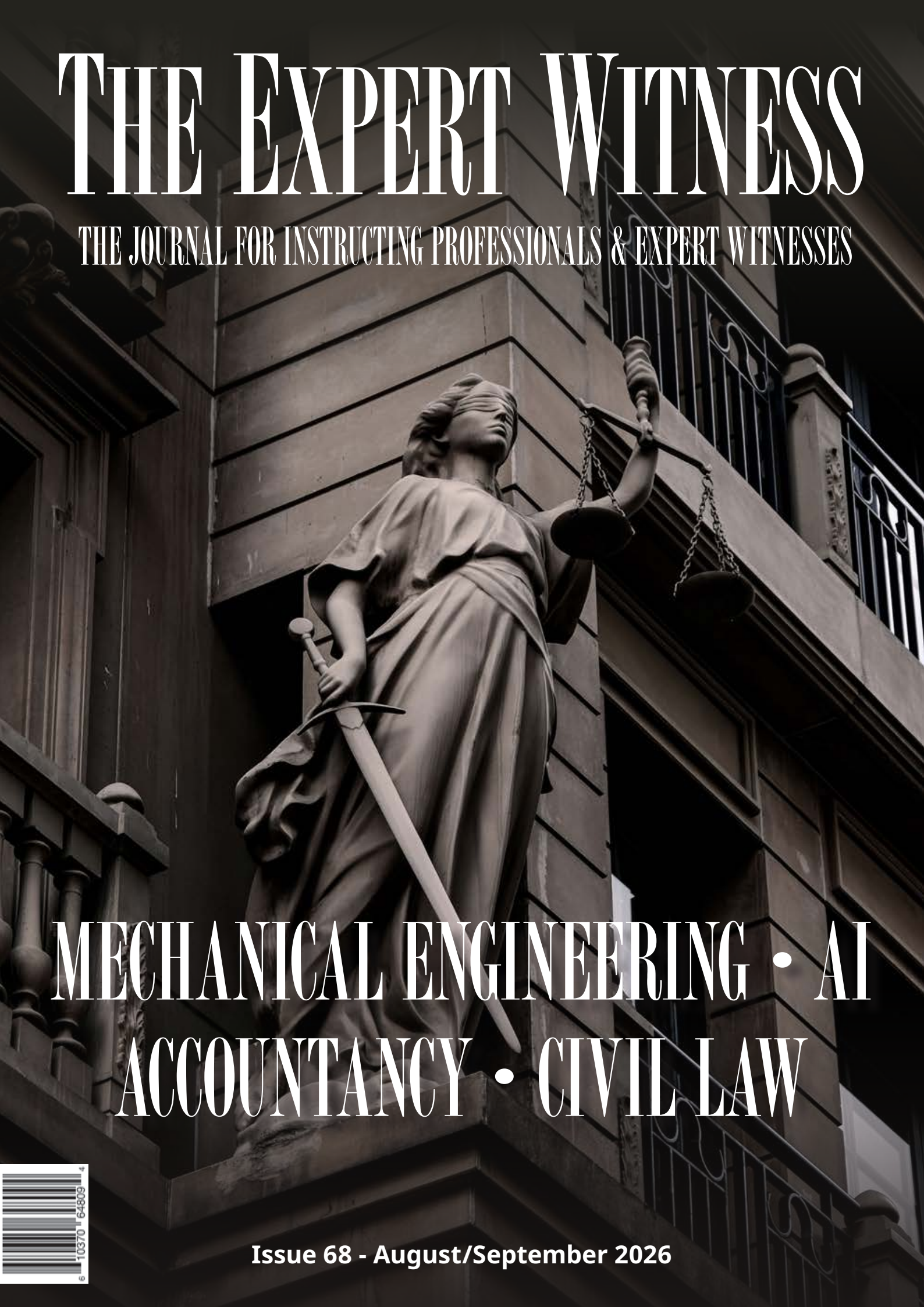
The Expert Witness

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES



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Issue 68 - August/September 2026

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Welcome to the Expert Witness Journal

Hello and welcome to our August issue, the main focus of this issue is non-medical experts.

These areas of expertise cover a vast area of specialism including; construction work, building surveys, mechanical engineering, environmental issues, AI, accountancy and many more.

Jamie Caulfield at Tudor Rose discusses the judgement in Santos Ltd v Fluor Australia Pty Ltd. This case provides one of the clearest modern judicial statements on construction delay expert analysis.

The Museum of the Future is often described as one of the most beautiful buildings in the world. Austen Smith, Architect Expert at Hawkins writes about a number of obstacles the building had to overcome, in particular the design of the project-defining façade

We also feature details of a significant judgment that was handed down featuring novel arguments relating to the cladding and fire safety issues of a commercially leased high-rise hotel. Yaasica Hamilton-Haye and Mark Foxcroft at Devonshires talk over the case.

Other articles include – Value Engineering – Is it Truly Valuable by David Waddle at Rimkus, Can you have capacity for residence if you lack capacity for care? By Faria Jamali at Browne Jacobson, When the Specialists Mark Their Own Homework by James Byrne and Giles Mooney KC at Deka Chambers and Neil Rudd at Crowe UK LLP explores the practical realities of international and cross-border valuations, highlighting issues that solicitors should consider when selecting, instructing and assessing expert valuation evidence.

Our next issue will be published in October 2026, and will be available for the Bond Solon Conference in November, if you have a submission please email us.

Nigel Hector

Publisher
nigel@expertwitness.co.uk

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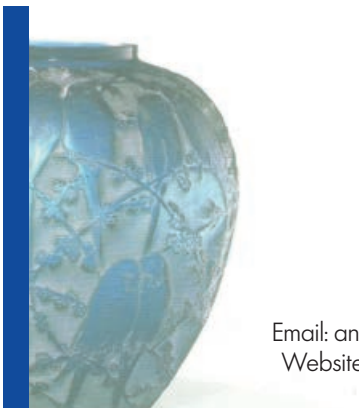
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Andrew Acquier, FRICS, FNAVA

CHARTERED ARTS SURVEYOR

Andrew Acquier FRICS, FNAVA has been working as an independent valuer since 1982, specialising in fine art and antiques. Instructions for probate, divorce settlement, tax/asset and insurance valuations as well as expert witness work are regularly received from solicitors and other professionals.

Andrew has many years experience of compiling reports for litigious cases, several of which have necessitated a subsequent court appearance as an expert witness to argue quantum. Divorce valuations are a speciality, usually as Single Joint Expert. He is an Associate Member of Resolution. Work is carried out throughout the UK and abroad.



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Professor J. Peter A. Lodge MD FRCS FEBS

Recognised internationally as an expert in surgery for disorders relating to the gallbladder, liver and bile ducts as well as weight loss (bariatric) surgery



Surgical training primarily under the guidance of Professor Geoffrey R Giles, and the New England Deaconess Hospital (Harvard Medical School), Boston, USA, under the guidance of Professor Anthony P Monaco.

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12th August 2026
25th August 2026
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Civil Law and Procedure (England & Wales)
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10th September 2026 to 11th September 2026
12th November 2026 to 13th November 2026

Law and Procedure - Scotland
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Discussions Between Experts
One day, virtual classroom

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Mr Adam Ross
Consultant Ophthalmic Surgeon
MBChB, FRCOphth, FHEA, PGC MedEd, MBA

Adam Ross is a Consultant Ophthalmologist with a sub-specialty interest in cataract surgery, including micro-incision and complex cataract surgery, medical retina and uveitis. He has over 15 years experience in medicine, and was previously the lead for the medical retinal service at the Bristol Eye Hospital, as well as being exceptionally active in clinical research, as the principal and chief investigator on a variety of trials. He carried out his training in Bristol and Cheltenham, as well as visiting fellowships in New York and Washington. He further completed various post-graduate qualifications.

Mr Ross is a fellow of the higher education academy, and continues to be actively involved in teaching of ophthalmologists in addition to allied health professionals.

He has an extensive background in teaching and was the Ophthalmology Postgraduate Training Director and Head of School for Ophthalmology in the Severn Deanery, as well as an Honorary Senior Clinical Lecturer at the University of Bristol.

His expertise lies in cataract surgery, complex cataracts, premium multifocal and toric intraocular lenses, as well as retinal disease. Mr Ross is also involved in research within the subspecialty of retina at Boehringer Ingelheim, and sits on the board of trustees for the charity SRUK (Sight Research UK).

Dr Ross has vast experience in acting as an expert witness. He is familiar with my duties as an expert witness under Part 35 of the CPR and is happy to be instructed as a joint expert witness. He currently prepares expert reports for a number of r eputable medical agencies who are members of the Association of Medical Reporting Organisations.

Dr Ross now has a dedicated medico-legal service with turnaround of reports of 4 weeks with competitive quotes from the outset of instruction.

Dr Ross regularly publishes in ophthalmic literature.

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Dr Dimitrios Sampanis PhD MSc mCSP mHCPC - Dr Sampanis is a Chartered Physiotherapist and HCPC registered expert witness with a PhD in Neuroscience, specialising in traumatic brain injury, spinal cord injury and stroke rehabilitation. He has completed numerous medico-legal assessments and reports for litigation and insurance matters.

Dietetics

Rebecca McManamon (MNutr, RD, HCPC-Registered) - Rebecca McManamon is an HCPC registered Dietitian and experienced medico-legal expert specialising in clients with complex needs following brain and spinal injury, polytrauma and cerebral palsy. She prepares expert reports for claimant, defendant and joint instructions.

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Mrs Robyn J S Webber

Consultant Urological Surgeon

MD, FRCSEd (Urol)

Consultant Urologist based in Fife, Scotland.

My medicolegal areas of interests are; personal injury, pelvic and genitourinary trauma, clinical negligence in all aspects of urological surgery, including delayed diagnosis and complications related to implanted surgical materials.

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What should an expert witness expect from a court-compliant letter of instruction?

by Bond Solon.

A Court of Protection case that was heard last month provides invaluable guidance to all expert witnesses about what a letter of instruction that is compliant with best practices should contain

Bristol City Council v CC & Ors [2026] EWCOP 19 concerned the capacity of CC, a 23-year-old male with a complex social and mental health background.

The judge, Mrs Justice Theis DBE, was critical of the way in which documentation relevant to the case was passed to the expert witness.

She said:

> *"Those willing to give expert evidence in cases in the Court of Protection are an invaluable resource to assist the parties and the court reach decisions in these difficult cases. The parties and the court need to ensure that all necessary steps are taken to enable them to undertake that important role."*

The Judge invited the parties to produce an agreed note on the instruction of experts in the Court of Protection, which they duly did.

When and how should an expert witness be instructed?

Rule 15 of the Court of Protection Rules 2017 provides guidelines on how experts should be instructed and reminds parties that expert evidence should only be requested when it is "necessary" for the court to reach a resolution. Similar instructions can be found in the equivalent procedural rules for civil, criminal and family cases.

Justice Theis said a draft letter of instruction to the expert should ideally be signed off by the court. If that is not possible then the court should have sight of the questions the expert is being posed.

What should a letter of instruction contain?

Outlining the requirements of the letter of instruction itself, Justice Theis warned against "lengthy and unwieldy recitations of the background facts and procedural history" or "detailed descriptions of previous case law".

She said it should be "focussed and adapted to the facts of the particular case" and pointed to AMDC v AG and CI [2020] EWCOP 58 [28 (b)] in which Mr Justice Poole said the letter of instruction should "identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide".

Mrs Justice Theis advised experts that if they are "unsure what decisions they are being asked to consider, what the relevant information is in respect to those decisions, or any other matter relevant to the making of their report, they should ask for clarification".

She then outlined the key components that an expert witness should expect to see in their letter of instruction:

- Statement of facts and list of materials. A brief "neutral" statement of the facts of the case, with a list of the materials the expert is expected to assess before reaching an opinion.
- Core legal framework. As this case was a Court of Protection hearing, the judge suggested including the core legal principles of the MCA 2005, or a summary of those that are relevant to the case. Similar legal frameworks should be included for hearings in the criminal, civil, or family courts or specialist tribunals.

- Relevant decisions (if assessing capacity). Relevant decisions to be assessed, with the relevant information for each decision as agreed between the parties.

The judge said: "If required there can be a brief explanation as to where the information derives, providing confirmation that what the relevant information consists of should ultimately be a matter for the relevant expert to determine when undertaking the assessment and a reminder of the importance that the expert is not an arbiter of fact."

- Details of person(s) the parties consider the expert should or may meet with.
- Confirmation as to whether proceedings are public or private and details of any transparency orders.
- Crucial information. Timescales for the report, the expert's fees, dates of hearings/oral evidence, and confirmation of who the report will be disclosed to, with a reminder that parties have the right to pose questions of clarification.

What other documents should experts expect in the run up to a hearing?

The judge emphasised that questions to the expert after the filing of their report should only be done in accordance with COPR 2017 rules and must be for the purposes of clarification only. Similar rules would apply to other courts and tribunals, and the instructing parties would be well advised to include the corresponding information for their specific hearings.

Parties should then keep any further relevant evidence under review and make sure it is sent to the expert with a suitable covering message identifying the relevant documents.

Finally, if an expert is expected to give oral evidence at a hearing, they should be provided with:

- An updated court bundle at the same time as the bundle is lodged with the court.
- A list of documents that have been filed since their instruction, specifically highlighting which documents the parties want them to review in advance of giving oral evidence.
- Any further documents filed immediately prior to the hearing that the parties will likely refer to in questioning.

How can we help

This case provides invaluable guidance for experts who regularly give evidence on Court of Protection matters on what they should expect from a court-compliant letter of instruction. However, some of the general principles, in particular those relating to the neutrality of instructions and the sensible use of documents are also useful to experts giving evidence in other courts and tribunals.

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Mr Panchmatia is a Consultant Orthopaedic Spine Surgeon at Guy's and St. Thomas' Hospitals NHS Trust. His Spine Fellowship was at Johns Hopkins Hospital, USA. Mr Panchmatia graduated from Cambridge and Harvard Universities. He has presented internationally, and is published widely in orthopaedic and neurosurgical journals.

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Dr Duncan Dymond

MD FRCP FACC FESC

Consultant Cardiologist

Dr Duncan S Dymond has been a consultant cardiologist at St Bartholomew's Hospital, now a part of Barts Health NHS Trust since 1987.

He has been undertaking expert witness and medicolegal work for more than 12 years and has completed his Cardiff University Bond Solon expert Witness course.

Dr Dymond currently completes 1-2 medicolegal reports per week, for personal injury and medical negligence, with roughly a 60/40% split claimant/defendant.

He has also completed expert witness work for the General Medical Council, the Medical Defence Union and the Crown Prosecution Service as well as accepting private instructions directly for solicitors. He has also provided mediolegal opinions for cases in Singapore.

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Connecting You with the Right Expert Witness for Your Defence Case

by Forensic Access.

Choosing the right expert witness can have a significant impact on the outcome of a criminal case. Whether the evidence relates to forensic biology, digital evidence, pathology, psychiatry or another specialist discipline, instructing an expert with the appropriate knowledge and experience helps ensure that the scientific or technical matters are considered thoroughly and objectively.

For solicitors, identifying the most appropriate expertise is not always straightforward. Cases often involve highly specialised disciplines, varying timescales and the need for an expert who understands both their field and the requirements of the criminal justice system. In some cases, the evidence may span multiple areas of professional knowledge or require specialist input that is not readily available, making the process of identifying the most appropriate expert increasingly challenging.

At Forensic Access, our experienced Casework Team supports defence solicitors through an extensive network of independent expert witnesses across a broad range of forensic, scientific, medical and technical disciplines. By understanding the matters in dispute from the outset, we help ensure each instruction is matched with the specialist expertise most appropriate to the case, allowing solicitors to progress their work with confidence.

Access to a Broad Range of Expertise

No two criminal cases are the same. Some require expertise within well-established forensic disciplines, while others demand highly specialised knowledge that may only be available from a small number of practitioners.

Our expert witness network includes specialists across forensic science, medicine, engineering and

many other technical disciplines, enabling us to support criminal cases involving a wide variety of evidential matters. From DNA evidence and toxicology to firearms, digital forensics, collision investigation, pathology, psychology and psychiatry, we work closely with solicitors to understand the questions that need to be addressed before recommending specialist input that reflects the specific circumstances of the case.

Every instruction is considered on its own merits. Rather than simply identifying an expert within a particular discipline, we consider the complexity of the evidence, the questions that require independent opinion and the practical experience needed to address those matters effectively.

Finding Experts in Emerging or Unusual Disciplines

Some cases involve evidence that does not sit neatly within a single forensic discipline. They may require expertise in an emerging, highly specialised or unusual field where the number of suitable experts is limited.

In these circumstances, identifying appropriate expertise requires experience, established professional networks and an understanding of both the scientific questions and the requirements of criminal proceedings.

Where a case requires knowledge beyond our core expert witness panel, we draw on our wider professional network to identify suitably qualified specialists. Our longstanding relationships across the forensic, scientific and medical communities enable us to source expertise in niche or emerging disciplines where suitable experts may not be readily available. This is particularly valuable where evidence spans multiple disciplines, involves new technologies or raises questions that fall outside traditional forensic fields.

Matching Expertise to the Case

Selecting an expert witness is about more than identifying someone with the right qualifications. The most effective expert is one whose knowledge, experience and practical background are directly relevant to the questions that need to be addressed. Our Casework Team takes time to understand the circumstances of each instruction, the available evidence and the matters requiring expert opinion. By considering these alongside the timescales of the case, we can identify the specialist whose experience and professional background are best suited to the instruction.

This helps ensure that the expert instructed has the relevant experience to provide clear, objective opinion on the matters that are genuinely in dispute.

Experience Beyond Technical Knowledge

Technical expertise is only one aspect of being an effective expert witness.

Experts instructed in criminal proceedings must be able to analyse complex evidence, prepare balanced and well-reasoned reports, explain technical findings clearly and understand their duties to the court. Where required, they must also be capable of presenting evidence confidently during conferences, joint discussions and court proceedings.

Many of the experts within our network have extensive experience providing independent expert evidence in criminal cases. They understand the importance of impartiality and the need to communicate scientific findings in a clear, objective and accessible way, ensuring that complex technical evidence can be understood by solicitors, counsel and the court.

