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# Annual Construction and Infrastructure Seminar 2019

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# AGENDA

- Final account claims – contractual mechanisms and dispute avoidance
- Termination – procedures, mechanisms and key issues
- Case law update

# SPEAKER

## Mark Manning

Construction & Infrastructure

- Specialises in complex building and engineering contracts and ancillary contract documentation as well as construction and engineering disputes.
- A wealth of experience in advising on complex disputes arising in relation to PPP/PFI contracts.
- Extensive building contract experience and is described in Chambers & Partners Legal Directory as "*proactive*" and a "*can-do person*", with clients praising his ability.



**Mark Manning**

Partner

[m.manning@ashfords.co.uk](mailto:m.manning@ashfords.co.uk)

+44 (0)1392 333882

+44 (0)7515 577067

# FINAL ACCOUNT CLAIMS

- Contractual mechanisms:
  - JCT D&B 2016
  - NEC4
- Common areas of dispute (loss and expense)
- Dispute avoidance

# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - JCT Design and Build 2016

- 4.24.1 Following PC Contractor submits Final Statement
  - with such supporting documents as the Employer may reasonably require
- 4.24.2 Final Statement shall set out
  - adjustments to the Contract Sum; and
  - sums previously paid; and
  - show balance to Contractor (or Employer); and
  - the basis on which that amount has been calculated
- 4.24.3 If Contractor does not submit Final Statement within 3 months of PC, Employer may give Contractor 2 months' notice to do so.
- 4.24.4 If Contractor fails to submit Final Statement within that 2 months, Employer may issue the Final Statement.

# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - JCT Design and Build 2016

- 4.24.5 Due date for final payment - one month after whichever of the following occurs last:
  - the end of the Rectification Period;
  - the date stated in the Notice of Completion of Making Good;
  - the date of submission of the Final Statement (or Employer's Final Statement).
- 4.24.6 Except to the extent that prior to the due date the other party gives notice disputing anything in the Final Statement / Employer's Final Statement, and subject to clause 1.8.2, the relevant statement shall upon the due date become conclusive as to the sum due under clause 4.24.2 and have the further effects stated in clause 1.8.

# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - JCT Design and Build 2016

- 1.8.1 from the due date, Final Statement is conclusive evidence that:
  - where and to the extent that any particular quality of materials, goods or standard of workmanship was expressly described in the ERs or any instruction to be for the Employer's approval, the particular quality or standard was to the Employer's satisfaction (but not that they or any other materials goods or workmanship comply with any other requirement or term of the Contract);
  - all and only such EoTs as are due have been given;
  - reimbursement of loss and expense is in full and final settlement of all and any claims which the Contractor has arising out of any Relevant Matters.
- 1.8.2 Except in relation to the subject matter of any proceedings where such proceedings are commenced before or within 28 days after the date of issue of the relevant statement.

# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - JCT Design and Build 2016

- In summary to avoid conclusive effect:
  - Serve clause 4.24.6 notice; and
  - Issue proceedings within 28 days of the Final Statement.



# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - NEC4

- 53 New final account mechanism introduced. Final and conclusive.
- Industry feedback - wanted finality and to minimise later challenges.
- 53.1 PM makes assessment of final amount due and certifies final payment no later than either:
  - 4 weeks after the Defects Certificate is issued; or
  - 13 weeks after a termination certificate is issued.
- 53.3 PM's assessment is conclusive evidence of the final amount due unless challenged by using the dispute resolution procedures within the time periods prescribed.

# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - NEC4

- For W2 (used where Construction Act applies):
- Potentially 3 steps to avoid conclusivity of final certificate:
  - 1. refer a dispute about the assessment of the final amount to Senior Reps or Adjudicator within 4 weeks of assessment being issued;
  - 2. refer any issues referred to but not agreed by Senior Reps to Adjudicator within 3 weeks of list of issues being produced (or should have been produced);
  - 3. refer to the tribunal dissatisfaction with Adjudicator's decision as to the final assessment within 4 weeks of Adjudicator's decision being made.

