimant alleges that the tubing supplied by the defendant was defective and seeks over US\$257 million in damages. The preliminary issues dispute was largely concerned with when the contract was formed and which terms applied. The claimant argued that the contract was based on its purchase order and standard terms (albeit amended for the purposes of an earlier order), while the defendant contended its own general conditions were incorporated.

The court held that the contract was concluded on 25 November 2008 when the defendant returned a signed purchase order to the claimant. The court therefore held that the contract was governed by the claimant's amended terms. The court accepted that: i) the defendant's covering letter of 25 November 2008 stated that it also enclosed the defendant's own standard terms and conditions in the associated envelope; ii) the defendant did in fact enclose its standard terms and conditions in the envelope; iii) the claimant's offer referred to one grade of steel (L80) while the defendant's correspondence referred to another (VM80); iv) the claimant's offer referred to pipes of a standard range 3 length, whereas the defendant's correspondence referred to pipes of a shorter length. Such matters notwithstanding, the court rejected the defendant's argument that its correspondence of 25 November 2008 was a counter-offer. The court held that the defendant's correspondence of 25 November 2008 was an 'unconditional acceptance' of the claimant's offer and held that this was not a standard battle of the forms case. The court therefore held that the defendant's general conditions were not incorporated.

Veronique Buehrlen KC and Matthew Finn acted for the Defendant.



Providence v Hexagon: Clause 8.9.4 Is Not a Shortcut to Termination



Youcef Boussabaine

In Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC 1, the Supreme Court resolved an important point on the JCT Design and Build Contract 2016.

Lord Burrows described the issue as one of “*general public importance*” because the clause in question is “*very widely used in the construction industry*” and, importantly, because in the 2024 JCT Design and Build form “*the wording of the termination clause remains the same*” [1]. The decision therefore matters not only for this dispute, but for the operation of one of the industry’s standard termination mechanisms more generally.

The issue before the Court was framed with welcome precision: whether the contractor could terminate under clause 8.9.4 where “*a right to give the further notice referred to in clause 8.9.3 has never previously accrued*” [3].

That issue arose because Hexagon had made a late payment in December 2022, but cured it within the contractual 28-day period, so that “*it was not, and never became, open*” to Providence to terminate under clause 8.9.3 in respect of that payment [11]. When a further payment was made late in May 2023, Providence purported to terminate under clause 8.9.4 on the footing that the May default repeated the earlier specified default [12].

The Supreme Court held that Providence was not entitled to do so. The heart of the judgment is Lord Burrows’ conclusion that clause 8.9.4 is “*parasitic on clause 8.9.3*” and that clause 8.9.3 is the “*gateway*” to clause 8.9.4 [32]. On that reading, clause 8.9.4 is not a free-standing right triggered whenever there has been a repeated specified default. Rather, it operates only where the contractor previously had an accrued right to terminate under clause 8.9.3, but did not exercise it. Lord Burrows put the point another way: it is only if the employer has “*failed to cure any earlier specified default within 28 days*” that the contractor may terminate for a repetition of that specified default [32].

That conclusion was driven, first and foremost, by the text read in context. Lord Burrows held that, if clause 8.9.4 were independent, “*there would be no need for those opening words*” referring back to the “*further notice*” under clause 8.9.3 [32]. On Providence’s construction,

those words were effectively “superfluous”; indeed, they became “otiose and obscure” [33]. The judgment is therefore a strong reaffirmation of an orthodox textual approach: where the contract includes language linking one termination route to another, the court will strive to give that language real work to do.

The Court also considered that Hexagon’s interpretation produced a more measured commercial result. Lord Burrows described it as a “rational and less extreme outcome” because immediate termination for repetition would arise only where the earlier breach had gone uncured for 28 days and was, in that sense, particularly serious [34]. By contrast, Providence’s reading would mean that two late payments, each only one day late, could justify termination. That, he said, might be thought to provide a “sledgehammer to crack a nut” [35]. This part of the reasoning is important. It does not elevate commerciality above language; rather, it shows commercial coherence operating in support of the interpretation already indicated by the words used.

One of the most interesting aspects of the judgment is methodological. Lord Burrows criticised the Court of Appeal for beginning with the words of clause 8.9.4 “viewed in isolation”, even though it then recognised that it was “necessary, and vital to view the words in context” [36]. That observation should not be overstated into a rigid rule about sequencing, especially given the familiar unitary and iterative approach described in *Wood v Capita* [2017] UKSC 24. But it is a pointed reminder that, particularly in a standard form, the disputed words cannot sensibly be divorced from their immediate contractual setting.