Quality and Independence

Every expert instructed through Forensic Access is independent. Their duty is to the court, providing objective opinion based on their professional expertise and the available evidence.

Before joining our network, experts are carefully assessed for their qualifications, professional standing, relevant experience and ability to produce reports that meet the standards expected within criminal proceedings. Many continue to practise actively within their specialist disciplines, ensuring their knowledge reflects current developments, methodologies and best practice.

Alongside recruiting experienced experts, we also support the development of future expert witnesses. By helping emerging specialists gain experience under appropriate guidance, we contribute to maintaining the availability of high-quality expert evidence across a wide range of disciplines for the future.

Dedicated Casework Support

Our support extends well beyond introducing an expert.

From the initial enquiry through to report delivery, our Casework Team works closely with instructing solicitors to manage each instruction efficiently. This includes discussing the circumstances of the case, identifying appropriate expertise, obtaining quotations, coordinating documentation, arranging examinations where required and maintaining clear communication throughout the instruction. Where circumstances change, we continue to work closely with instructing solicitors to help ensure the instruction progresses smoothly.

For many solicitors, this responsive support is one of the reasons they continue to work with Forensic Access. Rather than spending valuable time searching for, vetting and coordinating experts independently, they can rely on our team to manage the process efficiently while ensuring the instruction is placed with the most appropriate specialist.

This allows solicitors to focus on progressing their client's case, confident that the expert witness instruction is being managed professionally, efficiently and with a clear understanding of criminal proceedings.

A Trusted Partner for Criminal Defence

Forensic Access has supported criminal defence solicitors for many years by providing access to experienced independent expert witnesses across an extensive range of disciplines.

Whether a case requires expertise in an established forensic discipline or a highly specialised area of knowledge, we work to ensure solicitors have access to independent expert opinion tailored to the specific matters in their case.

By combining an extensive expert network with experienced case management, responsive support and a commitment to quality and independence, Forensic Access has become a trusted partner for criminal defence solicitors seeking independent expert opinion. We simplify the process of identifying, instructing and managing expert witnesses, allowing solicitors to focus on progressing their client's case with confidence.

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If you require expert witness support in a criminal defence case, or assistance with a wider range of forensic evidence, get in touch with our Casework Team on 01235 774870 or at science@forensic-access.co.uk.

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Downstream recovery in historic cladding claim: court awards 87.5% contribution claim against cladding product supplier

by Louise Shiels, Head of Dispute Resolution and Risk & Partner, Keith Kilburn, Legal Director & Nathan Rodgers, Trainee Solicitor at Brodies LLP.

The TCC in Mulalley & Co Ltd v STO Ltd & Anor considered how much a contractor could claim for contribution against the supplier of a defective external cladding system via a building liability order ("BLO").

In the aftermath of the Grenfell Tower fire in June 2017, many building owners undertook reviews to determine whether their properties contained potentially dangerous cladding.

In this recent case, the installed cladding system was found to be unsafe, and Mulalley entered into a settlement agreement where it agreed to remove and replace the defective cladding.

Mulalley sought to recover the cost of these remedial works from Sto, the British company that supplied the cladding system. Sto was placed into administration in 2025, and so Mulalley instead pursued Sto's German parent company via a BLO.

BLO's are a legal mechanism which prevent developers from escaping liability for safety defects by hiding behind complicated legal structures. They extend liabilities to associated companies (such as parents, successors, or related groups), typically, where the original developer has become insolvent, or where the company involved was a special purpose vehicle without any assets.

In any event, Sto Germany did not participate in the proceedings, and so Mulalley obtained a default judgment against them. The only question left for the Court was how much could Mulalley claim in contribution from Sto Germany?

The Court noted that notwithstanding Sto Germany's failure to engage, Mulalley must prove its loss or damage by evidence. In this regard, Mulalley produced evidence from its Commercial Directors as to the remedial costs incurred and independent expert evidence as to the reasonableness of these remedial costs.

The Court found the remedial costs to be reasonable, and so next looked to how much Mulalley could recover in contribution towards these remedial costs.

In doing so, the Court had to consider both the seriousness of Mulalley and Sto's faults, and their causative relevance. The Court accepted that it was to adopt a similar approach to that between a contractor and an architect on the basis that Sto, like an architect, was responsible for any design defect. It found that the principal cause of the remedial works was that Sto had marketed and supplied an inherently defective cladding system.

On that basis, it found that the just and equitable contribution payable by Sto (and therefore Sto Germany under the BLO) was set at 87.5% of the costs of carrying out the remedial works.

Commentary

This is another example of BLOs cutting through companies group structures and insolvency protections in building safety claims.

Unlike most recent defective cladding cases, where a building owner has been seeking to recover from the original contractor, this was a contractor passing the costs "downstream" to the cladding supplier after already reaching an "upstream" settlement with the building owner.

The award of 87.5% against the supplier of the defective cladding system is a good indicator as to how similar future cases may be decided, however, each case will turn on its respective facts. As Sto Germany did not take part in proceedings, they could not dispute either the reasonableness of the remedial costs or forward any defence as their liability. If defended, it's possible the award would not have been so high.

This is a developing area, and we will continue to provide updates as to the various court's approaches to BLO's, contribution orders, and historic cladding claims.

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FRICS MAE

If you need any advice on legal matters relating to property, or if you require an expert witness to gather factual and impartial evidence that could help you win your case, then you should contact the professionals at Simon Levy Associates on 020 8207 6100.

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Mr. Matthew Klinefelter
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Matthew Klinefelter is an Expert Witness and Director at Planetal Limited, where he leads the Delay Analysis & Expert Services team.

Matthew is a seasoned construction expert with over 19 years' experience across a multitude of sectors. His career has combined practical project delivery with specialist expert witness appointments across the UK, Europe, USA and the Middle East. With experience on projects ranging from circa £30,000 to over £250 million, he has acted for Tier 1 Contractors, Subcontractors, Employers and their legal representatives.

His expertise is deeply rooted in practical on site delivery experience, having held senior management roles for both Tier 1 Contractors and Subcontractors before specialising in expert witness work. This practical background provides a unique perspective, allowing him to combine sound engineering judgement with technically robust analysis when forming independent expert opinions.

Matthew has developed a reputation for resolving highly complex delay and disruption disputes, particularly where conventional approaches alone are insufficient. His appointments frequently require the development of bespoke or hybrid analytical methodologies, carefully tailored to the facts, available evidence and complexity of each commission. This ability to adapt his approach, whilst maintaining independence, technical rigour and practicality, enables him to deliver clear, well-reasoned opinions that assist clients, legal teams and tribunals in understanding the true causes and extent of delay.

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Construction Delay Analysis after Santos v Fluor: Method, Credibility and the Future of Expert Evidence

by Jamie Caulfield, Associate Director (Delay Expert Witness Services) at Tudor Rose.

Introduction

The judgement in Santos Limited v Fluor Australia Pty Ltd [2025] QSC 184 from the Queensland Supreme Court has provided one of the clearest modern judicial statements on construction delay expert analysis. It is particularly significant for delay analysts and experts, as it highlights that methodology and reasoning are scrutinised as closely as conclusions.

For companies that specialise in delay analysis, this case sends a strong message:

Decision makers are far more interested in clear reasoning and real evidence than in complicated models or impressive-looking software outputs.

Two Experts, Two Very Different Stories

In this case, the claimant was Santos Limited and the defendant was Fluor Australia.

Both sides hired delay experts who agreed on an initial methodology; as-planned vs as-built windows analysis. However, their conclusions were contrasting due to one expert's decision to apply 'but-for' scenarios to their analysis.

The claimant's expert carried out an as-planned vs as-built windows analysis. They looked at what was originally planned and compared it with what actually happened on site, breaking the project into time periods and showing how critical path delays built up over time.

The defendant's expert tried to argue that if certain delays had not happened, the project would still have finished late anyway, because other tasks were nearly critical.

The referees preferred the former approach, as did the Court. The referees found the evidence of the claimant's expert to be "consistent with the objective factual circumstances and, indeed, was supported by a prodigiously detailed analysis of background facts and documents. It was unshaken in cross-examination".

Judge Freeburn commented on the near critical path analysis undertaken by the defendant's expert. The judge concluded the evidence did not demonstrate these near critical delays ever became critical. He asserted that the, "process of identifying the critical path, that is what is controlling the progress, is fundamental to the agreed process".

Why Near Critical Paths Are Not Your Friend

The defendant expert's evidence relied on a 'but-for' scenario, which relies on the following proposition:

'If this delay had not happened, something else would have caused delay anyway.'

The problem is that construction projects do not behave like that. When one delay is removed, the whole sequence of work can change. A different activity may become critical, or work might be done in a different order. Delay experts must rely on the facts only and not hypothesise about what could have happened.

The Court accepted that you cannot safely assume the project would have been late anyway without showing what would actually have happened. Delay analysis has to reflect how projects behave in real life, not how they might behave in theory.

Why looking at what actually happened is important

The claimant's expert focused on actual progress. They identified:

- What the planned intent of the parties was.
- What actually happened contemporaneously.

- How specific problems caused the project to slow down and identified critical delay to completion.

By working through the project periodically, they were able to identify the critical path and evidence delay against as-built site records. This made their explanation easy to follow and hard to argue with.

The Court said this was a sensible and reliable way to show cause and effect while acknowledging their analysis "is actually derived from a detailed analysis of the facts and documents of the project".

The lesson is simple: Methods based on real progress are easier to trust than methods based on imagined alternatives or reliance on over complicated software modelling.

What About Industry Guidance?

The defendant complained that the referees preferred an approach that followed guidance from the Society of Construction Law Delay and Disruption Protocol. They argued that the Protocol was not part of the contract, so it should not be relied upon.

The Court agreed that the Protocol is not legally binding. However, it also said that it is helpful guidance on how delay analysis should be done properly. While Judge Freeburn noted "...the SCL Protocol is not a straitjacket...", following it shows that an expert understands accepted industry practice.

Freeburn added that "...the referees were uncomfortable with the logic of [the defendant's expert's] departure from the agreed SCL Protocol methodology". This case provides a gentle reminder to all of us that whilst the Protocol is not law, it is still a useful benchmark for professional behaviour.

Evidence Matters More Than Theory

The referees decided that one party had clearly shown how breaches caused delay and the other party had failed to show any real alternative explanation. The Court agreed with this.

This highlights an important point:

Delay analysis is not about debating possibilities. It is about proving what happened using facts and records. If an expert cannot connect delay events to real site activity, their opinion is unlikely to be trusted or relied upon by decision makers.

The Importance of Record Keeping

An important lesson from the case is the critical role of good record keeping in construction projects. Delay analysis is only as strong as the evidence that supports it. Contemporaneous records such



as programmes, progress reports, site diaries, photographs, and meeting minutes allow an expert to show what actually happened and when.

Without reliable records, any delay analysis risks becoming speculative and assumption-based, which courts and tribunals are unlikely to accept. Proper record keeping therefore underpins the ability to demonstrate cause and effect. It strengthens the credibility of expert evidence, and significantly improves a party's prospects of success in any delay-related dispute.

What This Means for Delay Experts

Santos Limited v Fluor Australia Pty Ltd [2025] QSC 184 shows that delay analysis is not just a technical task. It is about judgment and communication.

A good delay expert should:

- Use a clear method that others can understand.
- Show how one delay event led to another, relying on contemporaneous as-built records to support the evidenced delays.
- Follow recognised guidance sensibly and avoid speculation and assumptions.

In short, the expert needs both technical skill and practical construction understanding.

What This Means for Clients and Lawyers/Instructing Solicitors

For those choosing an expert, the message is clear:

Pick someone who can explain the story of the project, not just produce complex diagrams or rely solely on software modelling. An expert who relies on theory or assumptions without real evidence risks having their work rejected.

The most persuasive expert is the one who can describe the project and delay in a way that is easy to understand and does not over complicate it. Ultimately, many decision makers are not from a delay background. Making the analysis and conclusions easy to follow while simultaneously relying on actual records will be preferred.

Final Thought

Santos v Fluor reminds us that delay analysis is not about clever models or colourful programmes. It is about explaining why a delay happened in a way that makes sense.

Good experts don't just show where the critical path is, they show where it is and why it moved, using the facts.

That is what the Court trusted — and that is the lesson for everyone involved in delay analysis.

If you are dealing with delays or claims in your project, getting the right help early can really make a difference. Get in touch with Jamie or one of the team and we can support you with all aspects of delay analysis and claims management, from live projects through to disputes.

About the author

Jamie is an expert construction planner with over 10 years of on-site experience across the infrastructure, building, and civil engineering sectors. He has a strong background in project planning, programme management, and the analysis of live projects and strategic portfolios.

Jamie has acted as a delay expert on major infrastructure disputes and has supported clients through adjudication, arbitration, and litigation. He also advises employers, contractors, and consultants on delay claims, extension of time applications, and programme-related matters.

For more help with this or any related issues, get in touch today.

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Can Contractors Resist Enforcement of an Adjudicator's Decision? Lessons from Kingsmead Homes v Laycock Mechanical Services [2025]

by Michael O'Connor, Partner & William Mortimer, Paralegal at Charles Russell Speechlys.

A Technology and Construction Court (TCC) ruling demonstrates that adjudicators' decisions may be successfully challenged where a clear error has been made by the adjudicator which would be unconscionable for the court to ignore.

In Kingsmead Homes Ltd v Laycock Mechanical Services Ltd, the court granted declaratory relief under Part 8 of the Civil Procedure Rules, enabling the contractor to resist enforcement of an adjudicator's decision. The case offers important guidance on how construction programmes can form part of subcontracts and when the courts will intervene to correct an adjudicator's material oversight.

What Was the Dispute About?

Kingsmead Homes Ltd (the contractor) engaged Laycock Mechanical Services Ltd (the subcontractor) to carry out plumbing and electrical works. A dispute arose when Kingsmead deducted liquidated damages, alleging that Laycock had caused delays on site.

Laycock referred the matter to adjudication and was awarded £27,895.26 plus VAT and £4,000 in fees. When Kingsmead refused to pay, Laycock commenced Part 7 enforcement proceedings and sought summary judgment under the well-established "pay now, argue later" principle.

Kingsmead responded by bringing a Part 8 claim for declaratory relief, seeking to resist enforcement of the adjudicator's decision.

What was the error made by the Adjudicator?

The central issue was whether the subcontract included an agreed completion date. The adjudicator found that an August 2023 programme containing an accelerated completion date had not been incorporated into the subcontract. However, he failed to consider an earlier programme from July 2023, emailed to Laycock with a copy of the subcontract for signing. Clause 6.8 of the subcontract contained the following wording "Commencement and completion:- see attached programme" though the programme was not physically attached to the signed subcontract.

Because the adjudicator concluded that no contractual completion date existed, he determined that no extension of time mechanism was engaged. He then substituted a "reasonable period" for completion.

When Will the TCC Allow a Part 8 Challenge to Block Enforcement of an Adjudicator's Decision?

The TCC applied the restrictive four-stage gateway test set out in Section 9.4.5 of the TCC Guide. This test permits the court to intervene where:

- The adjudicator has made a clear jurisdictional error.
- The error relates to a short, self-contained legal issue.
- The issue can be resolved without the need for oral evidence.
- It would be unconscionable for the court to ignore the error.

The court was satisfied that all four stages were met. The adjudicator's failure to consider the July 2023 programme was a clear error which was unconscionable for the court to ignore.

How Did the Court Interpret the Contract?

Applying the objective test for contractual interpretation, the court held that a reasonable observer would understand Clause 6.8—which stated "Commencement and completion: – see attached programme"—as incorporating the July 2023 programme into the subcontract. Laycock's witness evidence confirmed receipt of that programme.

The court rejected Laycock's reliance on the general proposition from Chitty on Contracts that programmes are not usually treated as contract documents. In this case, the express contractual language made the position clear.

What Does "Unconscionable" Mean in This Context?

Laycock argued that the unconscionability limb of the test could not be engaged because Kingsmead had not raised the July programme issue during the adjudication. The court rejected this argument, finding that Kingsmead had argued that, "The attached programme" would be sufficient to give rise to a completion date albeit that, during the adjudication, they were relying upon the August programme as the "attached programme".

Given that a proper legal analysis of the July programme had a significant prospect of producing a different outcome, the court found it would be unconscionable to ignore the adjudicator's error. Kingsmead was therefore granted the declaration sought.

What Are the Key Takeaways?

- Successful Part 8 challenges are rare but possible. Resisting enforcement of an adjudicator's decision is uncommon, but this case confirms genuine scope for intervention where a material error is made by the adjudicator.
- Construction programmes can be incorporated into contracts. Despite general convention treating programmes as non-contractual documents, express contractual language (such as Clause 6.8 in this case) can incorporate them. However, parties should bear in mind that there can be pitfalls in designating the programme a contract document such as:
  - Reduced flexibility for the contractor: Incorporating a programme into a contract obliges a contractor to carry out the works strictly in accordance with the programme, achieving all key dates shown and not just the final date for completion, bedding in more risk of being in breach of contract.
  - Employer reliance on its professional team: it would impose extra obligations on the employer such as binding dates for providing information and approvals to the contractor. This would require additional obligations on the professional team and may require specific drafting in their appointments to include obligations to comply with the employer's programming obligations.
- Unconscionability focuses on consequences, not procedure. The test for court intervention centres on whether ignoring the error would produce an unjust result.

Mr Nikhil Shah

Consultant Trauma and Orthopaedic Surgeon

FRCS(Tr & Orth), FRCS(Glasg), Mch(Orth), MS(Orth), DNB(Orth).



I provide medico legal reports in personal injury in various conditions – trips, slips, whiplash injury, hip surgery, complex pelvic acetabular fractures, long bone and articular fractures, ankle, lower limb injuries, hip/knee joint replacements, periprosthetic fractures, soft tissue injuries and LVI cases.

I also provide clinical negligence related reports in my specialist area pf practice concerning hip and knee replacements, revision surgery, and trauma including pelvic-acetabular fractures.