# FINAL ACCOUNT CLAIMS

## Contractual mechanisms - NEC4

- In addition, for cost based contracts, new process to reach agreement on value of Defined Cost during the contract period, rather than leaving it to the end.
- 50.9 Contractor can instigate a review and acceptance of part of Defined Cost (cl.50.9).
- PM reviews and assesses records within 13 weeks.
- If PM fails to assess within this time period, Contractor's assessment is treated as correct.
- Benefit of these clauses is to aim to bring commercial finality to the contract.

# FINAL ACCOUNT CLAIMS

## Court's approach

- Conclusivity provisions will be upheld by the Courts.
- The Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Limited [2015] EWHC 70 (TCC)
- Works in Mayfair under a JCT Standard Building Contract Without Quants Rev 2 (2009).
- *“1.9.3 If any adjudication, arbitration or other proceedings are commenced by either Party within 28 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate.”*
- CA issued Final Certificate on 3 Dec 2013.
- 20 Dec 2013 - D issued Court proceedings disputing Final Certificate.
- D subsequently wanted to adjudicate (after the 28 day period).
- Could it do so?

# FINAL ACCOUNT CLAIMS

## Court's approach

- Contract provided for proceedings started within 28 days of issue of the Final Certificate. It was too late for D to start an adjudication.
- Court held that the Final Certificate would stand as conclusive evidence in any adjudication commenced after the 28 period.
- If adjudication was commenced within the 28 days, a protective arbitration notice or claim form was also permissible, but it had to be issued within 28 days or in accordance with clause 1.9.4 (within 28 days of adjudicator's decision).
- Therefore, if you adjudicate within 28 days but don't also issue court / arbitration proceedings, you will be stuck with adjudicator's decision, save that in JCT you have 28 days from adjudicator's decision to issue at Court/Arbitration restricted to subject matter of adjudication.

# FINAL ACCOUNT CLAIMS

## Areas of dispute

- The usual battlegrounds:
  - Liquidated damages
  - Loss and expense
  - Variations
  - Retentions

# FINAL ACCOUNT CLAIMS

## Loss and expense

- Contractual provisions normally include entitlement to loss and expense and mechanism for claiming.
- Contractor needs to show delaying event and associated financial effects. Can be difficult where there are numerous events.
- There may be multiple causes of loss and expense - better if you can link each loss caused to a particular event of disruption or delay.
- If Contractor cannot separate individual causes and consequences of events to establish loss, consider global claims.

# FINAL ACCOUNT CLAIMS

## Loss and expense

- Society of Construction Law Delay and Disruption Protocol:
  - *“A global claim is one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events.”*
- Global claims are discouraged by the protocol.
- If it is shown that any material part of the global loss is not due to an Employer Risk Event, and it is not possible for the assessor to assess that value of that part, the entire claim *may* fail.



# FINAL ACCOUNT CLAIMS

## Loss and expense

- Walter Lilly & Co v (i) Mackay and (ii) DMW Developments [2012]
- Mr Justice Akenhead

*“the Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense”*

*“There is nothing in principle “wrong” with a “total” or “global” cost claim. However, there are added evidential difficulties ...*

# FINAL ACCOUNT CLAIMS

## Loss and expense

*“proof that an event played a material part in causing the global loss, combined with failure to prove that the event was one for which the defender was responsible, will undermine the logic of the global claim.” (quoting another case)*

However,

*“The fact that one ... event (... the risk or fault of the claimant contractor) caused or contributed ... to the global loss does not necessarily mean that the claimant contractor can recover nothing.”  
– individual claims may survive and be provable.*

# FINAL ACCOUNT CLAIMS

## Dispute avoidance

- Follow the contractual provisions, ensure you serve notices on time and in correct way.
- Review the content of the final account / statement – does it comply with the contract and is it valid?
- Records, records, records!
- Avoid global claims where possible.

