



**HAWKSWELL  
KILVINGTON**

Specialist Construction Solicitors



## Newsletter – September 2023

### Introduction

Welcome to the September edition of our newsletter. The new legal term is yet to begin but prior to their Summer recess the courts handed down several important decisions including, most notably, the wide-ranging judgment given by the Court of Appeal in *URS Corporation v BDW Trading*. In this issue we feature that case among other key recent decisions as well as considering the announcement of the forthcoming JCT 2024 suite of contracts. We also share with you a selection of HK news items concerning staff promotions and fundraising efforts.

For details of our ever-popular Autumn seminar series, please see the 'Dates for Your Diary' and sign up if you wish to attend.

Please feel free to make contact with us on any of the items covered, or on any other matter we can assist with.

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### Latest News

- JCT Announces Next Editions of Contracts – JCT 2024

### Case Reviews

- URS Corporation Ltd v BDW Trading Ltd [2023]
- Sudlows Ltd v Global Switch Estates 1 Ltd [2023]
- Henry Construction Projects Ltd v Alu Fix (UK) Ltd [2023]

### HK News

- Promotions
- Newly Qualified Solicitor
- Fundraising

### Dates for Your Diary

- Autumn Seminars – choose from Leeds, Manchester or London

## JCT Contracts 2024

The JCT have announced that we can expect their long-awaited new suite of contracts to be published next year, including important updates in relation to the Building Safety Act.

Information about the new suite of contracts remains limited, but we understand the main features will include:

- **Modernising and streamlining** – including adoption of gender neutral language, and increased flexibility around the use of electronic notices.
- **New Target Cost Contract** – the introduction of a new contract family, JCT Target Cost Contract (TCC), comprising main contract, sub-contract, and guide.
- **Legislative changes** – major updates in relation to the Building Safety Act together with amendments to the termination provisions to comply with the Construction Act and to reflect the Corporate Insolvency and Governance Act 2020.
- **Future proofing** – including changes to reflect the objectives of the Government’s Construction Playbook, and the incorporation of previously optional supplemental provisions relating to collaborative working and sustainable development and environmental considerations, into the main body of the contracts.

Watch this space for further details of when the new contracts will be published and training sessions we will be holding!

## Case Reviews

This section contains a selection of key construction cases to have emerged from the courts in recent months. For more in-depth analysis of these and other decisions of relevance for the construction industry, please visit our news section at [www.hklegal.co.uk](http://www.hklegal.co.uk).

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## URS CORPORATION LTD v BDW TRADING LTD [2023]

In its recent decision in *URS Corporation Ltd v BDW Trading Ltd*, the Court of Appeal has provided important guidance in respect of construction law questions old and new.

### Background to the Appeals

The respondent, BDW Trading Limited (“**BDW**”) had engaged the appellant consulting engineers, URS Corporation Limited (“**URS**”) to carry out structural design work in connection with a series of tower blocks (the “**Properties**”). Upon the discovery of alleged dangerous inadequacies in the structural design of the Properties, BDW commenced proceedings in negligence against URS on 6 March 2020.

URS raised certain Preliminary Issues, which were decided against it at first instance. The most important of these concerned the date of the accrual of a cause of action in tort against designers of a defective building, in circumstances where the defect caused no immediate physical damage (this gave rise to URS’ “**Substantive Appeal**”).

Following the coming into force of the Building Safety Act 2022 (“**BSA**”), BDW obtained permission to amend its statements of case to take advantage of the longer limitation periods identified in the BSA, and to add claims under the Defective Premises Act 1972 (“**DPA**”) and Civil Liability (Contribution) Act 1978 (“**CLCA**”) (this triggered URS’ “**Amendment Appeal**”).

### The Substantive Appeal

The first ground of appeal was dismissed as it was decided that at the time the design work was carried out, URS owed BDW a full, conventional duty of care. URS had been wrong to suggest that this was somehow discharged when BDW subsequently sold the buildings.

The second ground of appeal was also dismissed on the basis that BDW's cause of action in tort against URS accrued, at the latest, on practical completion of the buildings. Knowledge of the existence of that cause of action having accrued was irrelevant.