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Mr Ashish Khurana

Consultant Orthopaedic and Spinal Surgeon, Honorary Lecturer



MBBS, MS(Orth.), MRCS, MSc (Orth. Engineering), LLM, FRCS (T&O)

Mr Ash Khurana is a Consultant Orthopaedic and Spinal Surgeon based in Newport. His special interests include spinal trauma, metastatic spinal tumour and complex degenerative spine surgery including neck and the back. He uses various spinal injections, radiofrequency ablation, open and minimally invasive fixation techniques including cementation for managing his patients. He objectively assesses the outcomes of his interventions using PROMs (Patients Reported Outcome Measures).

Mr Khurana has operated a medico legal practice since 2013. He has a unique blend of Orthopaedic engineering and Law combined with his specialist training as a spinal surgeon which enables him to provide comprehensive reports. He undertakes over 200 complex personal injury and clinical negligence cases each year and has appeared in court. He sees clients of all ages via face to face, remote, prison and home visits. His work spilt is claimant: 50%, defendant: 40% and single joint expert:10%.

Mr Khurana is on the GMC panel for expert witness for FTP proceedings. He is also an examiner for FRCS (T&O), interviewer for Cardiff University and reviewer for various international journals including the Bone and Joint journal.

Mr Khurana's special interests include:

- Spinal trauma, whiplash injuries and vertebral fractures/wedge fractures
- Cauda Equina syndrome
- Metastatic spinal tumours
- Disc prolapse and complex degenerative spine surgery including for the neck and back
- Occupational injuries causing neck or back pain, repetitive strain injuries (RSI)

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Mr. Gunaratnam Shyamalan

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As the Director and lead surgeon at Midland Hand Clinic, Mr Shyamalan provide authoritative expert medical legal reports and expert testimony specifically tailored to clinical negligence litigation. His practice is built on a foundation of clinical excellence and a deep understanding of the complexities involved in hand, wrist, and elbow surgery.

With a clinical practice centered on the latest evidence based surgical techniques, he offers authoritative independent assessments on surgical complications, delayed diagnosis and substandard operative care.

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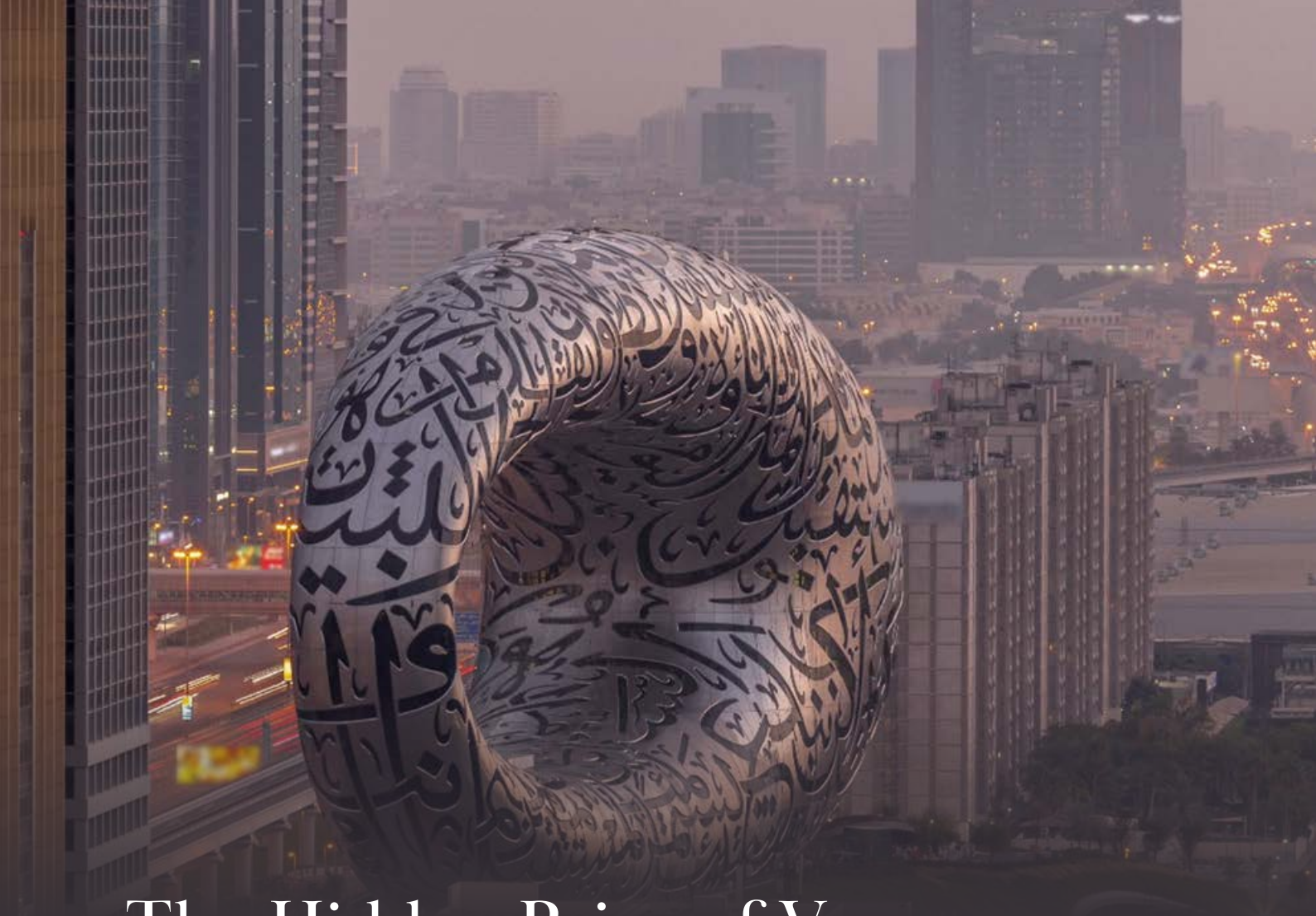


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The Hidden Price of Vague Specifications

by Austen Smith, Architect Expert at Hawkins.

The Museum of the Future is often described as one of the most beautiful buildings in the world. This reputation is due in part to its unique façade, where the glazing forms quotes from the poetry of His Highness Sheikh Mohammed, the Ruler of Dubai.

The building's structure is in the form of a diagrid with horizontal members spaced vertically every 4.5metres.The diagrid supports both the internal floors and the external façade.

The façade comprises approximately 1,000 panels made from glass fibre reinforced polymer (GFRP) overlaid with stainless steel sheets. Due to the calligraphy writing forming the glazing, each panel is unique.

As might be expected on such a technically-unique project, there were a number of obstacles to overcome, particularly in the design of the project-defining façade. Indeed, the final cost of the façade was roughly double the tender price submitted by the façade sub-contractor, with each panel ultimately costing around ₰250,000 (around £51,000).

The main contractor and the façade sub-contractor were unable to agree on how these cost increases had arisen or which party should bear financial responsibility. This resulted in proceedings before the Dubai International Financial Centre (DIFC) Court, where I acted as an independent expert to help the Court determine these complex issues.

So, how could the tender price differ so dramatically from the final cost? Did the façade sub-contractor underprice the works, or did something more fundamental cause the cost to increase?



Figure 1. The museum's diagrid

Background

The façade was tendered on the basis of a performance specification which stated:

> *"Drawings and information in this Specification are intended to show the general form and arrangement of the cladding, and basic cladding systems, including modules and envelopes of space allowed for cladding that must be adhered to. The contractor shall complete the engineering design of the cladding to comply with this Specification and shall be responsible for the design supply and installation of the cladding. The visual aspects of this design must be maintained."*

With regard to design responsibility the specification stated:

> *"This is a performance specification, accompanied by drawings showing the design intent. The contractor shall be responsible for the development of any information beyond IFC to reflect any specific design or technical aspects required by the specialist façade sub-contractor. The façade drawings issued as part of the tender package reflect the detailed design, and the specification outlines the required technical performance of the building envelope."*

The GFRP system was described as having a *"stainless steel cladding or skin bonded..."*

Horizontal and vertical joints were stated to be *"as indicated on the contract drawings."*

The tender drawings for the façade stated that panel sizes were to be:

> *"2.5m x 4.5m or 9m x 3m, vertical span 4.5m or 9m typ (to preferred contractor module)..."*

The panelisation process was described as:

1. Preliminary subdivision of façade surface along horizontal diagrid members.
2. Secondary transversal subdivision to achieve panel sizes within the maximum allowable limits by main UAE suppliers of GFRP and close to single curvature configuration.
3. Manipulation of the panel geometry to minimise the deviation from single curvature within an acceptable tolerance for the manufacture of the stainless steel cladding is undertaken. Panels are single curved with limited areas of minimal double curvature."

Within its tender response the façade sub-contractor stated:

> *"The Panels of Main façade are proposed to be 9 Mtr. x 2.20 Mtr. in size with double curvature to achieve the required outer surface."*

As part of its tender return, the façade sub-contractor produced a mock-up to show that production of its preferred panel size was feasible. The mock-up indicated that the stainless steel sheets were to be mechanically fixed to the GFRP panels using rivets,

as the adhesive alone could not be relied upon to secure sheets to the GFRP panels.

A letter of intent (LOI) was issued to the façade sub-contractor within which is stated:

> *"All qualifications, exclusions, clarifications, etc. stated within the subcontractors quotation shall be deemed withdrawn and shall not form part of this Letter of Intent..."*

Attached to the LOI was a list of issued for-construction drawings and documents. The content of these was identical to the tender documents; they had not been updated to reflect the façade sub-contractors tender proposal.

The façade sub-contractors contract included that *"The Sub-contractor is to allow for all design changes of a minor nature."*

Post contract, the client and consultant team requested that a number of alternative panel module options be developed. It was submitted that this went beyond simply assisting with the finalisation of the design, and instead removed the façade sub-contractor's contractual right to develop its own preferred module size, as stated in its tender proposal.

The "approved" panel module size resulted in panels significantly larger than the 9x2.2m units on which the façade sub-contractor had based its price, with the sub-contractor alleging that over 70% of the panels exceeded this size. This not only required a greater volume of foam to create the moulds for the GFRP panels, but also necessitated changes to the fabrication and production processes.

Following the production of visual mock ups, the proposed use of rivets to mechanically fix the stainless-steel sheets was rejected. Instead, welded studs were introduced. These studs had to be welded to the back of the stainless-steel sheets in a manner that avoided any burn marks on the visible face. This added a further production step to ensure precise alignment with corresponding holes in the GFRP panels.

In addition, vertical hairline joints between the stainless-steel sheets bonded to the GFRP panels were rejected, with full length sheets across the width of the panels requested to mitigate the need for vertical joints between the stainless-steel sheets.

The increased panel size and curvature also created difficulties in bending the stainless-steel sheets to match the panels. To overcome this, a hexagon scoring pattern was introduced which involved laser cutting slots in the stainless-steel sheets to improve

Figure 2. The hexagon pattern in the stainless steel sheets



its ability to conform to the panel curvature. Moreover, the horizontal joints between sheets were requested to be cut with a 'zig zag' pattern to give the impression of a single continuous stainless-steel sheet on each GFRP panel.

Parties' Positions

The façade sub-contractor submitted that it was unable to verify the additional cost arising from these changes, relative to its tender proposal, until a number of panels had actually been produced. Once this had occurred, the façade sub-contractor suggested the cost would now be double the amount originally tendered.

Despite the changes introduced, the sub-contractor's claim for additional costs was rejected. Moreover, the client and its design team rejected the visual mock ups without reference to the specification or to any non-conformance with the Contract documents. They further asserted that the introduction of the hexagon scoring pattern was required to address the façade sub-contractor's alleged inability to resolve bonding issues between the stainless steel sheets and the GFRP panels, and was a means of achieving the design intent of stainless steel bonded to the GFRP over a doubly curved surface, despite the original intent being a single curved façade.

Court's Findings

In its judgment, the Court agreed that the changes in the panel size were not "minor", expressly accepting the expert evidence regarding the panel sizes having been increased beyond 9m x 2m. The Court was satisfied that changes to the design, increased panel size and the introduction of the hexagon pattern were for aesthetic reasons, and *"not based on engineering necessity"*.

Conclusions

Whilst it was intended for the contractor to complete the technical design of the façade, the performance specification and design intent were found to lack sufficient constraints to maintain the architect's vision without the need for design changes during the contract works.

In accordance with the contractual documentation, the panel sizing was defined but was for the façade sub-contractor to develop in line with its preferred approach. However, the Court found that the façade sub-contractor was not permitted to develop its preferred module size, and therefore it could not be held responsible for the increase in costs.

It was also determined that the specification was not sufficiently detailed to prohibit the use of visible fixings. If the intention had been to require 'secret' or 'invisible' fixings, such terminology should have been expressly included. Instead, the specification merely stated the stainless-steel sheets were to be bonded to the GFRP panels.

Similarly, neither the specification nor the drawings were sufficiently detailed to prescribe the required joint location or the joint pattern.

These findings, including the Court's acceptance of expert evidence on the nature and impact of the design changes, highlight the importance of clear, unambiguous, and robust specifications and contract documents. Such clarity minimises gaps in information, reduces the risk of unexpected cost increases, and helps prevent disputes.

Postscript

Please note that the contents of this article are based on publicly available information and drawn directly from the judgment in the DIFC Court proceedings. The outcomes of these proceedings also relied on the specific contractual framework in place between the parties. Accordingly, any dispute arising in similar circumstances will ultimately depend on its own specific facts. On that basis, this article is provided for information only and does not constitute technical or legal advice.

About The Author



Austen Smith is an architect expert at Hawkins, based in our Dubai office. He appeared for the façade sub-contractor in the above case. He opines on building failures due to defective design and workmanship, fire safety defects, scope of work, design approvals and variation disputes amongst others. Austen is registered with the Architect's Registration Board, is a member of the Royal Institute of British Architects, the Chartered Institute of Building, the Chartered Institute of Arbitrators, the Society of Construction Law and the Academy of Experts, and is on the roster of arbitrators with the Saudi Centre for Commercial Arbitration.

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Resounding win: multiple indemnity and contribution claims

by Kate Archer, Partner & Samantha Betts, Senior Litigation Executive at DAC Beachcroft.

Overview

DAC Beachcroft Claims Limited (DACB Claims), acting on behalf of Ainscough Crane Hire Limited (the claimant) and its insurers recently succeeded in bringing a claim for an indemnity and/or contribution in respect of damages paid in relation to a number of accidents caused by hydraulic oil which had leaked from one of the claimant's vehicles onto the road surface.

Background

The claimant had engaged Hydraquip Hose & Hydraulics Limited (the defendant) to supply it with services including the supply and installation of hydraulic hoses on its cranes. The defendant warranted that its work would be undertaken with skill, care and diligence, and agreed to indemnify the claimant against third party liabilities arising from its negligence.

A little less than 15 months after one of the defendant's employees had replaced a hose on one of the claimant's vehicles, that crane was driving on a motorway when the driver noticed that the coolant temperature warning light on the vehicle's dashboard was illuminated. The driver stated that having stopped the vehicle when it was safe to do so, he looked and observed steam emerging from near the vehicle's exhaust so returned to the claimant's depot.

It subsequently transpired that the crane had leaked hydraulic oil onto the highway, resulting in road traffic accidents and damage to the highway surface. The oil had leaked from a perforated hydraulic hose inside the crane which had been previously replaced by the defendant's employee. The failed hose was subsequently replaced by one of the defendant's employees.

The underlying claims

The claimant received several third party claims arising out of the oil spillage including three personal injury claims arising out of accidents caused by vehicles which skidded on the hydraulic oil, a claim from a local authority for the clean-up of the road surface, as well as a significant claim for repairs to the motorway.

The claimant's claim against the defendant

The claimant commenced proceedings against the defendant seeking an indemnity and/or contribution in respect of the claims that it faced arising out of the spillage of hydraulic oil. The defendant denied liability and also alleged that even if there was liability on its part, there had been contributory negligence on the part of the claimant. The court ordered that there be a preliminary trial to deal with the issues of liability and causation.

At trial, the claimant was represented by Richard Whitehall KC instructed by DACB Claims, the matter being conducted by Kate Archer, Partner and Samantha Betts, Senior Litigation Executive, and Sophia Murphy, Senior Complex Loss Handler from Aviva Insurance Ltd.

The trial

At trial, the claimant called five lay witnesses, the defendant called one. Both parties also called evidence from one expert. Having examined in detail the evidence of the lay and expert witnesses, the judge turned to the legal argument, noting that the claimant's primary case was the doctrine of res ipsa loquitur, (the thing speaks for itself) a rule of law which allows negligence to be inferred from the circumstances of an accident without direct evidence

of a defendant's actions. The claimant argued, in the alternative, that the evidence established that the incident and the resulting damage and loss were caused by the negligence of the defendant.

The judgment

The judge was satisfied that, contrary to the defendant's arguments, the doctrine of res ipsa loquitur applied but went on to note that the point was somewhat academic as the claimant had established that, on the factual findings made, the failure of the hydraulic line had been due to the negligent fitting of the hose, an act for which the defendant was responsible.

Finally, the judge concluded that the defendant had failed to establish any contributory negligence on the part of the claimant.

The defendant was therefore held wholly responsible for the oil leak and the resulting damage caused to the highway and to those injured in various road traffic accidents that occurred that day.

Final comments

The case shows the benefit of (in the right cases) settling primary claims before pursuing claims for an indemnity or contribution. This is particularly relevant where a party fails to engage in the settlement process and maintains, what was eventually determined to be, an unsustainable position and could have led to significant additional costs being incurred in the underlying claims.

Tenacity and extensive preparation by the claimant throughout and, particularly in the lead up to the trial, proved to be invaluable and contributed in no small part to the successful outcome.