The Supreme Court was equally unpersuaded by the Court of Appeal’s reliance on clause 8.4, which governs termination by the employer. Lord Burrows held that there was “no necessary reason why the right to terminate should be symmetrical” as between employer and contractor [37]. Indeed, the provisions as incorporated were “plainly asymmetrical” [37]. The clauses used different language, operated with different cure periods, and were not mirror images once the parties’ amendments were taken into account. Most importantly, clause 8.4.3 expressly made clear that “there need be no previously accrued right to terminate”, whereas clause 8.9.4 did not [37]. The difference in drafting was treated as deliberate and significant.

The judgment is also notable for what it says about standard forms more generally. Lord Burrows rejected the suggestion that an industry-wide standard form is interpreted by a fundamentally different method from an ordinary contract. The orthodox objective and contextual approach still applies. At the same time, where parties adopt an industry form, it can generally be taken that their rights and obligations “should usually be interpreted

consistently” with those of others using the same form [30]–[31]. That is a useful and nuanced restatement of principle: standard forms are not subject to a special code of interpretation, but their standardised and repeat-use character is itself part of the relevant context.

“Clause 8.9.4 is not a shortcut around clause 8.9.3.”

There is also a helpful warning against excessive reliance on what Lord Burrows called the “archaeology of the forms” [28]. Earlier versions of the JCT form, prior judicial decisions, and the JCT Guide may in some cases illuminate why a particular clause was changed. But absent a sufficiently clear reason for the amendment, the court will be slow to attach much weight to that historical exercise. In *Providence v Hexagon*, Lord Burrows found that neither the Guide, nor previous versions of the form, nor older authorities materially assisted on the question before the Court [38].

For practitioners, the practical message is clear. Clause 8.9.4 is not a shortcut around clause 8.9.3. A contractor cannot ordinarily move from one cured late payment to immediate termination upon the next late payment. Unless the earlier specified default remained uncured long enough for a right under clause 8.9.3 to accrue, the clause 8.9.4 route is unavailable. That does not exhaust the contractor’s remedies: as the judgment notes at [6], the contractual termination provisions are “without prejudice to any other rights and remedies”, and Providence also relied on repudiatory breach at common law [13]. But so far as the JCT machinery itself is concerned, the Supreme Court has restored a structured escalation process rather than an immediate termination trigger.

The broader lesson is equally important. The Court declined to allow concern about contractor cash flow to distort the construction of the clause. Lord Burrows said that the disputed termination provision “should not be distorted so as to favour the Contractor” and that, if greater protection is thought justified, “that is a matter for the JCT to consider” in a future draft [38]. In that respect, *Providence v Hexagon* is both a decision on JCT clause 8.9 and a careful restatement of first principles: start with the contractual words, read them in context, avoid assuming symmetry where the drafting does not support it, and resist the temptation to use commerciality to rewrite the bargain.



Courtney Burrell-Eade

Q&A

You have been a tenant at Keating Chambers for over six months following the successful completion of your pupillage. What have been your highlights so far?

One of the real highlights has been how quickly my practice has developed and the level of responsibility I have been trusted with so early on. During pupillage and into tenancy, I have been fortunate to build a busy court-based practice, appearing as sole counsel in both the TCC and the County Court, which has been both challenging and rewarding.

I have also really valued the early exposure to such a broad range of work. I have been involved in matters across Chambers' core practice areas, including construction, professional negligence and related commercial disputes. This breadth has provided a strong foundation and a valuable insight into the varying issues and approaches involved in different types of cases.

Finally, I have particularly enjoyed the combination of advocacy and substantial written work. Opportunities to appear in court, alongside drafting pleadings and skeleton arguments in complex, multi-party disputes, have allowed me to develop both my oral and written advocacy skills at pace. Overall, it has been an exciting and fulfilling start to practice.

“One of the real highlights has been how quickly my practice has developed and the level of responsibility I have been trusted with so early on.”

What drew you to Keating Chambers for your pupillage?

I chose to undertake my pupillage at Keating Chambers for four main reasons.

First, I wanted to practise at a specialist commercial set. Keating is recognised as a leading construction set, involved in high-profile disputes that are complex and intellectually challenging. Exposure to work of that calibre from the outset of my career was incredibly appealing.

Second, the people. There is a real sense of community at Keating. The staff and barristers are supportive, welcoming and approachable, and there is a strong sense of camaraderie across Chambers. That environment made an enormous difference both during pupillage and since starting tenancy. Whilst pupillage provides excellent training, the transition to tenancy can still feel daunting, as you inevitably encounter new challenges. Keating’s supportive culture gives junior barristers the confidence to tackle such challenges and continue developing their practice.

Third, I was particularly drawn to the strong representation of female barristers at all levels of seniority within Chambers. Although the Bar has become increasingly diverse, that representation is not always reflected across every level of practice. I therefore wanted to join a set that demonstrated that women could build and sustain highly successful careers at the Bar.