### The Amendment Appeal

The several ground of appeal raised by URS were each dismissed, with the Court holding that:

- The judge had exercised his discretion correctly in managing the case and the correct test was applied;
- The wording of the BSA was intended to have retrospective effect and "is to be treated as always having been in force". As a matter of statutory interpretation, the BSA did not exclude the rights of parties involved in ongoing litigation at the time the BSA was enacted/brought into force;
- A developer can be classified as a person to whom a duty is owed under the DPA if the correct tests are satisfied;
- BDW had, as a matter of law, a valid claim against URS under s1(1)(a) of the DPA and that claim was subject to the longer limitation periods provided for by the BSA; and
- There is nothing in the wording of s1(1) of the CLCA to suggest that the making or intimation of a claim by the owners of the Properties was a condition precedent to the bringing of a claim in contribution by BDW against URS.

### Conclusion

This important decision provides welcome guidance not only in respect of issues which have long been debated in English law e.g. the date of accrual of a cause of action in tort, but also in relation to questions which have emerged more recently as to how the newly extended limitation provisions introduced by the BSA will impact ongoing and future claims concerning damaged and defective buildings.

For more information: [Download the bulletin here](#)

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## SUDLOWS LTD V GLOBAL SWITCH ESTATES 1 LIMITED [2023]

In *Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813, the Court of Appeal has provided useful guidance as to the approach to be adopted when considering potential overlap between adjudication decisions.

### Background to the Case

Global engaged Sudlows to carry out fit-out and enabling works at an electricity substation in London.

The works were significantly delayed and in the fifth of a series of adjudications, the adjudicator, Mr Curtis decided Global was contractually responsible for the ductwork issues which had caused those delays. In consequence, Sudlows was awarded an extension of time of 482 days.

In subsequent adjudication 6, Sudlows sought a further 133 days EOT, and related loss and expense. The adjudicator, Mr Molloy concluded he was bound by Mr Curtis' decision as to contractual responsibility, and as such granted Sudlows the further EOT, and c.£1 million loss and expense (the "Primary Decision").

Unusually, the adjudicator nevertheless issued an "Alternative Decision", in the event he was later found to have been wrong to conclude that he was bound by the previous adjudication; the "Alternative Decision" held that c.£209k was due *from* Sudlows *to* Global.

Sudlows asked the TCC to enforce the Primary Decision. The TCC found Mr Molloy had acted in breach of natural justice as he had been wrong to consider himself bound by Mr Curtis' decision. It therefore declined to enforce the Primary Decision and, moreover, found that Global was entitled to enforce the Alternative Decision in its favour.

Sudlows appealed against the TCC's decision.

## What did the Court of Appeal decide?

The Court of Appeal considered that whilst a court was not automatically bound by the second adjudicator's decision, it should nevertheless *"be slow to interfere with it, unless it concluded that it was clearly wrong."*

In coming to this decision, the Court of Appeal was influenced by the fact that the same issue of contractual responsibility went to the heart of both adjudications. Indeed, this was the only Relevant Event relied upon in both adjudications, making this an unusual delay case (there being no competing Relevant Events/other issues on the critical path). The first adjudicator's determination of that issue was binding; and, significantly, any other finding in the second adjudication would produce a result *"fundamentally inconsistent"* with the first adjudication.

The TCC had been wrong to enforce the Alternative Decision as this suggested an outcome which was *"diametrically opposed"* to the essential reasoning behind the first adjudication decision.

Sudlows' appeal was therefore allowed and the Primary Decision was reinstated.

## Conclusion

Questions of potential overlap between adjudication decisions are often fact-sensitive and difficult to navigate. Adjudicators faced with this issue are the first to determine the extent of that potential overlap and the courts should be slow to interfere with their determination unless it is clearly wrong. Parties are nevertheless reminded that engaging in multiple adjudications increases the risk of there being overlap and the issue becoming hotly contested in any subsequent enforcement proceedings.

For more information: [Download the bulletin here](#)

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## HENRY CONSTRUCTION PROJECTS LTD v ALU-FIX [2023]

In *Henry Construction Projects Ltd v Alu-Fix (UK) Ltd* [2023], the TCC declined to enforce a true value adjudication decision where that adjudication had been commenced before the contractor had discharged its immediate payment obligation to its subcontractor arising from an earlier dispute.

This was notwithstanding the earlier award had, in the meantime, been paid.

## Background to the Case

Henry entered into JCT standard building sub-contract with Alu-Fix, to carry out works at a boutique hotel development in central London.

Following a dispute, Alu-Fix terminated the Sub-Contract. This triggered a payment mechanism which required Alu-Fix to submit an application for payment. It did so on 15 November 2022 and Henry had until 13 December 2022 to pay the sum notified of c.£260k .