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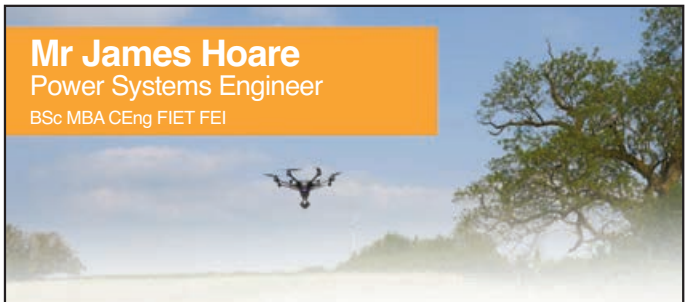
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James Hoare is an experienced and qualified professional Power Systems Engineer with 30 years Energy Engineering (26 years' renewable power) with experience in the Energy Industry. He founded LHW Partnership in 2013; a specialist engineering consultancy established to provide high quality engineering expertise with the aim of accelerating the adoption of quality, low carbon energy projects.

James has undertaken a range of engineering services including feasibility, design, installation, commissioning review, inspection, auditing and verification of thousands of renewable energy systems. Predominantly involved with solar PV projects since 1999, ranging from off-grid battery-based systems to large, utility scale projects. With particular expertise in system performance optimisation, shading appraisals, system modelling, and testing & inspection.

He is an energy Institute recognised ESOS Lead Energy Audit Assessor. Other experience includes conventional power generation, transmission & distribution, network automation, SCADA/EMS/Telecoms and Traction Power Supplies (AC & DC). Substation / Overhead line / underground cabling design/construction LV/11/25/ 66/132/275/400 kV.

James is fully trained, and supported by Chartered Engineer status and Professional Indemnity Insurance. The technical knowledge accumulated over many years has provided an immense amount of learned expertise. This knowledge supplemented by formal Expert Witness training allows James to act in the role of an Expert Witness providing professional and impartial opinion.

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Physics Doesn't Care Who's Paying

by Jason Madge, CEng MIMechE PhD & Lorenzo Baietta, CEng MIMechE at Elemeca.

The legal starting point

Expert witnesses in civil proceedings owe an overriding duty to the court, not to the party instructing them. Practice Direction 35 is explicit, and the courts are increasingly willing to enforce it with serious consequences. That much is familiar to every solicitor engaged in technical litigation. What receives less attention is a complementary observation: the core requirements that the procedural rules impose on engineering experts are not foreign impositions on engineering practice. On the contrary, this is what good engineering practice demands. However, the two frameworks are challenged not by a flaw in either — it is a human one.

Physics has no client

A fracture surface does not know which party retained the expert who examined it. A fatigue crack propagates under the same stress intensity conditions regardless of whether the failed component belongs to the claimant's equipment or the defendant's product. Material properties, load history, geometry — these are objective facts, and they point in whatever direction the evidence leads.

The engineer who follows the physics is already doing what Part 35 requires. The engineer who starts with a conclusion and works backwards is not simply failing a legal obligation — they are doing bad engineering. These two failures are the same failure, arrived at by the same route.

What root cause analysis actually looks like

This would be straightforward if physical evidence produced unambiguous answers. It rarely does. A competent engineering investigation almost always begins with a picture that is partial, contradictory, and consistent with more than one explanation.

Secondary damage is the most familiar obstacle. When a gas turbine blade fails, the initial fracture event releases energy that immediately begins destroying evidence of its own cause. Downstream components are struck by liberated material; the fracture surface may be obliterated within fractions of a second; witness marks that might have distinguished fatigue initiating at a manufacturing discontinuity from fatigue initiating at a thermally degraded surface are gone before the investigation begins. What the investigator receives is not the failure — it is the aftermath of the failure.

Some secondary damage is often inevitable – e.g. due to continued operation or shut down after the primary failure, is a reality. However, some of it can be avoided: Careful storage and recording of evidence and considered, strategic activity planning to minimise destruction of other evidence are powerful methods to build as full a picture as possible.

Incomplete documentary evidence compounds this. Maintenance records may have gaps. Operational data may have been overwritten. Borescope images taken prior to an incident may be genuinely ambiguous — dimensional measurements serviceable on one reading of the applicable standard and unserviceable on another. The result is that multiple failure hypotheses are commonly supportable from the same physical dataset. Each may be technically defensible. Each may imply a different liability picture.

Investigations must often take an iterative approach: the hypotheses come first, and then each hypothesis is tested against the evidence available. Some can then be ruled out confidently. Of the remaining theories the investigator must ask what information could prove or disprove the hypothesis, and this activity can be integrated into the evidence gathering plan. This loop will often need to be revisited several

times before a single confident conclusion can be reached. Sometimes a single viable hypothesis is just not possible.

Two requirements: both shared by engineering and the law

Engineering discipline and civil procedure each impose two related but distinct requirements on expert investigations. It is worth understanding them separately, because they tend to fail for different reasons — and, as the case law shows, they can be violated independently of each other.

The first is **analytical impartiality**: The obligation to test every plausible hypothesis against the evidence from both directions, rather than selecting evidence that supports a preferred conclusion. The second is **rigorous recording**: The obligation to document what evidence was examined, what information was relied upon, and the basis for every opinion expressed. Both are required by good scientific practice. Both are required by the procedural rules. Both can be independently violated. Both failures lead to the same outcome — an opinion the court cannot trust.

Analytical impartiality: testing every hypothesis from both sides

An expert who holds a preferred conclusion will examine evidence selectively. They will identify features that support their hypothesis and give less weight to those that complicate it. They will articulate one narrative clearly and leave competing narratives unstated. The infamous 'confirmation bias'.

The difficulty with this approach is well understood by experienced litigators. Opposing counsel, advised by an expert who has examined the same material, will know precisely which features were left unstated. The one-sided analysis is technically fragile in a predictable way: it has already identified the pressure points that cross-examination will find.

The rigorous approach is to treat each plausible hypothesis as a proposition to be tested from both the claimant's and the defendant's perspective: what evidence supports this failure mechanism, and what evidence is inconsistent with it? Does the inconsistency falsify the hypothesis or merely reduce its probability? If two hypotheses survive that testing, what further evidence would distinguish between them, and is it available?

This is what competent root cause analysis requires. It is also what Practice Direction 35, paragraph 3.2(6) requires: a mandatory summary of the range of opinion, including legitimate contrary views, with reasons for the opinion expressed. The procedural obligation and the analytical obligation converge at this point. An expert who has genuinely tested all plausible hypotheses from both perspectives, and explained why the evidence favours one over the others, has satisfied PD35 3.2(6). They are also prepared for cross-examination in a way that an expert who has not cannot be. The opposing argument has been tested from the inside. There are no surprises.

Rigorous recording: documenting the investigation

The second requirement is less dramatic but equally fundamental. A scientific investigation is reproducible only if it is properly recorded. Every piece of evidence examined, every document reviewed, every instruction received and every assumption made must be identified, attributed and disclosed, so that the basis of the opinion can be understood and tested.

CPR 35.10(3) requires the expert's report to state the substance of all material instructions, whether written or oral. PD35 paragraph 3.2(3) requires identification of the documents and materials relied upon. These are not bureaucratic formalities — they are the procedural expression of the same principle that underlies scientific reproducibility: an opinion that cannot be traced to its evidential foundation cannot be properly evaluated.

In practice this means maintaining a clear audit trail throughout the investigation: what components were examined, in what condition, by whom; what information was provided by the instructing party and when; what tests were conducted and under whose supervision; and critically, what information reached the expert through channels other than the formal instruction process. The discipline of recording is inseparable from the discipline of independence — because undisclosed information reaching one expert but not the other corrupts the level playing field on which expert evidence depends.

The human factors that undermine both

Both requirements are undermined by recognisable human behaviour patterns that have nothing to do with deficiencies in the legal framework or the engineering methodology.

Analytical impartiality fails through confirmation bias — the tendency to give greater weight to evidence that supports a pre-existing view — and through what might be termed advocacy drift: the gradual alignment of an expert's framing with the narrative of the instructing party. These are not usually deliberate distortions. They are patterns that emerge naturally from the adversarial environment in which expert evidence is produced, and they require conscious and sustained counter-effort to resist.

Rigorous recording fails through a different set of pressures: the informality of technical discussions between expert and client, the assumption that some communications are "just logistics" rather than substantive instruction, and the failure to apply to forensic investigation the same documentation discipline that engineers are accustomed to applying in certified design and manufacturing environments. The two failure modes are distinct. Both are predictable. Both are avoidable with care.

When these requirements fail: two cases

The consequences of failing the first requirement are illustrated by Agilisys Ltd v CGI IT UK Ltd, a commercial action concerning a disputed IT services subcontract. The court found CGI's expert's approach "one-sided" and "not balanced" — specifically because he had failed to consider whether his own instructing party might have been in breach of its obligations. By contrast, the opposing expert, who was prepared to make criticisms of her own instructing party, had her evidence accepted across the board. The court drew an explicit distinction between an expert who had tested both perspectives and one who had not. The one-sided expert's evidence was largely rejected.

The consequences of failing the second are illustrated by Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1413 (TCC), a manufacturing defect claim arising from the premature failure of polymer seals supplied for installation in Jaguar Land Rover vehicles. Freudenberg's three technical experts were found to have received a sustained flow of undisclosed information directly from Freudenberg's own engineers — through site visits, calls, and email exchanges not disclosed to the opposing party and not recorded in the reports. Mrs Justice Joanna Smith excluded all three experts on day seven of trial, finding that their conduct called into question their impartiality and created doubt as to whether their reports reflected independent analysis. Judgment was entered for Dana in the sum of £11.24 million, with indemnity costs.

In Dana, the analytical opinions may have been defensible. The process that produced them was not. The court's response was the same as if the analysis itself had been demonstrably biased: once the independence of the investigation could not be verified, the opinions derived from it were worthless.

A shared standard

The two requirements discussed here — analytical impartiality and rigorous recording — are demanded by civil procedure and by engineering science for the same reason: they are what it takes to produce an opinion that can be trusted. The Expert Witness has a unique privilege in being permitted to offer an opinion in court. It is essential that this opinion is reliable: Built on firm factual foundations, with remaining uncertainties clearly stated for the court to consider.

The challenge is one of human behaviours. Confirmation bias, advocacy drift, and poorly recorded evidence are precisely the problems the rules are designed to address. The expert who recognises them in their own practice, and builds deliberate counter-measures into their investigation from the outset, is doing better engineering and better law simultaneously.

Physics doesn't care who's paying. Neither, ultimately, does the court.

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Significant judgment handed down in respect of hotel cladding remediation responsibilities

by Yaasica Hamilton-Haye & Mark Foxcroft, Partners at Devonshires.

Essendi UK Hotels 2 Ltd v. London Property Company Ltd [2026] EWHC 1354 (TCC)

On 5 June 2026 a significant judgment was handed down featuring novel arguments relating to the cladding and fire safety issues of a commercially leased high-rise hotel.

The external wall system of the hotel had been covered in ACM cladding panels, which were the same type as the category 3 panels used on the Grenfell Tower. Whilst both parties' fire safety experts clarified the intolerable degree of risk that the cladding posed to the property, both parties were nevertheless convinced that the responsibility for the required major building safety works lay with the other party.

By way of background, in 2005 Essendi engaged contractors to apply the ACM panels when it held the freehold of the hotel. Essendi later sold the freehold, to LPC and then took a leaseback of the hotel. When LPC bought the freehold, they did so with an agreed 'cut-off date' after which the liability for the cladding would rest with LPC. Crucially, this 'cut-off date' happened to fall just under a month before the Grenfell fire which proved pivotal in alerting the construction industry to the seriousness of the fire safety risks of PE core ACM panels.

Since the Building Safety Act 2022 (the "BSA") only applies to residential buildings and therefore does not include hotels, Essendi had to use a novel legal strategy of building its case on standard commercial lease covenants, where it argued that the landlord breached both its 'good conditions' covenant and 'compliance with legal obligations' covenant. Essendi argued that LPC, as the landlord and owner of the hotel, was responsible for the removal of the cladding due to either:

i. LPC's "good condition" covenant in the lease.
ii. A combination of the landlord's "compliance with legal obligations" covenant in the lease, which they argued encompassed duties under the Regulatory Reform (Fire Safety) Order 2005 (the "FSO").
iii. Under its obligation as landlord not to derogate from its grant of the lease.

Essendi also sought to recover its losses from its decision to close the hotel due to these issues of safety. Essendi relied on the expert opinion of its appointed fire engineer to make this decision. Essendi sought an order for specific performance against LPC requiring it to replace the category 3 ACM with non-combustible cladding panels at no cost to Essendi.

The 'good condition' covenant

The case addressed whether a covenant to keep premises in good condition can require the replacement of cladding where there has been no deterioration. The answer here was yes, although it is significant that the lease was entered into post Grenfell, meaning that the parties' understanding of "good condition" was informed by heightened awareness of fire safety risks.

The court accepted that authority generally supports the presumption that a good condition covenant does not oblige a party to remedy an inherent defect which has caused no physical damage. However, that presumption was displaced on the facts, having regard to the post Grenfell context, the use of the building as a high rise hotel accommodating overnight guests, and the absence of any service charge mechanism for cost recovery.

In those circumstances, the court held that a covenant to "put and keep" such a building in good condition requires it to be reasonably fit for its intended use in terms of fire safety. In the judge's words, in the

post Grenfell era this can extend to addressing an inherent defect which 'creates a significant fire safety risk' and necessitates remediation, even if no damage has yet occurred. The court stressed that this is fact specific and will not apply to every safety defect. It is a matter of fact and degree.

The 'compliance with legal obligations' covenant

The lease included a covenant on the landlord to carry out works to the building where the legal obligations required this. The court found that this created a stand-alone enforceable contractual obligation upon the landlord to comply with all relevant legal obligations in relation to the premises. This obligation was owed to the tenant and permitted them to apply for an order for specific performance compelling the landlord to comply with its legal obligations in relation to the premises in circumstances where such duties had not been complied with. Crucially, this was found to be the case even in relation to legal obligations which the landlord may have in its capacity as a statutory duty-holder and which are owed not to tenant directly but rather a statutory enforcing authority, e.g. under the FSO.

Obligations under the FSO

In his conclusion, HHJ Stephen Davies said that Essendi successfully made its case regarding the legal obligations clause and the FSO independently of its claim under the good condition covenant. The judge held that LPC had control of the structure and exterior of the building, including the cladding, which meant that LPC is a responsible person under Article 3 of the FSO. In addition to this, as the responsible person, LPC owes a duty to 'take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe' under article 8 of the FSO.

Furthermore, Essendi relied upon the interpretations in Article 2(c)of the FSO to argue that the category 3 ACM cladding panels are a dangerous substance, which the judge strongly agreed with. Under Article 12 of the FSO, 'where a dangerous substance is present in or on the premises, the responsible person must ensure that risk to relevant persons related to the presence of the substance is either eliminated or reduced so far as is reasonably practicable'.

Therefore, given that the judge held that LPC is a responsible person under the FSO, and that the cladding is a dangerous substance as defined under article 2(c) of the FSO, it followed that LPC was required to remove the cladding in order to eliminate or reduce the risk that the cladding caused.

That being said, it was acknowledged that Article 39 of the FSO states that nothing in the FSO is to be construed as conferring a right of action in any civil proceedings. Therefore, Essendi needed to rely on the compliance with legal obligations covenant of the lease agreement between the two parties to demonstrate its claim under the lease in relation to the obligations imposed by the FSO. The judge held, against LPC, that the FSO does not expressly oust private law rights which made available the enforcement of the legal obligations covenant as agreed within between the two parties privately.

Conclusions

The judge laid out his six conclusions:

1. By failing to remove and replace the category 3 ACM cladding panels, LPC is in breach of the good condition covenant in its lease agreement.
2. Additionally, by reference to its obligations under the FSO, LPC is in breach of the compliance with legal obligations covenant.
3. However, LPC has not breached the implied covenant not to derogate from grant.
4. Essendi's decision to close the Hotel was a reasonable decision to take at the time and was caused by LPC's breaches.
5. Essendi is entitled to an order for specific performance requiring LPC to:
    i. Remove the category 3 ACM cladding panels within 6 months.
    ii. Replace them with suitable alternative external cladding within an overall period of 18 months.
6. Essendi is entitled to proceed to an assessment of the damages to which it is entitled. The subject of which will be a further trial.

The novel arguments in the decision will come as a welcome development to commercial leaseholders which are not afforded the same protections as residential leaseholders under the BSA. However, we are interested to see whether an appeal will be lodged by the unsuccessful defendant, given the outcome of the case.

The findings of the Court in relation to the enforceability of the compliance with legal obligations covenant are also likely to be welcomed by residential and commercial leaseholders alike as it provides clear authority that a tenant can rely upon such covenants to compel their landlord to comply with legal duties the landlord has in relation to the relevant premises even when those duties are not owed directly to the tenant.

Mr. Mark Finch

Offshore Geotechnical Engineer

CEng MEng BSc (Hons)



Mark is a Chartered Engineer with 35 years' experience of offshore geotechnical engineering and foundation design for the sectors of offshore Oil & Gas, Renewable Energy and Subsea Power Cables. Mark has worked for a broad range of offshore companies, from site investigation and EPCI contractors to operators and developers.

He regularly acts as an Expert Witness in high-value disputes and advises clients on project issues relating to soils, foundation design and installation. He has produced numerous Expert Reports and given oral evidence under cross examination in several arbitrations.

Experience summary:

- Core competence is the acquisition, description, and interpretation of offshore and nearshore soils for marine construction projects and subsequent foundation engineering analyses.
- Significant foundation design and installation experience (e.g. driven piles, drive/drill/drive piles, drilled & grouted piles, suction caissons, gravity-based structures, monopiles, marine anchors).
- Jack-up emplacement analyses (e.g. punch-through, lateral stability, scour). Remedial foundation solutions (e.g. rock pads), interaction with existing structures and removal.
- Trenching engineering design, upheaval buckling assessments, dredging, rock dump and on-bottom stability issues for cables and pipelines worldwide.
- Shore approach design, including HDD analyses and installation supervision.
- Considerable period spent offshore managing and supervising site surveys and trenching, piling and rock placement operations.
- Certified Expert Witness (CUBS) experienced in writing technical reports and giving oral evidence in arbitration hearings.

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Mr Stephen Marshall

Chartered Engineer

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I have been a professional engineer for over forty years and a chartered engineer since 1985. I have experience working in several industries and I bring this unusually broad experience to the field of building services engineering. Until recently I ran a successful building services practice (Synergy Consulting Engineers) where I built an experienced and dedicated team of engineers delivering projects of all sizes in most fields of construction.