Finally, the quality of the training and mentorship at Keating. Pupillage is well structured, with a clear focus on ensuring pupils are prepared for tenancy. Each pupil completes four seats with different supervisors, offering insight into a range of areas. There are also six formal assessments involving both written and advocacy exercises. Pleading forms a significant part of our practice, so written work is a central component of the training programme.

How did your experience as a Judicial Assistant in the Court of Appeal shape your views on advocacy?

As a Judicial Assistant in the Court of Appeal, I had the privilege of witnessing a wealth of exceptional written and oral advocacy. Everyone has their own advocacy style; there isn’t one right way. That said, there are key themes that were present in all advocates. First, sign-posting. It is a simple technique, but it makes an enormous difference to how easily a judge can follow your submissions. Second, always ensure you keep your eye on the judge. Are they still reading? Are they making a note? Have they looked up? Remember to pause rather than press on. Third, something deceptively basic but essential: knowing your bundle references. This prevents unnecessary distraction, keeps the judge with you, and saves valuable time (which is often limited!).



Before commencing pupillage, you spent two years in Shell’s global litigation team working on major cases across multiple jurisdictions. Which part of that experience has been most influential on your practice now?

There are several aspects of my time at Shell that continue to influence my day-to-day practice, but the most valuable aspect was developing an appreciation that the legal merits may be only one of several factors informing a decision that the client has to make. As a barrister, one is engaged primarily for legal expertise, and providing accurate and robust legal advice is, of course, paramount. However, my experience at Shell highlighted that the best barristers understand the wider commercial context in which advice is given and are able to factor that context into their advice.

Which areas of law are you currently focusing on?

My practice is broadly divided between construction and procurement.

On the construction side, I am developing a busy practice across a wide range of disputes, including claims arising from defective works, delay and disruption, and

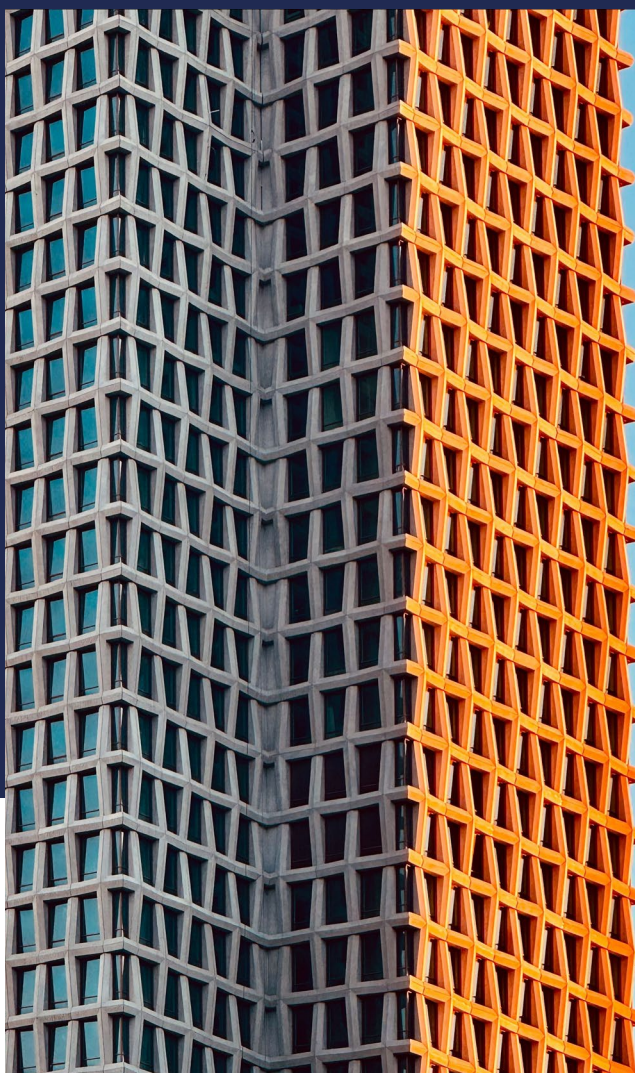
“Keating’s supportive culture gives junior barristers the confidence to tackle such challenges and continue developing their practice.”

professional negligence. I am involved in a number of complex, multi-party High Court disputes spanning these areas, providing key insight and experience in navigating large-scale, technically detailed matters.

Alongside this, I have a growing interest in public procurement. My work in this area includes challenges to procurement decisions as well as advisory work on compliance with the applicable regulatory framework. Procurement issues arise across a variety of sectors and are by no means confined to construction. This, combined with the fast paced nature of procurement litigation, makes the area particularly engaging.

Maintaining a busy practice across both fields provides valuable variety and helps to develop a rounded, commercially informed approach when advising clients.