# SPEAKER

## Ruth Gibson

Construction & Infrastructure

- Acts for a range of clients including high net worth individuals, developers, local authorities, contractors, banks and joint venture entities.
- Advises on a variety of construction documents including bespoke and standard forms of construction contracts, consultants' appointments, collateral warranties, deeds of novation, bonds and guarantees.
- Dispute resolution experience includes assisting with pre action negotiations and Court proceedings.



## Ruth Gibson

Associate

Direct +44 (0)20 7544 2495  
Mobile +44 (0)7702 565025  
r.gibson@ashfords.co.uk

# TERMINATION

- Common law termination
- Contractual termination – dependent on terms of contract
- For example, JCT Design and Build 2016:
  - Termination by Employer
    - Immediate termination (eg insolvency, bribery)
    - “Opportunity to remedy” (default by Contractor)
  - Termination by Contractor
    - Employer default (e.g. non payment)
    - Employer insolvency
  - Termination by either party
    - Suspension for period set out in CPs eg for force majeure, civil commotion etc
- We will focus on termination by Employer for Contractor default (under JCT D&B 2016) and touch upon common law termination.

# TERMINATION

- Opportunity to remedy termination:
- 8.4.1 If before PC Contractor:
  - without reasonable cause wholly or substantially suspends the carrying out of the Works;
  - fails to proceed regularly or diligently with the performance of his obligations under the Contract;
  - refuses or neglects to comply with a notice or instruction from the Employer requiring him to remove any work, materials or goods not in accordance with the contract and by such refusal or neglect the works are materially affected;
  - fails to comply with clause 3.3. or 7.1 (sub-contracting / assignment);
  - fails to comply with clause 3.16 (CDM),
- Employer may give a notice specifying the default.

# TERMINATION

## Wholly or substantially suspending the carrying out of the Works before completion

- Purely factual test based on the level of attendance on site.
- All or substantially all personnel fail to attend site and progress any works.
- Subject to programming and personnel being required for any particular period.
- BUT, bear in mind right to suspend performance (JCT D&B 2016 cl. 4.11 / implied pursuant to section 112 of the Housing Grants, Construction and Regeneration Act 1996 as amended).

# TERMINATION

## Failing to proceed regularly and diligently with the Works

### West Faulkner v London Borough of Newham [1994] 71 BLR 1:

- **Regularly** = as a minimum attending site “*with sufficient in the way of men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations.*”
- **Diligently** = the physical capacity must be applied “*industriously and efficiently*” with “*successful progress towards contractual obligations*” being “*a good touchstone by which to judge whether a contractor is proceeding regularly and diligently.*”
- **Overall obligation** = to proceed “***continuously, industriously and efficiently*** with appropriate physical resources so as to progress the works towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work.”



# TERMINATION

## Failing to proceed regularly and diligently with the Works (cont'd) Vivergo Fuels v Redhall Engineering Solutions [2013] EWHC 4030 (TCC):

- **Lack of productivity:** Redhall's failure to achieve productivity required to complete the works and achieve programmed productivity was a failure to properly resource the Project. The judge considered this “*the best evidence...of a failure by Redhall to proceed with the works regularly and diligently*”. (Para 402).
- **Lack of programming:** Redhall had no proper programme on which to plan, monitor and manage the work. Lack of a programme (required by contract) “*undoubtedly meant ... that Redhall was unable to **proceed continuously, industriously and efficiently** with appropriate physical resources so as to progress the works towards completion substantially in accordance with the contractual requirements as to time and sequence*”. (Paras 403-404).

# TERMINATION

Refuses or neglects to comply with a notice or instruction from Employer requiring him to remove any work, materials or goods not in accordance with the Contract and by such refusal the Works are materially affected

- Requires previous instruction or request to remove defective works or materials prior to default notice.
- Need to be able to demonstrate existence of a defect or materials not in accordance with the Contract **AND** a failure to remove **AND** a material impact on the Contract Works.