I am particularly adept at seeing past the rules-of-thumb to the underlying physical processes in order to understand what can go wrong in complex systems on a fundamental level. Long practice enables me to communicate what is happening in terms legal professionals can understand, with an awareness of what aspects have particular significance for them. I tend to rely strongly on the use of graphical presentation to illustrate engineering concepts simply and effectively. Where possible I will always look for alternative practical and economic solutions to any systems which require remediation. I can be most effective if instructed before disproportionate remedial works have been carried out.

I have been undertaking instructions as an expert since 1995, and in 2005 I was accredited by Cardiff Law School. I have advised on approximately 40 matters relating to Building Services Disputes and have participated in mediations and arbitrations. I have given evidence and been cross-examined many times in the High Court.

Testimonial:

"First, thank you for preparing such a helpful report. Often technical reports are difficult to follow by a lay person but your report identifies the key issues and explains them in a clear and logical way such that even a lawyer like me can follow it. I am sure that it will help the tribunal understand the issues very well and enable the tribunal to see a clear way through all the fog created by the defendant's correspondence."

Michael Hopkins, Partner for Pinsent Masons LLP

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Mr Hugh Gray

Consultant Chartered Engineer specialising in Lifts/Elevators

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Hugh Gray is a Consultant Engineer with over 25 years experience. His main area of expertise is lifts, escalators and window cleaning equipment design. Hugh has hands-on lift experience as he started his career with the installation and maintenance of lifts. Since 1993 his main area of work has been statutory inspections of lifts and lift consultancy. Sectors covered are residential, retail, commercial, transport, health care and social housing. Hugh is based between his London and Manchester offices providing full UK coverage.

His experience includes: The design and management of several high end lift refurbishments projects throughout the City, and West End, of London; conducting feasibility studies to improve the performance of existing lift systems; investigation inspections on new lifts which are failing; condition surveys and dilapidation reports; lift traffic analysis and lift energy reports.

Mr Gray has been appointed as a specialist expert witness to write reports and give oral evidence in relation to lift accident investigations, incorrect lift designs, rent reviews, claims against main contractors and to provide general lift condition reports. He has also acted and represented professional football players and clubs in contract negotiations, including disputes and arbitration proceedings.

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Ms. Lavinia Moore

Senior Child Protection Social Work consultant



I am a Senior Child Protection Social Work consultant with over 35+ years' experience in front line practice with children, young people and families. My expertise is strengthened by my role as a Social Care Auditor specialising in pre-Ofsted improvement projects and post Ofsted improvement planning since 2010, more recently as part of a team of improvement partners with the DfE.

I have been an Expert witness in high-risk complex assessments for court proceedings. I am a Child & adult safeguarding Improvement trainer, mentor, coach and auditor, plus a SCiE Associate trainer for safeguarding Adults and child protection, Local Authority Lead Specialist consultant & trainer for child criminal exploitation, child sexual exploitation and Modern Slavery and trainer and assessor in Domestic Abuse (Freedom Programme online creator and specialist since 2008 with specialism in coercive control, cognitive dissonance and disguised compliance)

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When trees become litigation: Boundaries, subsidence and neighbour disputes

by Michael Lewis, Senior Associate & David Pack, Hannah Langford, Partners at Devonshires.

Tree disputes rarely start as major litigation. More often, they begin with a branch over a fence, roots near a wall, blocked light, falling leaves, or a neighbour who refuses to engage. But what looks like a garden disagreement can quickly become a property, insurance and litigation problem.

For homeowners, landlords, developers and managing agents, trees can raise a surprisingly wide range of legal issues: nuisance, negligence, boundary rights, access, planning controls, subsidence, insurance claims and neighbour relations. The legal position often depends on the facts, but the practical lesson is consistent. Early advice is usually cheaper than allowing a dispute to harden.

The most common issue is encroachment. As a general principle, a property owner may cut back branches or roots that cross the boundary onto their land, but only up to the boundary line. That does not give a right to enter a neighbour's land without permission, nor to damage the tree. There may also be additional restrictions where the tree is protected by a Tree Preservation Order (TPO) or located in a conservation area. The Town and Country Planning Act 1990 and related regulations explain that a TPO can prohibit cutting down, topping, lopping, uprooting, wilful damage or wilful destruction without appropriate consent from the Local Planning Authority (LPA).

That means the apparently simple question, can I cut this back, often needs a more careful answer. Who owns the tree? Where is the boundary? Is there a TPO? Is the land in a conservation area? Will the proposed work destabilise or damage the tree? Is access needed from the neighbouring land?

Access is a frequent flashpoint. If work cannot be carried out safely from the owner's own land, the neighbour's permission may be needed. Where permission is refused, the Access to Neighbouring Land Act 1992 can allow an application to court for access where works are reasonably necessary for the preservation of land. That is a useful remedy, but it is not a substitute for practical engagement. In many cases, a clear letter, proper method statement and evidence of insurance can avoid proceedings altogether.

The most serious tree disputes usually involve damage. Tree roots can contribute to cracking, movement, blocked drains and subsidence, particularly where soil conditions, foundation depth and seasonal moisture changes are relevant. These cases are evidence-heavy. A claimant will usually need arboricultural, structural engineering and sometimes geotechnical evidence. They may also need to show notice, causation and foreseeability. In Delaware Mansions v Westminster City Council, the House of Lords considered liability for a continuing nuisance caused by tree roots and the ability to recover the cost of remedial works where the defendant had notice and an opportunity to abate the nuisance.

High hedges raise a different set of issues. They are not always best approached as ordinary litigation. Government guidance explains that local authorities have statutory powers to deal with certain high hedge complaints, although the process is intended to follow attempts at informal resolution. The regime is specific, and not every tall or irritating hedge will qualify. It is therefore important to identify whether the complaint is really about light, access, privacy, overgrowth, boundary encroachment or general neighbour hostility.

For commercial property owners and managing agents, tree disputes also have a risk management dimension. A tree that is unsafe, diseased or causing damage may create liability if ignored. Conversely,

unnecessary or unlawful cutting can trigger claims, enforcement action by the LPA, criminal sanctions if the tree is protected by a TPO and reputational problems. Where tenants, leaseholders or neighbouring owners are involved, the contractual position may also matter. The relevant lease, transfer, estate regulations or management agreement may determine who is responsible for inspection, maintenance and costs.

The best approach is evidence-led. Before taking action, parties should obtain photographs, check title and boundary documents, ask the local authority about protected status, keep records of complaints, preserve expert arboricultural reports and notify insurers where damage is alleged. If the issue is capable of resolution, correspondence should be firm but practical. If it is not, the legal route should be chosen carefully: nuisance claim, access application, injunction, insurance process, local authority complaint or negotiated undertaking.

Tree disputes can be emotional because they concern homes, privacy and amenity. But they should not be handled emotionally. The earlier the legal, factual and expert issues are identified, the more likely it is that the dispute can be contained before a branch over the fence becomes a fully rooted piece of litigation.



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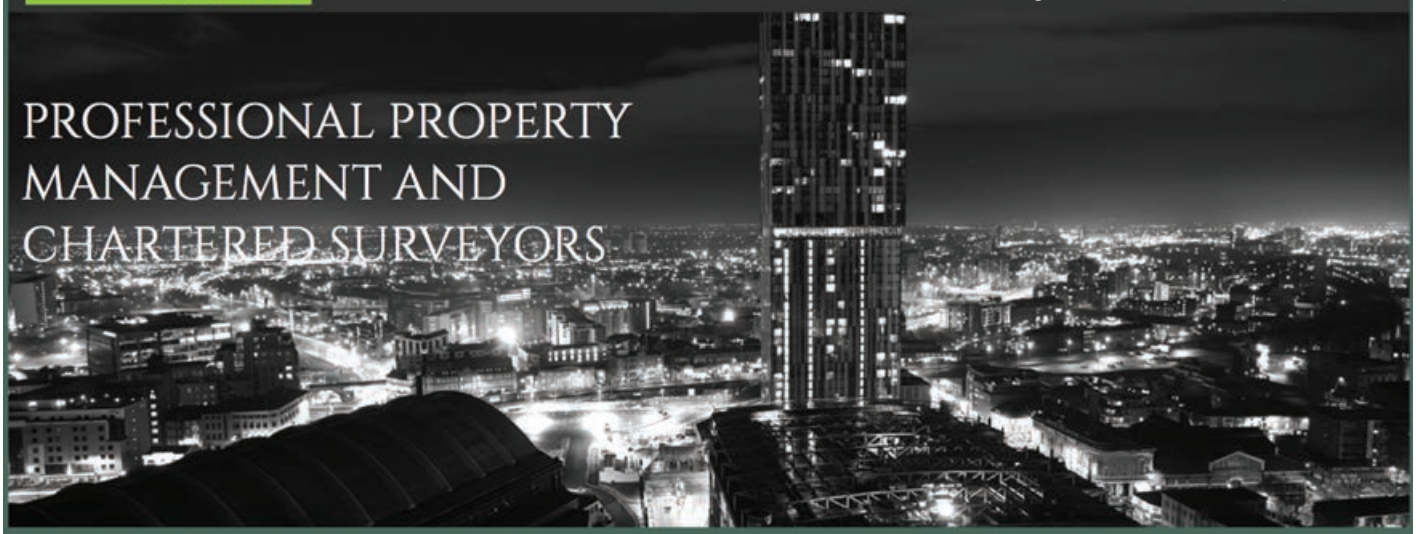
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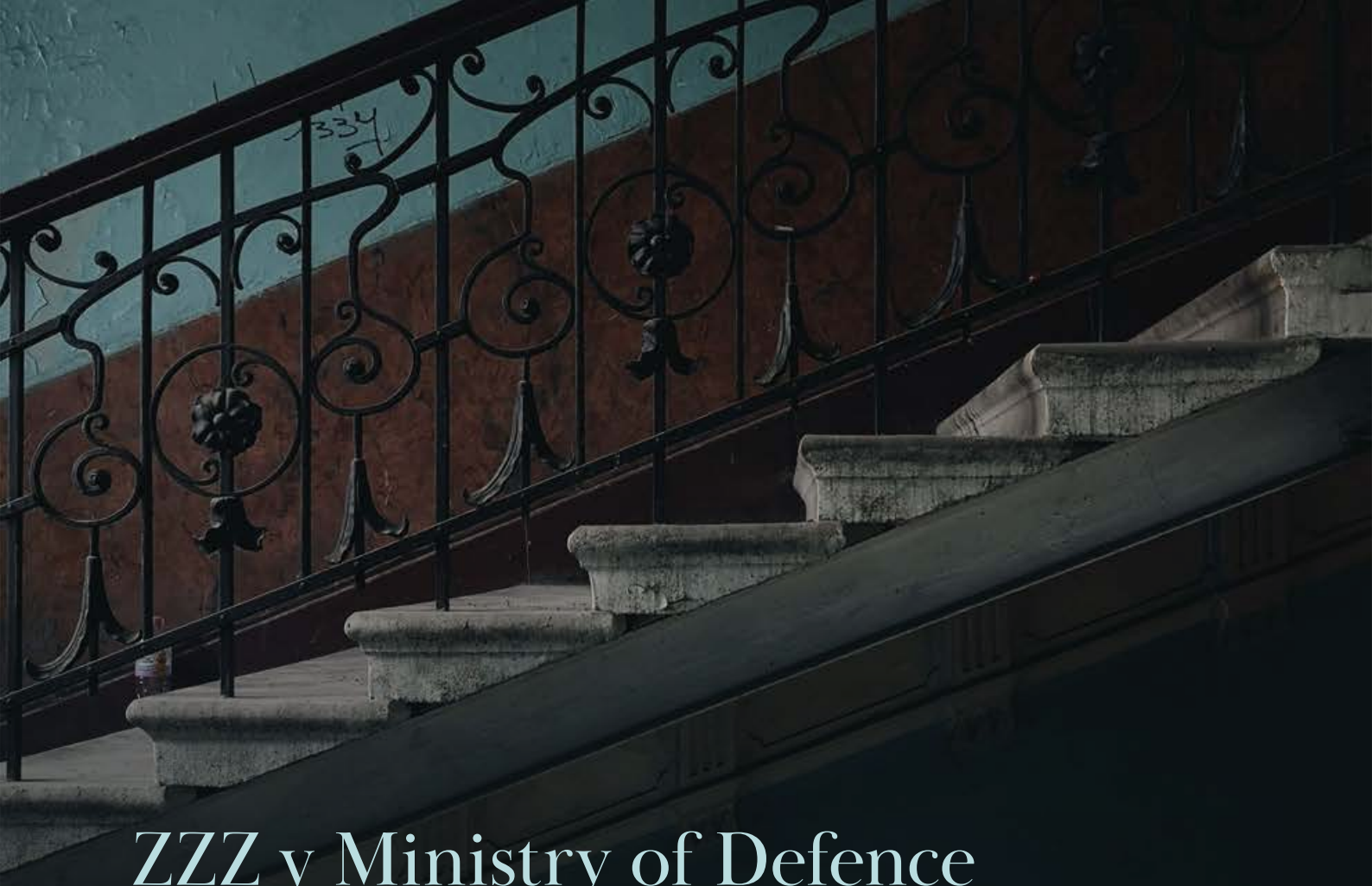
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ZZZ v Ministry of Defence [2026] EWCA Civ 875: occupiers' liability, low balustrades, horseplay and the discipline of factual analysis

by Pankaj Madan, Barrister at Exchange Chambers.

The Court of Appeal has upheld a finding of full liability against the Ministry of Defence after an 18-year-old soldier sustained a significant brain injury when he fell over a low landing balustrade in barracks. In my view, the judgment is important well beyond its military setting. It addresses the proper limits of appellate intervention, the status of a visitor under the Occupiers' Liability Act 1957, the relevance of current standards to older premises, causation in falls from height, and the evidential burden on a defendant alleging contributory negligence.

Introduction

Falls on or from stairs are often treated as intensely fact-sensitive cases with limited wider significance. That is usually a mistake. Such cases frequently bring into sharp focus the central questions in occupiers' liability: what was the danger; who ought reasonably to have appreciated it; what precautions were proportionate; and did the condition of the premises materially contribute to the injury?

Where the injury is a brain injury, the evidential difficulties become more acute. Memory may be fragmented or unreliable. Early histories may differ. Accounts may evolve as a claimant attempts to reconstruct events which he or she cannot properly remember. The court must be careful not to equate inconsistency caused by injury with dishonesty.

ZZZ v Ministry of Defence [2026] EWCA Civ 875 is a striking illustration. The claimant, an 18-year-old rifleman required to live in Army accommodation, fell from a second-floor landing to the ground floor following an alcohol-exacerbated episode of horseplay. The balustrade was approximately 900 mm high. The claimant was 6 ft 4 in tall. He sustained serious injuries, including a significant brain injury. At first instance, HHJ Simon, sitting as a Judge of the High Court, in July 2025, found the Ministry of Defence liable in full. On 8th July 2026, The Court of Appeal, in a judgment given by Stuart-Smith LJ, with which King and Falk LJJ agreed, dismissed all six grounds of appeal.

The judgment applies established principles with clarity. Its central message is that an occupier cannot avoid responsibility for a dangerous feature of premises by attempting to convert a resident into a momentary trespasser whenever the resident behaves imperfectly. Nor can an appeal against evaluative findings be turned into a second trial by selecting isolated inconsistencies from a much wider evidential picture.

The accident and the decision at first instance

The claimant was based at Bulford Army Base and was required to live in the barracks. In the early hours of 24 March 2019, after drinking with other young soldiers in the barracks and in Salisbury, he and Rifleman Graham became involved in a struggle on the landing.

The precise mechanism of the fall was disputed. The claimant's accounts varied, unsurprisingly given the combination of a serious brain injury and alcohol. Statements taken from fellow soldiers described playfighting or a "friendly drunk fight", involving grappling, a headlock and an attempt by Graham to break free. The claimant came into contact with the balustrade, pivoted over it and fell to the ground floor.

The building dated from about 1939 and had originally been constructed as a place to treat the sick rather than for use as soldiers' accommodation. The balustrade was approximately 900 mm high. Modern guidance for guarding to common landings indicated a height of 1100 mm. It was common ground between the experts that the Building Regulations were not retrospective and had not been triggered by the refurbishment works. That did not, however, answer the common law or statutory question whether the premises were reasonably safe for their actual use.

HHJ Simon found that the incident occurred during a "frolic", by which he meant something akin to playfighting exacerbated by alcohol, rather than a malicious assault. He regarded the claimant as credible, in the sense that he was doing his best to tell the truth, but unreliable in his recollection of significant events. He preferred the broad account emerging from the contemporary witness statements.

The judge found that the claimant had not ceased to be a lawful visitor; that the pre-accident risk assessment was inadequate; that the low balustrade was an inherently unsafe feature; and that a balustrade of around 1100 mm would probably have prevented the fall. He rejected the defences of volenti, illegality and contributory negligence.

The appeal

The Ministry of Defence advanced six grounds of appeal. Taken together, they amounted to a sustained attack upon both the factual findings and the resulting conclusions of law.

The Ministry contended that:

1. The judge's findings that the event was a frolic and involved no great force were unsupported by the evidence.
2. The claimant had breached Army rules or committed criminal offences and had thereby ceased to be a lawful visitor.
3. The claim was barred by illegality.
4. The judge had wrongly treated the balustrade as a danger, applying modern standards retrospectively and reasoning with hindsight.
5. Causation had not been established because the claimant's expert could not exclude the possibility that the claimant would have fallen over a 1100 mm balustrade if subjected to a forceful push.
6. The judge ought to have made a substantial deduction for contributory negligence, with the Ministry contending for a deduction of 75%

Every ground failed.

An appeal is not a re-run of the trial

The first ground challenged the trial judge's findings about what occurred on the landing. The Court of Appeal began with the restraint required of an appellate court when reviewing findings of fact and evaluative conclusions.