The End of the Retention: An Initial Reaction



Retention clauses have their origin in the Victorian Railway “Boom” when over £3bn was spent on the building of railways and the provision of stock. The concept was that employers would protect themselves from contractor default by retaining funds. Like parts of the railways, retentions were said to be in need of abolition in the 1960’s (the Banwell Report of 1964). Unlike the railways, retentions were, however, not even curtailed at that time.

Retentions, perhaps for those historical reasons and perhaps as a result of a common sense view as to the holding back of money, have been regarded as an employer’s security (see Keating on Construction Contracts 12th Edition paragraph 11-027; Hudson’s Building and Engineering Contracts 14th Edition paragraph 3-069) and as “an assurance of project completion and as a safeguard against defects which may subsequently develop and which the contractor may fail to remedy.” (BEIS Research Paper 17 at https://assets.publishing.service.gov.uk/media/5a821ff740f0b62305b929d8/Retention_Payments_Pye_Tait_report.pdf). Thus, a retention, although usually a low percentage, may be held under until completion of the works (see *Hoenig v Isaacs* [1952] 2 All E.R. 176 at 181) and be paid as part of the final instalment (and making good of all defects can be a condition precedent to the release of the instalment containing the retention – see Hudson *supra*).



Sean Wilken KC



Sarah Williams

A retention may, however, also be a benefit to contractors. Tier 1 contracts may use the retention as working capital (see paragraph 4.3.1 BEIS Research Paper 17). It may also be that retentions are the least worst option in response to the ancient and continuing questions of contractor default – real, imagined or created (see below for a discussion of the other responses).

For these reasons, retentions currently find themselves in the standard form contracts (clauses 4.17–4.19 of the JCT Standard Building Contract; 4.16–4.18 of the JCT Design and Build Contract and in NEC3 and NEC4 as options). As indicated, the percentage retention is usually low: the JCT uses 3 or 5%.

All that, however, may be about to change. On 24 March 2026, the government issued a press release <https://gov.uk/government/news/time-to-pay-up-government-unveils-toughest-crackdown-on-late-payments-in-over-25-years>. This was in response to the July 2025 consultation in which 53% of those that responded favoured abolition of the retention. Thus, as can be seen and as part of a package of wider measures, the retention is to be abolished – or rather phased out over a period of 12–24 months.

Unsurprisingly, the announcement has triggered a fair amount of comment – retentions are, after all, a fact of construction life and were not substantively eroded by the processes put into place by the Housing Grants, Construction and Regeneration Act and subsequently refined. So what does the abolition of retention mean? Or more accurately what will be the results?

Even though the form of the legislation is not published, we would suggest little turns on that. After all, abolition is abolition. What will be more interesting is how the construction industry responds.

For contractors little may change. Retentions are included in the payment processes such that if a retention is not paid and there is no proper withholding as per the process, then the contractor can claim the retention element then due in adjudication. To the extent, therefore, that there are issues over retention, the contractor already has remedies – including the “smash and grab” option if otherwise available.

The position is different for employers. It is reasonable to expect employers to protect against contractor default in different ways. Two are already used. On large scale infrastructure, some employers have already moved away from retentions altogether preferring to adopt a “cooperative team” approach to the project. Other employers, for example utilities, use a retention bond. As to those, on smaller projects, employers may have neither the expertise nor the personnel to administer the cooperative team approach. It is reasonable, however,

“Abolition is abolition.”

to expect all employers to have greater resort to bonds and guarantees assuming the former is not too costly and the latter is available and has any force (the employer having carried out the requisite due diligence). Whether contractors (or their parent companies) will agree to such bonds or guarantees would obviously be an interesting debate in contractual negotiations.

Three other approaches are possible.

The first is a greater use of warranties and indemnities as against the contractor and down the contractual chain. Those warranties and indemnities could extend to periods during construction, the rectification period and thereafter. Careful drafting could allow for smash and grab type claims under the warranties and indemnities and for a rolling, continuous obligation (which could extend limitation). Whether more onerous drafting would be acceptable to contractors or would be passed over as the price of then doing business perhaps triggering later sellers’ remorse, remains to be seen.

The second approach is a more proactive use of adjudication by employers. Employers could, for example, monitor construction processes closely for defects/delay, engage experts and then have their own rapid defects/delay adjudication which would then, if successful, be temporarily binding. This route would, in effect, replicate the retention albeit in a quantified and specified way until any final “true value” adjudication. There may be benefits to both parties in this approach – temporarily binding certainty at least. There are, however, the perennial questions associated with adjudication and an issue as to whether the question of defective performance is simply being postponed to the “true value” assessment.

The third approach is altering the payment mechanism to allow for early payment bonuses to be generated, from the contract price, for early or exceptional performance. In colloquial terms, as the net cost / payment remains the same, contractors would then have to decide whether they wished for jam today but no jam tomorrow.

Thus, although retention may be abolished, the questions of true or imagined contractor default and the employer’s prospective and retrospective responses to that position will remain.

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