Henry did not pay, and Alu-Fix referred the matter to adjudication on what is commonly referred to in the construction industry as the 'smash and grab' basis (the **"SGA"**). Henry contended it had submitted two potentially valid pay less notices on 25 November and 12 December 2022 respectively.

On 18 January 2023, before the SGA was decided, Henry commenced a true value adjudication claiming that Alu-Fix was, as a result of overpayment, indebted to Henry in the sum of c.£235k plus VAT (the **"TVA"**).

The SGA Adjudicator found in favour of Alu-Fix. The TVA adjudication was stayed pending payment of the SGA award. Henry paid the SGA award; the TVA continued; and the TVA Adjudicator ultimately found in Henry's favour.

Alu-Fix failed to comply with the TVA award. It argued the TVA adjudicator had lacked jurisdiction, as Henry had commenced the TVA before complying with what the SGA Adjudicator had found was Henry's immediate obligation to pay the sum notified in Alu-Fix's application.

## What did the Court decide?

Applying the principles summarised in the well-known case of *Bexheat v Essex Services Group* [2022], the TCC agreed with Alu-Fix and refused Henry's application for summary judgment to enforce the true value adjudication decision. The court determined that Henry's immediate payment obligation had arisen on 13 December 2022, and that Henry's TVA commenced on 18 January 2023 – at a time payment in the SGA dispute had not yet been made - was thus premature.

## Conclusion

This case lends further support to the court's policy of 'pay now, argue later'. While it may not fully close the door on commencing a TVA prior to the outcome of a SGA being decided, it ought to serve as further deterrent to those considering such a course of action, unless they have, in the words of the Judge, "a sufficient level of confidence that any dispute raised [in the SGA] should result in a finding of no immediate payment obligation having been established."

For more information: [Download the bulletin here](#)

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## Firm News

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### PROMOTIONS



In June we were pleased to announce two new promotions. Jonathan Robson was promoted to Legal Director. Jonathan joined HK 6 years ago and is an integral part of the firm's contentious department. Jonathan deals with complex and high value construction and engineering disputes across a range of forums including litigation, arbitration and adjudication. Jonathan acts across the full width of the construction supply chain and is renowned for helping clients resolve their disputes as quickly and cost-effectively as possible.

Katherine Morgan was promoted to Associate. Katherine initially joined the firm as a trainee solicitor in 2018 and has progressed to become a key member of the firm's contentious team. Katherine's practice centres around resolving construction disputes in litigation, adjudication and mediation.

Thomas Salter, Partner at Hawkswell Kilvington, said: "We are delighted to announce well deserved promotions for Jonathan and Katherine. Both are extremely hard working, dedicated and talented lawyers who will no doubt continue to go from strength to strength."

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### NEWLY QUALIFIED SOLICITOR



We are delighted to announce that having recently completed her training contract with the firm, Shauna O'Neil has agreed to take up a position with HK as a newly qualified solicitor. Shauna will continue to work alongside both the contentious and non-contentious team. Well done Shauna!

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## FUNDRAISING



During May members of the HK team participated in the Your 100 walking, cycling and running a total of 1,000 miles raising almost £600.00 for Yorkshire Cancer Research.



A fantastic effort from Thomas Salter, Ross Galbraith and Matthew Shotton who completed the enormous task of playing 72 holes in a day on a very hot sunny day in June. All three completed 4 full rounds, took over 50,000 steps, spent 14 and a half hours on the course, played over 300 shots and raised a further £900 for Yorkshire Cancer Research.

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## Dates for the Diary

### Seminars

#### Autumn 2023 Construction Law Update

Our ever-popular seminars are returning in Autumn and will cover important changes and issues, including:

- **The Defective Premises Act** – a comprehensive review of its role in building safety including key provisions and potential defences; important changes introduced by the Building Safety Act 2022; and recent judicial consideration including retrospectivity and the duty owed to developers.
- **Limitation of Liability** – we consider the negotiation and drafting of assorted contractual limitation and exclusion clauses and their profound bearing on the allocation of financial risk.
- **Case Law Update** – our seminar will conclude with a review of recent cases dealing with payment, jurisdiction and limitation of actions, including several key decisions at appellate level.

#### Dates & Locations

- 2 November 2023 | Thorpe Park Hotel, Leeds
- 9 November 2023 | Etihad Stadium, Manchester City Football Club **\*\*new venue\*\***
- 28 November 2023 | IDRC, London

For more information or to book a space [click here](#).

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### Hawkswell Kilvington

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