Drawing upon Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 and Prescott v Potamianos [2019] EWCA Civ 932, Stuart-Smith LJ emphasised that the appellate court does not undertake the factual balancing exercise afresh. The issue is not whether the appellate judges might themselves have reached a different view. The question is whether the trial judge's decision was undermined by an identifiable flaw, such as a gap in logic, an inconsistency or a failure to take account of a material factor.

That discipline was decisive. There were features of the evidence capable of supporting different findings, but that was not enough. There was evidence from Riflemen Green and Peden supporting the judge's conclusion that the incident remained playfighting and did not involve a concerted attempt to throw the claimant over the balustrade.

Green described the two men as laughing and giggling. He described Graham breaking out of a headlock, apparently striking the claimant's arm during the movement, whereupon the claimant fell backwards against the balustrade and flipped over it. Peden described a friendly drunken fight involving grappling and shoving. He believed that Graham, whose face was pressed against the claimant's chest, would not have known that they were moving towards the balustrade.

The Court of Appeal described the case as a classic example of an incident about which the evidence was inconsistent and in respect of which it was the primary function of the trial judge to make the necessary assessments. The judge had paid close attention to the evidence and recognised the inconsistencies. Although different findings might have been available, the Court was not compelled to overturn those which he made, "not by a long chalk".

That is a useful reminder of the distinction between showing that another factual conclusion was possible and demonstrating that the conclusion actually reached was wrong. The former is not sufficient on appeal.

The use of hearsay evidence

The judgment contains an important procedural lesson about hearsay evidence.

The Ministry of Defence served statements made by the soldiers to the service police but did not call the relevant witnesses. The claimant obtained an order permitting him to call three of the soldiers for cross-examination and asked the Ministry for their contact details. The response was that two had left the Army and the location of the third was uncertain.

Evidence at trial indicated that serving soldiers could be traced where their regiment and rank were known, and that the Army retained discharge addresses for those who had left. The Court of Appeal considered that there was no apparent reason why the requested information could not have been provided. It described the Ministry's response as a "brush off" which had two malign effects: the claimant could not cross-examine the witnesses, and the judge was left to assess the untested statements which the defendant itself had introduced.

That background considerably weakened the Ministry's attempt on appeal to subject those statements to a minute forensic examination in search of inconsistencies. A party which chooses to place hearsay evidence before the court, but does not call the witnesses or facilitate their attendance, may face real difficulty in subsequently inviting the court to reject the same evidence as unreliable.

There was a further point of procedural importance. The trial judge's findings did not precisely reflect either party's pleaded case. The Court of Appeal considered that best practice would have been for the judge to invite further submissions once he had formulated the findings he was minded to make. The failure to do so did not justify setting the judgment aside, because the findings were supported by the evidence and the exhaustive submissions on appeal came nowhere near demonstrating that they should not have been made. Nevertheless, where a judge is considering a factual route which differs materially from the competing pleaded cases, procedural fairness may require the parties to be heard.

Credibility, reliability and brain injury

The treatment of the claimant's evidence is particularly important in catastrophic injury litigation.

The claimant had given a number of differing accounts. At various stages, he described missing a step, falling backwards, being lifted, having his legs pulled from beneath him, being picked up and thrown, being pushed from behind and being pushed in the chest. His orientation to the balustrade also varied between accounts.

These inconsistencies entitled the trial judge to conclude that the claimant was not a reliable witness as to the mechanism of his fall. They did not require a finding that he was dishonest. The judge found that the claimant was doing his best to give truthful evidence but that his recollection had been affected by his injuries and alcohol.

That distinction between credibility and reliability was both humane and legally sound. A witness may be entirely honest yet unable to provide a dependable chronology because of post-traumatic amnesia, cognitive impairment, intoxication, medication or the ordinary process of memory reconstruction.

The Court of Appeal also noted that it had been submitted that gaps and inconsistencies in the claimant's evidence were "convenient". That allegation had not been put to the claimant in cross-examination. If a party intends to suggest that a claimant is deliberately exploiting gaps in memory or has fabricated an account, fairness requires the allegation to be put squarely.

Early medical histories should be preserved and analysed carefully, but they should not be treated as though each were a formal witness statement. Medical notes may contain abbreviated histories taken in difficult circumstances from a severely injured, medicated, confused or cognitively impaired patient. Their value depends upon the circumstances in which they were created.

The proper task is to construct the mechanism from the whole evidential mosaic: eyewitness accounts, photographs, scene measurements, contemporary accident documents, engineering evidence and the medical explanation for impaired memory. The claimant's recollection is important, but it need not carry the whole case.

A lawful visitor does not become a transient trespasser

The most significant part of the judgment concerns the claimant's status under the Occupiers' Liability Act 1957.

The Ministry argued that the claimant's conduct contravened Army rules or amounted to criminal conduct, taking him outside his express or implied licence to use the premises. It alleged potential offences under the Armed Forces Act 2006 and affray under the Public Order Act 1986.

The Court rejected both the factual premise and the proposed legal principle.

On the findings made at first instance, the claimant was responding to horseplay initiated by Graham. The headlock was consistent with the claimant's military training in de-escalating potentially aggressive behaviour. There was no proper basis for finding that he had committed a disciplinary or criminal offence. There had been an investigation, but no prosecution or disciplinary proceedings followed.

More fundamentally, the claimant was on the second floor because his employer required him to live there. The landing formed part of the common areas of his accommodation.

The principle advanced by the Ministry was far too broad. It appeared to suggest that a lawful visitor who engaged in conduct which the occupier would require him to stop thereby became a trespasser. Stuart-Smith LJ rejected the suggestion that James v White Lion Hotel [2021] EWCA Civ 31 supported such a general rule.

The relevant question under the 1957 Act is whether the person is a visitor, meaning someone who enters or uses the premises with the occupier's express or implied permission. Conduct of which the occupier might disapprove does not, without more, transform a lawful visitor into a trespasser.

The Ministry's case also created an insuperable practical difficulty: in relation to precisely what area had the claimant become a trespasser?

He could not sensibly have become a trespasser in the barracks as a whole because he was required to live there. He could not have been a trespasser in his own room. The argument therefore reduced itself to the proposition that he became a trespasser on the landing for the brief period during which he responded to Graham's renewed horseplay, only to become a lawful visitor again when the interaction ended.

The Court described that as a startling and unworkable framework. It would mean that the Ministry owed no duty concerning the balustrade during the brief struggle, but would have owed a duty if the claimant had returned the following morning and fallen after stumbling. Stuart-Smith LJ did not accept that the common duty under the 1957 Act was so "ephemeral".

This distinction is of considerable practical importance. Courts and practitioners should keep separate the following questions:

1. Was the claimant a visitor?
2. Did the occupier take such care as was reasonable to see that the claimant was reasonably safe in using the premises for the permitted purpose?
3. Did the claimant fail to take reasonable care for his own safety?

Misconduct may be relevant to breach, causation or contributory negligence. It does not necessarily extinguish the underlying duty by retrospectively converting the claimant into a trespasser.

The relevance of James v White Lion Hotel

The Court's reliance upon James v White Lion Hotel is particularly apposite.

In that case, the Court of Appeal recognised that the common duty of care is owed by a particular occupier to a particular visitor in a particular factual setting. A hotel room is a "home from home". A hotel guest may be tired, off guard, relaxed or affected

by alcohol. Those are facts of life for a hotelier and form part of the context in which the safety of the premises must be assessed.

There was a clear parallel with compulsory military accommodation. The claimant was not engaged in an inherently dangerous recreational activity of the kind considered in Tomlinson v Congleton Borough Council. He was in the common area of the place in which he was required to live.

Army witnesses accepted that young soldiers drinking in barracks, going out drinking and engaging in frolic or playfighting were familiar occurrences. One witness described such behaviour as having existed for as long as the Army itself. The King's Regulations also recognised service accommodation as personnel's own space away from working routines, while requiring the Army to continue fulfilling its obligations as a responsible employer.

This did not mean that the Ministry was required to prevent every act of horseplay. It meant that the foreseeable behaviour of those living in the building formed part of the factual context in which the adequacy of the guarding had to be assessed.

Old construction is not a complete answer to present danger

The Court of Appeal accepted that the Building Regulations were not retrospective. It did not treat modern guidance as imposing a direct statutory obligation to reconstruct every balustrade in an older building.

Instead, it treated modern regulations and standards as evidence of accumulated professional knowledge and practical experience about sensible safety precautions. The Building Regulations represented the consensus of current professional opinion about appropriate design and construction. Conversely, compliance with standards applicable at the date of construction did not mean that a building could never subsequently be assessed as presenting an unacceptable risk.

That is the correct analytical route. Historic compliance is relevant, but it is not conclusive forever. An employer or occupier must keep safety under review by reference to:

1. the present use of the building;
2. the characteristics of its users;
3. changes in professional knowledge;
4. the likelihood and gravity of injury; and
5. the availability and cost of precautions.

A feature which was lawful when constructed may nevertheless present an unacceptable risk many years later, particularly where the use of the premises has changed, the exposed population is different, or a straightforward and inexpensive improvement is available.

The evidence supporting the finding that the balustrade was dangerous was formidable.

The balustrade was approximately 900 mm high, around 200 mm below modern guidance for common landings. Photographs (see above taken from the case report) demonstrated its height relative to the claimant, who was tall but, as the Court noted, not "freakishly tall". The Army's own witness accepted that the risk shown by the photograph was obvious. Alcohol and horseplay among young soldiers were known features of life in the accommodation.

The post-accident risk assessment categorised the likelihood of a fall as "common, regular or frequent occurrence" and the potential severity as including fatalities or major injury. The Ministry's learning account concluded that the balustrade had not been high enough to prevent the fall. A subsequent Authority Notice of Change recorded that low balustrades across the retained estate posed a severe risk of occupants falling over them.



The relevant remedial works were modest. Mr Watts described raising the balustrade as achievable at minimal cost. The Court of Appeal endorsed that description when considered against the catastrophic potential consequences of a fall.

The balancing exercise was therefore stark. The foreseeable consequences were death or catastrophic injury. The cost and difficulty of the precaution were modest. The exposed population included young soldiers whose drinking and horseplay were foreseeable. The existing balustrade was materially lower than the height accepted in modern professional guidance.

Hindsight and inadequate risk assessment

The Court's treatment of hindsight is particularly valuable.

It was true that nobody had identified the balustrade as dangerous before the accident. That was not determinative. The correct question was not whether the Ministry did recognise the danger, but whether it should have recognised it.

Previous risk assessments had failed to identify the danger. That did not establish that the balustrade was safe. It supported the trial judge's conclusion that those assessments had been inadequate. Repeated inadequate inspections do not convert an unsafe feature into a safe one.

The duty was anticipatory and continuing. An occupier or employer cannot necessarily wait for a near miss or serious accident before undertaking a sufficiently robust assessment. The purpose of risk assessment is to identify foreseeable risks before injury occurs.

This is especially important in stair and balustrade claims. A low guarding feature may remain in place for many years without an accident. That history may be relevant, but it is not conclusive. The correct inquiry remains whether the risk was reasonably foreseeable, whether the possible consequences were serious, and whether proportionate precautions were available.

Causation must be tied to the facts actually found

The causation appeal illustrates a recurring error in the treatment of expert evidence.

The Ministry relied upon a concession made by the claimant's engineer, Mr Watts. He accepted in cross-examination that he could not say whether an additional 200 mm of balustrade height would have prevented a fall if one person pushed another with all the force he could muster in an effort to knock him from his feet.

The difficulty was that the factual premise of the question had not been accepted by the judge. The judge found no great force, no lifting of the claimant and no concerted attempt by Graham to propel him over the balustrade.

On the facts actually found, Mr Watts' evidence remained that a man of the claimant's height falling against a 900 mm balustrade faced a relatively high possibility of toppling over it, whereas he was unlikely to topple over a 1100 mm balustrade. The judge was entitled to accept that evidence and to conclude that the fall would probably have been avoided had the balustrade been raised.

Expert concessions are only as useful as their underlying factual assumptions. A concession based upon an extreme or rejected version of events does not displace the expert's opinion on the factual mechanism which the court accepts.

In stair and balustrade cases, the expert evidence should therefore be mapped against each realistic factual scenario. The expert should be asked:

1. What is the probable mechanism of the fall on each available account?
2. What part did the height, geometry and position of the guarding play?
3. What would probably have occurred had the guarding been at a reasonably safe height?
4. Does the answer change according to whether the claimant stumbled, was lightly displaced, was pushed with moderate force, or was subjected to a deliberate and forceful propulsion?
5. Which conclusions can be expressed on the balance of probabilities, and which amount only to a reduction in risk?

The question is not merely whether safer guarding would have reduced the risk in some general sense. The claimant must prove that, on the facts found, ***the precaution would probably have prevented the accident or injury.***

Contributory negligence: difficult, but not proved

The sixth ground was the closest. Stuart-Smith LJ expressly acknowledged that he had not found it easy to determine.

The Ministry argued that fighting or playfighting near an open stairwell was objectively reckless. It submitted that the claimant had voluntarily returned to the landing, could have walked away and had failed to take reasonable care for his own safety. It contended for a reduction of 75 per cent.

There was an immediate attraction in the argument at a general level. Horseplay close to an open stairwell may plainly create a risk of serious injury. However, contributory negligence is not determined at a level of generality. It depends upon the facts established in relation to the particular claimant.

Several matters were important.

First, the claimant's evidence could not safely be given substantial weight where the judge had found him unreliable as to significant events.

Secondly, the Ministry's characterisation of the conduct did not sit comfortably with the judge's findings. The interaction had been re-instigated by Graham. There was no serious intent to fight. The fall was accidental, not malicious.

Thirdly, the claimant's use of the headlock was consistent with his training in de-escalation.

Fourthly, there was no precise finding about the duration of the interaction. The available evidence suggested that the relevant sequence may have been swift and short.

Fifthly, the Court did not consider that the claimant should be criticised for failing to appreciate the unusual danger created by the low balustrade when the Ministry's own inadequate risk assessments had failed to identify it.

Sixthly, the landing was relatively extensive and there were no sufficiently precise findings about where the interaction began or the parties' exact position before the claimant went over the balustrade.

The burden of proving contributory negligence rested upon the Ministry. The Court did not have sufficient confidence in the fine detail of the incident to reverse the trial judge and make a deduction.

The result should not be read as establishing that horseplay near stairs can never amount to contributory negligence. It plainly can. The decision is instead a reminder that apportionment must be proved rather than assumed.

General disapproval of the claimant's conduct is not a substitute for evidence and findings addressing:

1. what the claimant actually did;
2. what danger he knew or ought reasonably to have appreciated;
3. whether he had a meaningful opportunity to avoid or disengage from the risk;
4. how long the conduct continued;

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5. whether his actions made a causative contribution to the fall; and
6. the relative blameworthiness and causative potency of the parties' conduct.

Illegality and volenti

The illegality ground failed once the factual allegations of criminal conduct failed.

The Court of Appeal added that it would have dismissed this ground even if criminal conduct by the claimant had been one of two or more causes of the accident. Relying upon McCracken v Smith [2015] EWCA Civ 380, Stuart-Smith LJ stated that the doctrine of ex turpi causa would not apply in those circumstances.

The defence of volenti had been rejected at first instance. There was an inherent difficulty in the Ministry maintaining, on the one hand, that the height of the balustrade was not dangerous and, on the other, that the claimant knowingly accepted the very risk created by its inadequate height.

The broader lesson is that illegality, volenti and contributory negligence are not interchangeable labels for unattractive behaviour.

Illegality requires proper identification of the unlawful conduct and analysis of its relationship with the claim.

Volenti requires a genuine and voluntary acceptance of the relevant legal risk, not merely knowledge that an activity carries some danger.

Contributory negligence requires proof that the claimant failed to take reasonable care for his own safety and thereby contributed to the damage.

Over-pleading each defence may distract from the realistic issue, which is often a conventional assessment of the claimant's own care and causative contribution.

Learning points for claimant solicitors

1. Establish the claimant's status early

In employer-provided accommodation, obtain the employment contract, service requirements, accommodation rules and evidence showing whether residence was compulsory. The fact that the claimant was required to live in the barracks was central to the Court's rejection of the temporary trespasser argument.

2. Identify the physical danger separately from the claimant's conduct

Do not allow allegations of intoxication, horseplay or other misconduct to obscure the condition of the premises. Identify precisely what made the feature dangerous, who was foreseeably exposed to it and what reasonable precaution would have reduced the risk.

3. Obtain the complete risk-assessment history

Seek all pre-accident inspections and risk assessments, together with post-accident reports, learning documents, near-miss investigations and estate-wide reviews. A later document may reveal the nature of a pre-existing risk and what a competent earlier assessment should have identified.

4. Investigate changes of use

Establish the building's original use, later use, refurbishment history and the characteristics of the present users. A structure built for one purpose may require reassessment when used for another.

5. Do not treat non-retrospectivity as determinative

Even where modern Building Regulations were not formally triggered, they may provide evidence of professional knowledge, accepted safety practice and the reasonableness of precautions.

6. Preserve compelling photographic evidence

Obtain photographs showing the guarding in context and, where appropriate, its relationship to the claimant or a suitable scale. Measurements alone may not adequately communicate the relationship between the height of the guarding, the claimant's centre of mass and the risk of toppling.

7. Instruct the appropriate expert disciplines

A building surveyor may address construction, standards and condition. A suitably qualified engineer or falls expert may be required to address the mechanics of the fall and counterfactual causation. Do not assume that a single expert is necessarily equipped to cover both areas.

8. Frame expert questions around alternative mechanisms

Ask what would probably have happened with reasonably safe guarding under each factual mechanism supported by the evidence. This protects the case if the court rejects the claimant's primary account but accepts an alternative version.

9. Address brain injury and memory expressly

Where the claimant's recall is impaired, obtain appropriate neurological or neuropsychological evidence if required. Explain why reliability may be affected without suggesting dishonesty. Construct the case so that it does not depend entirely upon the claimant's memory.

10. Treat early medical histories with care

Obtain the complete records and identify who gave each history, when it was taken and the claimant's clinical condition. Do not conceal inconsistencies, but place them in their proper medical and evidential context.