# TERMINATION

## **Fails to comply with clause 7.1 – assignment without Employer’s consent.**

- Purely factual test.
- Evidence of an assignment required. Intention to assign is insufficient.
- Bear in mind application of Business Contract Terms (Assignment of Receivables) Regulations 2018

## **Fails to comply with clause 3.3 - sub-contracting without consent**

- Failure to obtain consent to sub-contracting of the whole or part of the works (other than sub-contracting in accordance with Supplemental Provision 1 (Named Sub-Contractors)).

## **Fails to comply with clause 3.16 – CDM Regulations**

- CDM obligations on both parties. Applies equally to Employer.

# TERMINATION

## Notice of specified default

- Clause 8.4.1. If a specified default occurs before practical completion, *“the Employer may give to the Contractor a notice specifying the default or defaults...”*
- Clause 8.4.2 *“If the Contractor continues a specified default for 14 days ... the Employer may on, or within 21 days from, the expiry of that 14 day period by a further notice ... terminate the Contractor’s employment under this Contract.”*

# TERMINATION

## Service of notices

- The method of service of default notices and termination notices can be crucial. Essential that you carefully check the requirements of your contract.
- 1.7.4 “ *Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4 shall be delivered by hand or sent by Recorded Signed for or Special Delivery post. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the date of posting.*”

# TERMINATION

## Repeated specified defaults – clause 8.4.3

*“8.4.3 if the Employer does not give the further notice referred to in clause 8.4.2 [termination notice] (whether as a result of the ending of the specified default or otherwise) but the Contractor repeats a specified default (whether previously repeated or not), then, upon or within a reasonable time after such repetition, the Employer may by notice to the Contractor terminate that employment”.*

# TERMINATION

## Common law termination

- Right to terminate where there has been a **repudiatory** breach of contract.
- Commonly expressed in terms of whether the breach goes to the root of the contract or whether a party evinces an intention to no longer be bound by the terms of the contract.



# TERMINATION

- *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*  
[1962] 2 Q.B. 26

*“... some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking, as a ‘condition’ or a ‘warranty.’”*

- *Heyman v Darwins* [1942] AC 356

*“one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further.”*



# SPEAKER

## Jessica Taylor

### Construction & Infrastructure

- Jessica's core practice involves the drafting and negotiation of major strategic and operational commercial and construction contracts.
- Building contracts including advising on standard JCT Contracts, NEC3 and NEC4, Partnering and Alliancing contracts, bespoke construction contracts, professional appointments, collateral warranties; repairs and maintenance contracts.
- Development agreements; framework agreements; agreements for lease; construction related elements of funding agreements; drafting and reviewing parent company guarantees; advance payment and performance bonds.
- She has been a deputy director of the Quantity Surveyors Division of the RICS responsible for contracts; and also served on the JCT drafting committee.



## Jessica Taylor

Partner

Direct +44 (0)20 7544 2405

Mobile +44 (0)7912 464113

[j.taylor@ashfords.co.uk](mailto:j.taylor@ashfords.co.uk)

# CASE LAW UPDATE

- Triple Point Technology, Inc v PTT Public Company Ltd [2019] EWCA Civ 230 (**Triple Point**) – liquidated damages and termination
- Clancy Docwra Limited v E.ON Energy Solutions Limited [2018] EWHC 3124 (TCC) (**Clancy**) – a matter of construction
- Corebuild v Cleaver and another [2019] EWHC 2170 (TCC) (**Corebuild**) – adjudicator’s decisions and breach of natural justice

# Liquidated Damages and Termination

## What happens to liquidated damages for delay when a construction contract is terminated?

- Do liquidated damages clauses survive/apply?
- If so, is the employer entitled to payment up until the point of termination or beyond?
- 3 potential outcomes identified by the Court of Appeal where the initial contractor fails to complete the works and a second contractor steps in:
  - The liquidated damages clause does not apply at all;
  - The clause only applies up until the point of termination;
  - The clause continues to apply until the second contractor achieves completion.

# Liquidated Damages and Termination

## The commonly accepted position

- Until recently, the commonly accepted position (recorded in most leading legal textbooks) had been that the Employer was entitled to:
  - recover liquidated damages for delay from the original contractor at the contractual rate up to the date when the Contract is terminated; *and*
  - general damages thereafter.
- This is no longer regarded as the default. Why?