11. Secure key witnesses promptly

If the defendant serves hearsay statements from identifiable witnesses, seek contact details and attendance without delay. Where appropriate, obtain permission to call them and consider witness summonses. Keep a clear record of any failure to provide information necessary to secure their attendance.

12. Require precision in any plea of contributory negligence

Ask the defendant to identify the precise act or omission relied upon, the danger which the claimant should have appreciated, the reasonable alternative course said to have been available, and the alleged causative effect.

Learning points for defendant solicitors

1. Test the danger directly

Do not rely solely upon the age of the building or compliance with historic standards. Ask whether the feature was reasonably safe for the building's actual use and present users.

2. Avoid an exclusively technical Building Regulations defence

Non-retrospectivity may answer an allegation of direct regulatory breach. It does not, without more, answer a claim in negligence or under the Occupiers' Liability Act 1957.

3. Preserve the complete documentary record

Secure all inspection, maintenance, accident, learning and risk-assessment materials. Internal documents which acknowledge danger or recommend remedial work may be more influential than the formal litigation position.

4. Consider carefully whether hearsay witnesses should be called

If the defendant serves witness statements as hearsay, it should decide whether the witnesses can and should attend. A party may face obvious forensic difficulty if it introduces untested evidence, fails to facilitate cross-examination and later attacks the reliability of its own material.

5. Do not build an appeal on a rejected factual premise

Every expert concession and legal submission must be linked to the findings actually made. A concession based upon a deliberate, forceful push did not assist where the judge found that no such push occurred.

6. Define any alleged change of visitor status precisely

If it is contended that the claimant became a trespasser, identify the relevant premises, the act said to exceed the permission, the point at which status changed and the legal basis upon which it changed. A duty which disappears for a few seconds and then reappears is unlikely to provide a workable analysis. It does not flicker on and off.

7. Plead illegality with restraint

Identify the offence, evidence and legal consequence. A breach of workplace rules, misconduct, criminality and contributory negligence are different matters and should not be conflated.

8. Obtain evidence directed to contributory negligence

Evidence should address the duration of the conduct, the parties' position, any warnings, the claimant's opportunity to disengage, his appreciation of the hazard and the causative effect of his actions. Moral criticism alone will not establish a deduction.

9. Consider whether a separate falls expert is required

If the claimant relies upon expert evidence on fall mechanics, the defendant should decide whether that evidence requires a specialist response. A decision not to serve the defendant's own expert evidence may leave the claimant's opinion substantially uncontroverted.

10. Put allegations fairly and expressly

Any allegation that the claimant is fabricating, exploiting convenient memory gaps or giving dishonest evidence must be put squarely in cross-examination. It should not emerge for the first time in closing submissions or on appeal.

A practical framework for stair and balustrade cases

The following sequence may assist practitioners on both sides.

1. Define the claimant's legal status and permitted use of the premises.
2. Identify the physical feature alleged to create the danger.
3. Obtain accurate measurements, plans and good-quality photographs.
4. Establish the date of construction, original use, changes of use and relevant refurbishment.
5. Identify applicable regulations and standards, distinguishing legally binding requirements from evidence of contemporary safe practice.

6. Consider the characteristics of foreseeable users, including height, age, impairment, fatigue, distraction and foreseeable social behaviour.
7. Examine the adequacy of inspections and risk assessments before the accident.
8. Assess both likelihood and severity, rather than relying only upon the absence of previous accidents.
9. Identify the precaution which ought reasonably to have been taken, together with its cost, difficulty and likely effectiveness.
10. Reconstruct the mechanism from the whole body of evidence, distinguishing credibility from reliability.
11. Test causation against each realistic factual mechanism.
12. Analyse visitor status, volenti, illegality and contributory negligence separately rather than collapsing them into a general allegation of misconduct.

Conclusion

ZZZ is an important and factually rich authority. Its significance is not confined to military accommodation or alcohol-fuelled horseplay.

It confirms that the Occupiers' Liability Act 1957 is concerned with the real relationship between an occupier and a visitor, not an artificial legal status which changes from second to second according to momentary conduct.

It confirms that older premises must be assessed in the light of their present use, their present users and current professional knowledge, even where modern regulations are not retrospectively binding.

It demonstrates that causation depends upon the factual mechanism found by the court, rather than the most dramatic hypothetical proposition put to an expert.

It shows that contributory negligence requires proper evidence and sufficiently precise findings, particularly where the relevant events were brief and the claimant's memory has been impaired by brain injury.

The claimant's success did not depend upon establishing that the Ministry was required to prevent young soldiers from drinking or engaging in every form of horseplay. It depended upon the more conventional proposition that an employer and occupier, providing compulsory accommodation to young soldiers, should have identified and remedied an obvious low balustrade which exposed occupants to the risk of a catastrophic fall.

Above all, the case is a reminder that a low balustrade is not merely part of the background to a fall. It may be the very feature which converts an ordinary stumble, a loss of balance or a brief moment of horseplay into a catastrophic brain injury.

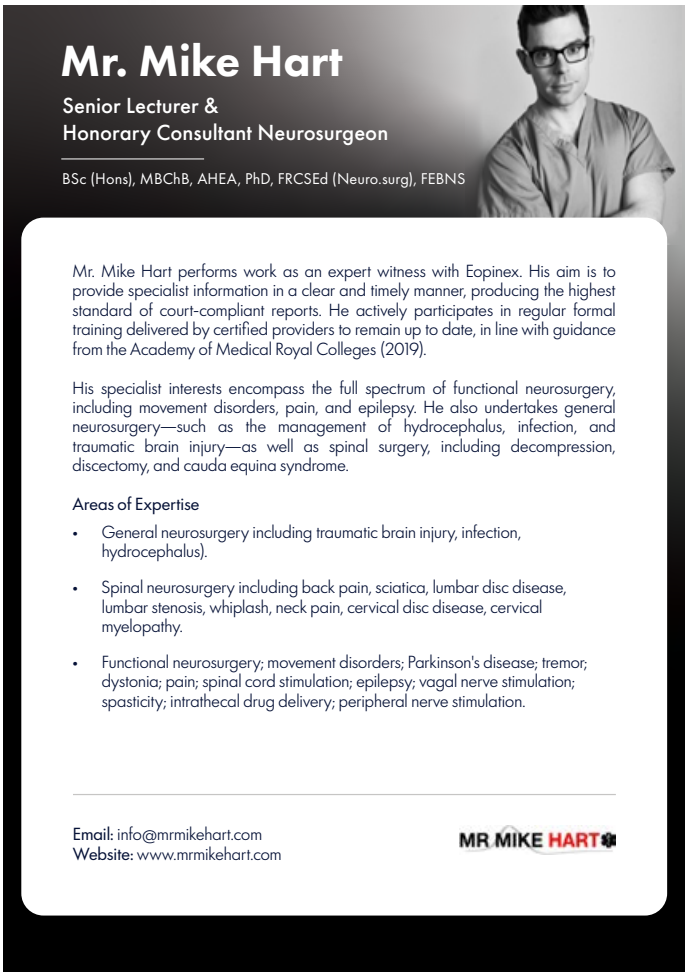
The law does not demand a risk-free environment. It does require occupiers and employers to recognise an obvious, grave and readily remediable danger before somebody falls.

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Did you miss? Pridewell Properties (London) Ltd v Spirit Pub Company (Managed) Ltd

by Lina Mattsson, Barrister at Gatehouse Chambers.

Pridewell Properties (London) Ltd v Spirit Pub Company (Managed) Ltd [2026] EWHC 953 (Ch) - Mr Justice Fancourt - 24 April 2026

The facts

Lina Mattsson, led by Mark Warwick KC, acted for the Appellant landlord, a single-purpose vehicle formed to redevelop The Railway Bell, a public house. Its scheme involved building three mews houses in the beer garden and converting the upper floors to flats. Planning permission had not yet been obtained as the landlord needed to carry out acoustic surveys and intrusive structural investigations before the application could be submitted to the Local Authority. The lease did not include any such access rights and the tenant refused access. Expert witnesses agreed that in the circumstances a realistic timeline to the start of construction was 10 to 14 months from the possession date.

HHJ Hellman sitting in the Mayor's and City of London Court held (amongst other things) that this was a "reasonable time" and that the ground of opposition was therefore satisfied on the timing point, but held that ground (f) was not satisfied on the "narrow ground" that the landlord had not shown that it had a real prospect of obtaining funding for the development. The landlord appealed and the tenant put in a Respondent Notice which challenged, amongst other things, the judge's finding on the timing point – an issue of wider legal significance.

The appeal

Fancourt J held that the trial judge had not erred when holding that the landlord had not established that it had a real prospect of obtaining funding for the development. That issue disposed of the appeal. Fancourt J, noting the wider importance of the timing point proceeded to consider the tenant's grounds in the Respondent Notice, albeit on the basis that those grounds were obiter dictum.

On the timing point Fancourt J held that the trial judge had asked himself the wrong question. The judge had assessed whether a 10–14 month delay was reasonable in the circumstances — essentially, whether it was justified or excusable given the practical constraints the landlord faced. That is not what the statute requires. Fancourt J traced the case law carefully. The Court of Appeal in Reohorn v Barry Corporation [1956] had established that a landlord need not have contractors on site the day after possession — some modest delay is tolerated. But the language used was deliberate: "... it means ... that the work will begin, not at any long delayed time, but on the termination of the tenancy."

Fancourt J also clarified what Jay J had actually decided in S Franses Ltd v Cavendish Hotel (London) Ltd [2017]. That decision was not authority for a broad "reasonableness" test. Jay J had in mind two distinct questions: how long was the delay likely to be, and could that delay properly be described as within the statutory tolerance — not whether the delay was excusable.

Fancourt J held that the statutory tolerance exists to accommodate the modest practical steps needed to mobilise once possession is obtained: securing and clearing the property, getting contractors on site, and so on. It does not accommodate a landlord that cannot yet set about the works because something else must be achieved first. If a landlord intends to set about works immediately on recovering possession, it satisfies the test — even if there is some short delay before the first tool is lifted. The fact that the prior step was outside the landlord's control, or caused by the tenant's lawful refusal to permit access, is irrelevant. That is simply the consequence of the parties' bargain.

Applied to the facts: the landlord could not even submit a planning application until post-possession surveys were complete. It intended to apply for a contentious planning permission six or seven months

after taking possession. That was not intending to do the works "on termination" — it was intending to do them after a substantial further period whose duration was itself uncertain.

Key takeaway

Pridewell will have huge ramifications for many landlords with redevelopment ambitions. Ground (f) is not satisfied simply because a delay in starting works is understandable or inevitable — the question is whether, given that delay, the landlord can genuinely be said to intend to carry out the works on the termination of the tenancy. The practical consequences of Fancourt J's analysis are significant.

If a landlord cannot obtain planning permission — for whatever reason — until after the trial, ground (f) is likely to fail. The same risk arises where works have long technical lead times that push the realistic start date well beyond the possession date. The judgment also signals that a tenant's refusal to grant pre-possession access, however frustrating, will not rescue a landlord whose timetable is already too long: that is simply the consequence of the parties' bargain.

Landlords and their advisers should now consider three things. First, whether future leases should include express rights of access for survey and investigation work, so that planning applications can be advanced before possession. Second, whether it may be prudent — in some cases — to commence ground (f) works such as demolition works promptly on recovering possession, even though this makes little practical or financial sense, to bring the start date within the statutory window. Third, whether a short new lease with an access right or a redevelopment break option better serves their position than opposing renewal outright.

Although obiter, the analysis is authoritative and is likely to be followed consistently in the county court, where ground (f) disputes are almost always decided. There is also a broader question as to whether the operation of ground (f) is now fit for purpose in complex urban redevelopments and when planning applications take months — and whether that is a matter to which the Law Commission might usefully turn its attention.

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Guy is an experienced, technically and legally qualified consultant, and advises clients across all tiers of the construction industry – from employer organisations to specialist sub-contractors. In his current practice, he provides both non-contentious (pre-contract) advice, and represents clients in contentious matters such as adjudication, and resolution of disputes.

His particular forte lies in dispute resolution and resolving complex commercial matters including claims and delay analysis. Guy has represented many clients in adjudication, and has acted as a quantum expert for litigation in the High Court. He has also acted as an expert in an expert determination.

Guy's most notable Expert Witness Cases include;

- Appointed by Clyde & Co as quantity surveying expert on the Local Authority's behalf, to determine the quantum (£8.6M) for a tree-root / subsidence claim for a large, residential property in central London. The matter settled by agreement.
- Appointed Norton Rose Fullbright as quantum expert for the portfolio holder (claimant) to value refurbishment costs, as at 2006, of part of a £1.235BN property portfolio in a claim for negligent valuation. The matter settled in August 2016.
- Appointed quantum expert by the Tenant to report on the appropriate value of reinstatement to three industrial/factory units in Salford, Manchester.
  Courtwell Properties Ltd v Greencore PF (UK) Ltd [2014] EWHC 184 (TCC)
- Appointed quantum expert by Fairview Land Limited to report on the £8M High Court claim raised by 85no individual claimants for a multi-storey residential scheme in London's Docklands. The dispute required valuation of circa 830no complaints of defective work. Following exchange of quantum reports, the matter settled privately.
  James Martin Scobie & Ors v Fairview Land Limited [2008] EWHC 147 (TCC)
- Appointed directly by a local authority as quantum expert witness for a professional indemnity claim against the Project Manager for over-certifying six compensation events for a infrastructure project for a local authority (procured under NEC3 Option B). Value circa £1.5M

Guy is the author of 'Design and Build Contracts' and the sixth edition of 'Building Contract Claims', both published by Wiley.

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Landlord Repair Covenants and Cladding Replacement: *Essendi v LPC* and fire safety liability under commercial leases

by Reena Patel, Partner, Gemma Whittaker, Partner & Co-head of Building Safety, Brett Mason, Senior Associate & James Giddins, Trainee at Gowling WLG.

A recent High Court judgment provides important and novel guidance on cladding replacement obligations under commercial leases, particularly where fire safety defects arise from combustible cladding.

In *Essendi UK Hotels 2 Limited v London Property Company Limited* [2026], the Technology and Construction Court (TCC) held that a landlord's covenant to "put and keep" the building in "good and substantial repair and condition" extended to an obligation to remove and replace highly combustible aluminium composite material (ACM) cladding panels, even in the absence of physical disrepair.

Three key headline points from the judgment include:

1. The Court held that a landlord's "good condition" covenant in a commercial lease can require wholesale cladding replacement on fire safety grounds; and
2. It is understood to be the first time the courts have considered whether obligations under the Regulatory Reform (Fire Safety) Order 2005 (the "FSO") can be enforced contractually through a covenant to comply with legal obligations; and
3. The tenant constructed the hotel prior to effecting a sale and leaseback to the landlord.

Although the fact matrix of this case was unusual, it will be of interest to landlords and leaseholders of commercial buildings which fall outside the scope of the Building Safety Act 2022 (BSA), including hotels, with fire safety or cladding defects. Given the potential impact of this decision, readers should watch out for any sign of an appeal to the Court of Appeal.

Building safety, hotels and the limits of the Building Safety Act

As the judge explained in this case, hotels do not fall within the definition of "higher-risk buildings" or "relevant building" in the BSA. Thus, Essendi (the tenant) could not seek a remediation order under the BSA, as it could have done had the building in question been a residential tower block above the height threshold.

The Dispute: ACM Cladding on a Commercial Hotel Building

The dispute centred around the Ibis London Wembley hotel – a 16-storey (42.5 metre high), 210-bedroom hotel building – constructed in the early 2000s. The building was subsequently re-clad in 2005-2006 by the tenant, Essendi (who was, at the time, the full owner of the whole hotel building).

- The cladding was made up of Reynobond ACM panels with a polyethylene (PE) core, the same type of highly combustible cladding that was a principal cause of the Grenfell Tower fire. These are classified as Category 3 ACM (highly combustible).
- The claimant tenant, Essendi, operated the hotel under a 12-year lease from the defendant landlord, LPC. The current lease was entered into in March 2019, after the Grenfell Tower tragedy.
- Despite being a lease of the whole building, under the lease the landlord retained responsibility for the structure and exterior of the building, including cladding, and covenanted to "put and keep" these in "good and substantial repair and condition." Unusually, there was no service charge provision entitling the landlord to recover the cost of such works from the tenant.
- It was common ground between both parties' fire safety experts that the Category 3 ACM cladding panels represented an "intolerable risk" of fire and required removal and replacement. However, LPC refused to accept liability for the remedial works, leading Essendi to issue proceedings.
- Essendi put forward novel arguments to obtain what equated to a building safety remediation order against LPC (despite not being entitled to the same protections as residential leaseholders under the BSA). It advanced three grounds of claim:
    1. breach of the landlord's "good condition" covenant;
    2. breach of the landlord's "legal obligations" covenant, in conjunction with its obligations under the FSO (as to which see further below),and;
    3. derogation from grant (which was rejected).
- Essendi sought an order for specific performance requiring LPC to remove and replace the cladding.
- In July 2025, Essendi closed the hotel on the advice of its fire safety expert, who advised that it could not safely remain open. Essendi also sought to recover its closure losses.

The Court's Decision on Landlord Repair Covenants and Fire Safety

The "good condition" covenant: beyond physical disrepair

It is well established in case law that an obligation to repair can only apply where there is a disrepair (e.g. a deterioration from some previous physical condition). The Court held that although the cladding was not in physical disrepair, the "condition" limb of the landlord's covenant was broader than the "repair" limb.

Applying the principle in *Credit Suisse v Beegas Nominees Ltd* [1994], the judge held that the covenant required the landlord to put and keep the building in a condition "which, given the property's age, character and locality and, in particular, as a tower block exceeding 18 metres in height intended and required to be used as a hotel, would make it reasonably fit for such use as regards fire safety risks".

The Court rejected arguments based on cost (£5–7 million), the (subjectively) short length of the lease term (12 years), the absence of physical manifestation of the defect, and the contention that replacement would give the tenant something "completely different" from what was demised.

The legal obligations covenant and the Regulatory Reform (Fire Safety) Order 2005

The FSO applies to all workplaces and the common parts of buildings containing 2 or more domestic premises, and imposes legal duties on the "responsible person" who has "control" of such premises.