# Triple Point Technology, Inc. v PTT Public Company Ltd [2019] EWCA Civ 230

## Triple Point Technology, Inc. v PTT Public Company Ltd [2019] EWCA Civ 230

- PTT engaged Triple Point to develop and install a new software system.
- The contract provided for payment against certain **milestones**.
- There was a significant **delay**.
- PTT **terminated** the contract.
- Triple Point sued on its invoices.
- PTT counterclaimed for liquidated damages.

# Triple Point

- The **liquidated damages clause** in that case (Article 5.3) provided:
- *“If CONTRACTOR **fails to deliver work within the time** specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of **delay** from the due date for delivery **up to** the date [PTT] accepts **such work...**”*



# Triple Point

## Court of Appeal held:

- the clause in question (Article 5.3) was focused specifically on the issue of delay between the contractual completion date and the date when the original Contractor actually achieved completion.
  - it had no application to the situation in which the original Contractor never in fact handed over completed work to the Employer.
- as the Contractor's employment had been terminated before the works had been completed by that Contractor, liquidated damages could not be applied at all.
- Whether or not liquidated damages apply therefore very much depends on the precise wording of the liquidated damages clause in question.

# Triple Point

- However, it is likely that where the wording of the clause links the application of liquidated damages to practical completion by the initial contractor (as is the case under many industry standard forms of contract such as the JCT) then the liquidated damages clause will not apply at all in circumstances where the initial contractor's employment is terminated prior to practical completion.
  - see clauses 2.27 – 2.29 of the JCT D&B 2016
- This does not mean that the employer is left without remedy. The Employer can claim general damages in the usual way but having to prove the actual loss it has suffered by reason of the delay rather than simply claiming the pre-agreed LADs.

## Key takeaways

- Consider the contractual rights and remedies relating to delay and termination at contract drafting stage
- For existing contracts consider the potential position in respect of entitlement to LADs before seeking to terminate.



# Clancy Docwra v E.ON Energy Solutions Limited [2018] EWHC 3124 (TCC)

***A cautionary tale* – express tender exclusions can trump a general site risk allocation clause**

- E.ON were main underground heating Contractor for Barts Square residential development in London.
- E.ON engaged CDL as sub-contractor to excavate certain trenches and install underground heating pipework.
- During excavation works, CDL encountered unexpected brick walls and brick rubble which had to be cleared.
- Dispute as to whether the additional work removing the underground obstructions constituted a variation entitling CDL to additional time and / or money.
- There was an adjudication followed by Court proceedings.

# Clancy Docwra v E.ON

*The Contract – site conditions risk allocation:*

- *2.1.7 “The Sub-Contractor shall be deemed to have inspected and examined the site and its surroundings and to have satisfied himself before the date of the Sub-Contract as to the nature of the ground, the sub-surface and sub-soil; the form and nature of the site; the extent, nature and difficulty of the Sub-Contract Works; ... and in general to have obtained for himself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the Sub-Contract Works.”*

# Clancy Docwra v E.ON

- 2.1.8 *“Notwithstanding any other provision of this Sub-Contract, the Sub-Contractor shall not be entitled to any extension of time or to any additional payment ... on the grounds of any misunderstanding or misinterpretation of any matter set out in clause 2.1.7, or his failure to discover or foresee any risk, contingency or other circumstance (including, without limitation, the existence of any adverse physical conditions or artificial obstructions) influencing or affecting the Sub-Contract Works.”*
- 2.1.9 *“The Sub-Contractor shall not be released from any of the risks accepted or obligations undertaken by him under the Sub-Contract on the ground that he did not or could not have foreseen any matter which might affect or have affected the execution of the Sub-Contract Works.”*

# Clancy Docwra v E.ON

- CDL's tender submission was accompanied by an email which stated that the offer was made on the basis that CDL had excluded from its tendered scope of work:
  - Removal of soft spots;
  - Any ground conditions which did not permit the use of mechanical plant and which instead required hand digging;
  - Diversion of mains and services;
  - Breaking out of obstructions; and
  - The unavailability of a clear and unrestricted corridor in which to carry out the Sub-Contract Works.

# Clancy Docwra v E.ON

- That email was not part of the main Sub-Contract document that was entered into by the Parties
- BUT it was appended to the Sub-Contract together with the post-tender review minutes which reiterated the exclusions
- These items were set out in the Numbered Documents comprising the technical sub-contract documentation.
- The Sub-Contract Works were defined as “the works.... described in the Numbered Documents”.

# Clancy Docwra v E.ON

- CDL argued that the excluded items did not form part of the Sub-Contract **Works** because they were clearly specified in the Numbered Documents as being “out of scope” and the Sub-Contract Works were defined by reference to the Numbered Documents.
- CDL argued the site conditions clause was irrelevant because it only applied to adverse site conditions *“influencing or affecting the Sub-Contract **Works**.”*
- In March 2017 a dispute arose when CDL encountered adverse ground conditions
- The issue was whether or not CDL was obliged to deal with the ground conditions under the existing Sub-Contract at its own risk and therefore not/entitled to make a variation claim resulting in additional time and/or money

# Clancy Docwra v E.ON

- Court found in favour of CDL.
- Court accepted intention of clauses 2.1.7 to 2.1.9 was clearly for E.ON to transfer to CDL the risk of adverse site conditions likely to affect the Sub-Contract Works.
- However, Court found this risk profile had to be read in the context of what those Works were.
  - The scope of the Sub-Contract Works had been expressly limited by the tender clarifications that CDL had sent out.
  - to say the site conditions clause placed the risk of underground obstructions on CDL would be to expand the scope of the Sub-Contract Works.
- The risk allocation clause was effectively trumped by CDL's exclusions and notwithstanding the attempt to plead the priorities clause

# Clancy Docwra v E.ON

## Key takeaways

- Clients' own due diligence needs to include a comprehensive review of the technical aspects of the contract documentation, especially tender and post-tender exclusions and clarifications contained in emails, site meeting minutes and other documents.
- Risk allocation clauses in contracts should not be viewed or drafted in isolation of the rest of the contractual documentation
- Contract conditions including priorities/order of precedence clauses will not always save you.



# Corebuild v Cleaver and another [2019] EWHC 2170 (TCC)

## Termination of contract

- Tom Cleaver terminated Corebuild **failure to proceed regularly and diligently** on advice of Contract Administrator.
- Corebuild disputed termination and brought adjudication.
- Cleaver argued that even if termination was invalid, it was not a **repudiatory breach** because he'd relied on opinion of CA.
- Corebuild did not dispute the reliance on the advice of the CA, but said it was irrelevant and not logical to link to the issue of repudiation of contract
- **Adjudicator** found Cleaver had not relied on the opinion of CA; and that the termination *was* repudiatory.
  
- Was there any breach of natural justice?

# Corebuild v Cleaver and another [2019] EWHC 2170 (TCC)

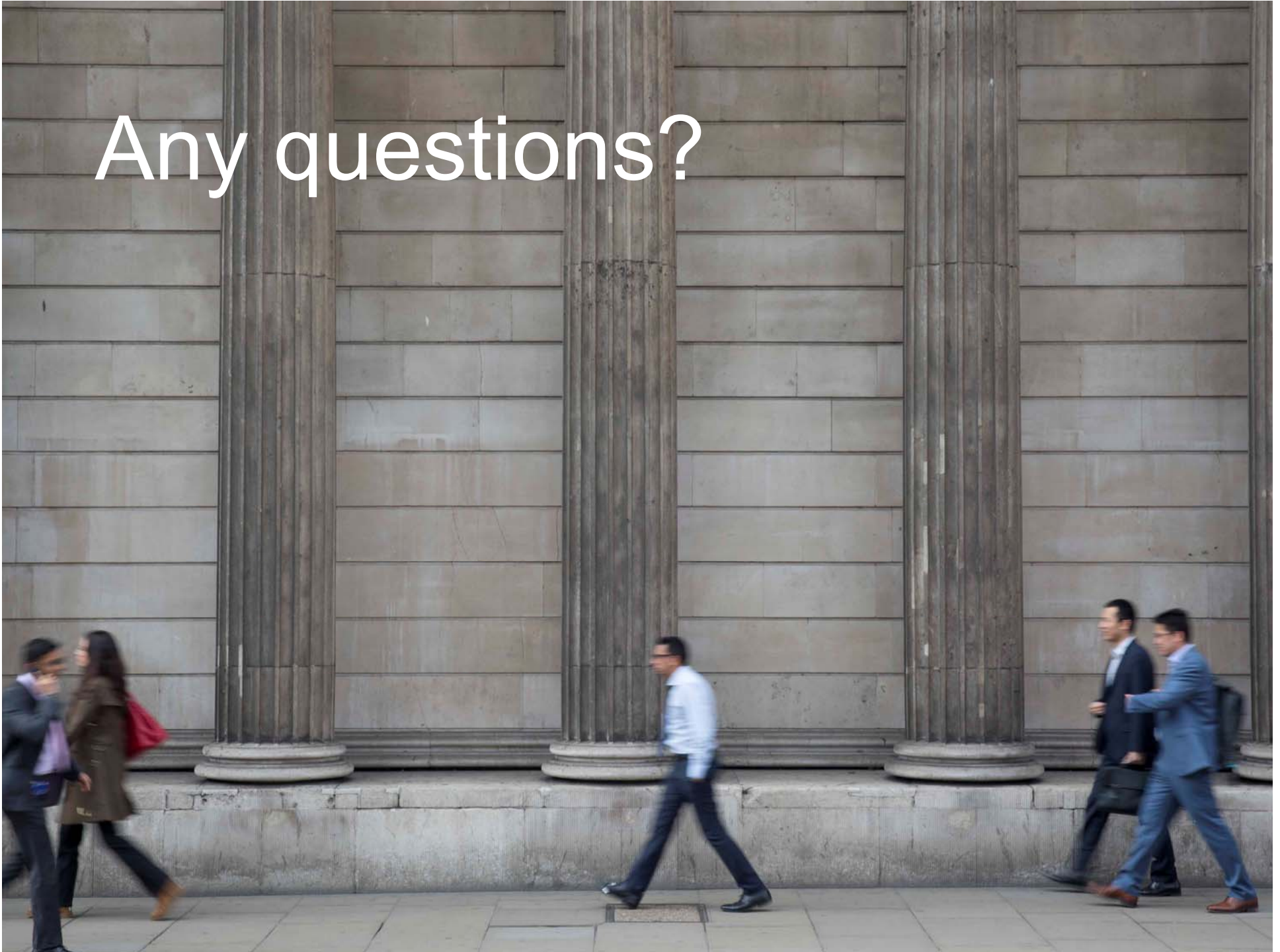
- Court held there *had* been a breach of natural justice as:
  - the adjudicator had decided the dispute on the basis of a factual ground that had *not been argued* by either party (there was no dispute on the reliance point) and on which the Defendant Cleaver had not had an opportunity to comment
  - The adjudicator had failed to assess the decisive issue of repudiation on the basis argued/submitted by the Claimant Corebuild
  - The adjudicator had instead decided the issue on assumed facts which neither party had argued; were unsupported by evidence or submissions; and the Defendant Cleaver had had not opportunity to address

# Corebuild v Cleaver and another [2019] EWHC 2170 (TCC)

## Key takeaways

- This is a rare case where the court found the adjudicator's decision unenforceable due to breach of natural justice
- Adjudicators must be robust in deciding the dispute on the basis of the submissions put before him/her and not “go off on a frolic” of his/her own
- However courts are generally keen to enforce adjudicator's decisions.
- Remains a high threshold to succeed in breach of natural justice arguments.

Any questions?



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