The Court held that LPC was in breach of the legal obligations provisions in the lease, read together

with the FSO. LPC was found to be a "responsible person" under the FSO in relation to the structure and exterior (including the cladding), and its duties under articles 8, 10 and 12 of the FSO required replacement of the Category 3 ACM panels. The Court rejected LPC's argument that the FSO's enforcement regime prevented contractual enforcement, holding that sufficiently clear lease provisions can make statutory duties actionable between the parties.

Specific performance: order to replace cladding

The Court ordered LPC to: (a) remove the Category 3 ACM cladding panels within 6 months; and (b) complete re-cladding within an overall period of 18 months, all at LPC's own cost.

Court upholds hotel closure decision

The Court held that Essendi's decision to close the hotel was caused by LPC's breaches, was reasonable in all the circumstances, and entitled Essendi to proceed to an assessment of damages.

Key takeaways: What this means for commercial lease fire safety obligations

- **"Good condition" covenants can require cladding replacement:** A landlord's covenant to put and keep a building in "good condition" may extend to removing and replacing cladding which presents a fire safety risk, even in the absence of physical disrepair. This is a strict liability obligation, with landlord knowledge of the defect being irrelevant. Landlords and tenants of buildings (particularly, given the post-Grenfell context, of taller buildings in which people live and sleep) with fire safety defects should review their lease obligations accordingly, but note that the exact wording of the lease is key to understanding the extent to which the obligations stretch.
- **An alternative route outside the Building Safety Act 2022:** Hotels and other buildings outside the scope of the BSA regime may be able to compel landlords to carry out cladding remediation through standard legal obligations in lease covenants via the Regulatory Reform (Fire Safety) Order 2005, where the landlord is the responsible person. The Court confirmed that sufficiently clear legal obligations provisions can make FSO duties contractually enforceable between the parties.
- **Cost proportionality alone is not a defence:** The Court rejected arguments that the estimated cost of replacement (£5–7 million) or the absence of a service charge mechanism made replacement disproportionate. The fact that the tenant was not liable to pay the cost of the cladding replacement under the terms of the lease distinguishes this case from most landlord and tenant relationships, and was almost certainly a factor in the tenant pursuing the landlord in the way that it did.
- **Post-Grenfell context is key:** The judgment is expressly rooted in the post-Grenfell context and the passing of the Building Safety Act 2022. Whether this reasoning extends to other types of safety defects is a question of fact and degree and will be determined on a case-by-case basis, with particular attention placed on the wording of the lease provisions.
- **Combustible materials ban for new hotels:** However, those procuring new-build hotels, hotels formed by material change of use, or recladding works to hotels which are over 18 metres in height should be aware of the ban on combustible materials introduced by the Building (Amendment) Regulations 2018 – which was extended in 2022 to cover hotels, hostels and boarding houses. Following this extension, materials in the external wall of buildings falling into those categories must meet the same performance requirements as the higher risk buildings previously covered by the ban i.e. A2-s1, d0 or better.

GOWLING WLG

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The reshaping of retentions: what's next for retentions in construction contracts?

by David Banks, Partner, Ruth Wilkinson, Legal Director and Professional Support Lawyer & Niké Jacobs, Associate at Hill Dickinson.

The abuse and delays in repayment of retention monies have been an industry wide issue in construction for many years. Over the previous ten years numerous efforts to reform retentions have been unsuccessful including a Pye Tait report, 2018 consultation, private member bills and lobbying within the industry. However, after decades, the relentless lobbying by parts of the construction sector has finally resulted in the Labour government committing itself to tackling late payments and culminated in last year's consultation which we wrote about in a previous article here. The government published its response to the consultation in March 2026[1], leading to the Commercial Payments Bill (the Bill) being published in May 2026.

The value of retentions is significant. In 2017 an estimated £3.2 billion to £5.9 billion was withheld in retentions in the construction sector in England annually[2], with an estimated £223 million of retention payments lost due to insolvency each year[3]. In March 2026, administrations in the construction industry reached the highest levels since 2023[4]. The increasing levels of insolvency, along with nearly a quarter of a billion pounds at stake, are clear indicators that ignoring the problem with retentions is unsustainable. Insolvency is a significant issue in the construction industry and disproportionately affects small and medium enterprises (SMEs) who reside at the delivery end of the supply chain.

In this article we will focus solely on the government's proposed reforms to address retention payments and will consider some of the potential consequences.

What is retention?

Retention clauses allow the paying party under a construction contract (typically the employer or main contractor) to withhold a percentage of the overall contract sum (usually around 3% to 5%) from payments made to contractors and sub-contractors, known as the retention sum. Half the retention sum is typically released at practical completion, with the final half released once the certificate of making good defects has been issued. In reality, some or all of it is never returned at all and that is fuelling the drive for reform in this area.

Retention is widely used as a form of security in construction contracts. The purpose of a retention is largely to:

- ensure the contractor or sub-contractor's performance of its obligations under the contract (ie facilitating the rectification of defects before the end of any rectification or defects liability period) and
- provide the employer or contractor with a sum of money to complete the works if the contractor or sub-contractor fails to do so as required.

The lack of governance around the deducting and withholding of retention means the practice is open to abuse. The standard form JCT D&B 2024 envisages the employer will hold the retention money in a separate bank account on trust for the contractor. This provision is routinely deleted. Employers and contractors often work to very small profit margins. Deducting and holding retention money provides employers and contractors with a third party's money which is often used to assist their own cash flow. If the retention money is not ringfenced and kept separate from an employer or contractor's own money, in situations of upstream insolvencies, contractors and sub-contractors lower down the supply chain may find themselves deprived of the return of retention monies (ie between 1.5% to 5% of the value of their works). In other situations, the retention may only be paid back in part or there

may be significant delays in the retention being released. Taking legal action to recover retention can be disproportionate in terms of costs.

The proposals

The two proposals put forward in the government consultation were:

1. an outright ban on the use of retention clauses or
2. mandatory protection of retention sums.

The government's preference is an outright ban, and this is reflected in the new Bill which was formally introduced to Parliament on Tuesday 19 May 2026. While we recognise the Bill is still in the early stages of becoming legislation, the Bill addresses the abolition of retentions in construction contracts and makes other changes to commercial payment practices.

Amendments to the Construction Act and standard form contracts

The Bill introduces the new measures through proposed amendments to the existing Housing Grants, Construction and Regeneration Act 1996 (the Construction Act). These will have prospective effect ie will apply to contracts made after the amendments come into force. In relation to retention, the Bill would achieve this by inserting new sections 113A to 113F into the Construction Act[5]. The Bill amends the Construction Act in the following ways:

- introducing a definition for retention as "the practice by which one party to a construction contract ("A") deducts or retains sums of money equating to a percentage of— (a) the amount payable to another party to the construction contract ("B") for any goods, services or works supplied by B, in accordance with the terms of the construction contract between A and B, (b) an interim payment payable to B in accordance with the terms of the construction contract between A and B, or (c) the contract total of the construction contract, until **any condition for** release or partial release of the sums to B (whether included in the construction contract or in an agreement relating to sums payable under that contract) is met.' (Section 113A (1))
- introducing a two-year transition period from the date section 113B comes into force before a full ban. During this period retention clauses will be permitted in contracts
- at the end of a three-year period, ("the last retention day"), such retention clauses will be ineffective and the "transitional retained sum" will be repayable. (Section 113B)
- at the end of the transition period, retention clauses included in construction contracts would be void. (Section 113C)
- once the ban is in force (ie after transition period), variations to pre-existing retention clauses would be void unless the provision makes the retention clause more favourable for the payee. (Section 113D)
- after the transition period, if there is a breach of these provisions and the deduction of an unauthorised sum, then an implied term will impose a penalty of the higher of £40 or 50% of the retention debt (in addition to any interest payable and compensation for late payment). (Section 113E).

Although no set timeframe has been given for when the Bill will become legislation, it is clear from the first reading in May and a second reading scheduled for early June 2026, that Parliament are working towards progressing the Bill. Progress to date has been swift, but with the transitional period it will be at least two to three years until the full effects of the ban on retentions are seen in practice.

To avoid falling foul of the new legislation, any changes in the law will need to be addressed in standard form contracts and bespoke contracts which expressly refer to retention clauses. This is because the legislation cannot be contracted out of and will take precedence over contractual provisions.

Following the release of the JCT 2024 suite of contracts (which followed the 2016 editions), we wait to see how JCT intend to deal with the necessary amendments to the standard form ie will they update the form or issue amendment sheets. If the latter, this comes with the risk that amendment sheets might be missed or forgotten by the parties and the new legislation not followed or followed incorrectly.

Considering the options

Notwithstanding that the government's preference is an outright ban, we have explored both options as this informs the debate about retentions.

Option 1: Outright ban

This is what is envisaged by the new Bill. An outright ban would make it unlawful for the paying party to deduct and withhold retention money under a construction contract. Although the simplest option in theory, this approach raises several practical concerns.

- **Risk of circumvention**
  Employers and contractors may start to undervalue or take a more conservative approach to valuing executed works, giving the employer or contractor an alternative way of retaining a portion of the payment creating a 'backdoor retention'.

- **More disputes**

  There might be more tension on sites where contractors and sub-contractors suspect their works are being undervalued, and this could lead to a rise in adjudications where contractors or sub-contractors turn to an adjudicator to determine the true value of the works completed. Errors in the issuing of payment notices unlawfully deducting a retention may also lead to more adjudications. It is not currently clear how adjudicators will address these issues and whether such unlawful deductions will result in payment/pay less notices being invalidated in their entirety (potentially resulting in more 'smash and grab' adjudications). There would need to be clear rules on the recovery of unlawfully deducted sums to avoid complex and costly disputes.

- **Failure to address the root cause**

  A ban removes the legal entitlement to withhold retention but does not address the reason why employers and contractors feel the need for one. As a result, employers and contractors may try to find ways to legitimately withhold a portion of money from the payments they make as a form of alternative security. Alternatively, there may be an increased need for performance bonds (perhaps even on demand bonds which are currently unusual in the UK construction market) or bespoke bonds – to the extent that the insurance market will cover the supply chain. The positive of bonds would be that the employer/contractor will be forced to pay the price of the security, but the negative for them will be they don't have access to the cash as part of their working capital.

- **Changes to approach to practical completion**

  Employers and contractors may be more stringent in their requirements to achieve practical completion and reluctant to agree to snagging schedules for minor items.

- **Expenditure of time and money**

  Contractors and sub-contractors may still spend significant amounts of time and money chasing unlawful retention payments or payments made to circumvent the retention ban. If this is the case, and an alternative is pursuing an adjudication (which can be expensive) then to what extent does this achieve the desired outcome of reducing the time and money spent chasing retention money?

- **Alternative payments**

  Employers and contractors may try to find alternative and creative solutions to replace retentions. We expect an increase in the use of



stage or milestone payments, which legitimately allows the paying party to determine in what tranches money is released. Paying parties may also give more weighting to payments at the end of projects or offer completion bonuses to incentivise contractors and sub-contractors to fulfil their obligations under the contract.

Option 2: Mandatory protection of retention sums

While this is not the option currently being pursued, under this option, retentions would continue as lawful, but would require any retention sums that are deducted to be held in a separate bank account for the benefit of the payee. Payers would have a choice to either keep the retention sum in a separate bank account or replace it through the use of an instrument of guarantee such as insurance or surety bond. For completeness we have included the following points we think are worth noting.

- **Greater protection in insolvency but additional administrative costs**

  Keeping retention sums segregated in a separate bank account or protected would ensure that in the event of insolvency, any retention money held would be ringfenced and protected. The result of this additional administration would lead to associated costs for the inception and administration of a separate bank account or instrument of guarantee – but these would lower overtime as the system normalised and would be off-set against the reduce risk of insolvency to project delivery. Any additional costs would have to be considered as additional costs to be borne by the paying party or both the payee and payer.

- **Balances the interests of the parties**

  This offers the best compromise when considering the interests of parties to a construction contract, along with the interests of any funders and has been tried and tested since 2023 in New Zealand. Third party funding is vital to the construction industry and investment is key for many projects. Funders usually have a lower appetite for risk but will want to be confident that projects can be delivered to a high standard. Alternative forms of security are available, however these may not always be appropriate and come at a cost that the borrower/developer will usually end up paying for.

- **Tried and tested method**

  As noted above, New Zealand has successfully implemented measures to protect retention money. Under the New Zealand legislation, any retention money deducted must be held on trust by the payer. In addition to this, accounting records are required to be kept and the contractor or sub-contractor are given a right to inspect retention money records. New Zealand offers a working example that could act as a blueprint for the government, and an opportunity for the government to cherry pick any successful elements and reconsider those deemed unsuccessful.

- **Affordability and availability of guarantee instruments**

  Administration costs for guarantee instruments, particularly on large projects where the amount of a retention held can be significant, are likely to be extremely high. The availability of bonds and insurance is also impacted by wider global issues and so political and economic instability will impact on the affordability of these instruments. The extremely tight profit margins that employers and contractors work in, might in some cases prevent this from being an affordable option in the same way it can be unaffordable for the supply chain.

Alternatives to retention

In the absence of retentions what are the alternatives?

Many of the risks that retention is meant to address can be mitigated through:

- better contractor due diligence and the selection of good contractors – improved procurement practices
- proactive management of the works, defects management and administration of the project
- clearer standards, definition of practical completion and the utilisation of practical completion checklists and
- alternative security such as performance bond or parent company guarantees (or the use of a project bank account).

Alternative forms of security will not always be suitable alternatives to a retention. The cost of a performance bond will typically be offset by the contractor required to procure one, as they will price the cost of obtaining a bond into the contract sum. In addition to this, most firms have a limited capacity to take out bonds and smaller companies or ones without strong financial positions might have to pay more to obtain a bond or might be unable to secure one at all. The client/funder may wish to fund this. A parent company guarantee, as an alternative, can only be obtained where a parent or ultimate holding company exists. However, if the contractor is unable to fulfil its obligations under the contract due to insolvency, then the wider group or parent may also be at risk, and if the parent or holding company becomes insolvent the parent company guarantee would be worthless.

Conclusion

The government is moving quickly. The Bill has been published with the second reading due to take place in June. The Bill sets out in detail how it will operate and while we understand there will be some consultation around the drafting, we think the principle is unlikely to be challenged.

The Bill envisages a period of transition, however it is useful to consider how this will work in practice and what approach will be taken to implementing it. It will also be interesting to see how the market reacts and the position of funders and developers particularly as there will be a period of time before the Bill is implemented to allow the market to transition to the new commercial landscape.

An outright ban risks creating ambiguity and may encourage paying parties to find creative ways to withhold money or circumvent the prohibition. In an ideal world removing retentions would lead to better managed projects and a reduction in defects as contractors and sub-contractors work to higher standards resulting in fewer defects at practical completion. For the reforms to be effective, the industry will need a cultural shift and change in practices and behaviours, setting higher standards and levels of professionalism from the outset. With the government also consulting on licencing this may herald the dawn of a new reality.

Rob Driscoll, Director of Legal & Policy for ECA, CLC Business Models contributor and former Chair of Cabinet Office Payment Advisory Group comments:

> *"Contrary to their theoretical purpose, retentions have been proven to amplify the risk of supplier insolvency jeopardising client risk of successful project delivery and not to motivate suppliers to remediate defects. In the majority of cases, they are cost-prohibitive to recover and are stifling innovation, investment and growth. The Construction Leadership Council called on Government to act and supported legislative intervention. Government has made the decision to introduce a ban, so industry has a choice, either we innovate to circumvent the ban, or we innovate to improve procurement and smarter delivery models – time will tell which gets more traction in the industry."*

Hill Dickinson







Mulalley v Sto: a landmark Building Safety Act decision and what it means for contractors

by Edward Lamptey, Solicitor & Timothy Willis, Senior Associate at Irwin Mitchell LLP.

The Technology and Construction Court (TCC) has handed down its decision in Mulalley & Co. Ltd v Sto Ltd and another company [2026] EWHC 1552 (TCC), providing one of the first reported judicial analyses of a claim brought under s. 149 of the Building Safety Act 2022 (BSA 2022).

Notably, it appears to be the first reported judgment involving a s.149 BSA 2022 claim, and the first instance of a Building Liability Order being made following default judgment.

Whilst the case is noteworthy, it should not be viewed as a radical development in the law. Claims relying on section 149 have been pursued since the BSA 2022 came into force and it is likely that some have resolved without reaching a reported judgment. Nor is the outcome particularly surprising. Given the findings established by the earlier default judgment and the court's broad discretion in contribution proceedings, many practitioners would have expected liability to fall predominantly on the manufacturer whose allegedly defective system formed the basis of the claim.

The decision nevertheless offers useful guidance on how the court may approach these types of claims and the assessment of responsibility between contractors and product manufacturers in the context of historic building safety defects.

Background: From Refurbishment to Litigation

In December 2006, Chelmer Housing Partnership Ltd engaged Mulalley & Company Limited design and build contract to carry out refurbishment works at Parkside Court, a residential tower in Chelmsford. The project included the design and installation of external cladding.

Mulalley subcontracted the cladding works, specifying the StoTherm Classic System (the Cladding System), which was manufactured and supplied by Sto Limited.

Following the Grenfell Tower fire in 2017, concerns about cladding safety prompted investigations. The Employer subsequently identified defects in the Cladding System.

To resolve its liability, Mulalley entered into a settlement agreement in December 2022, under which it:

- Agreed to remove and replace the defective cladding; and
- Pay certain associated sums to the Employer.

Mulalley then sought to recover these costs from Sto Limited by way of a contribution arising from its own liability to the Employer pursuant to s.149 of the BSA 2022.

However, matters became more complex when Sto Limited entered administration in January 2025. Mulalley therefore pursued Sto Limited's parent company, Sto SE & Co. KGaA, for a Building Liability Order pursuant to s.130 of the BSA 2022.

Sto Germany failed to engage in the proceedings. Consequently, in December 2025, the TCC entered default judgment, granting the Building Liability Order, with damages to be assessed later.

Assessing Damages: The Court's Approach

With liability established by default, the TCC clarified that the only issue remaining was quantum.

Importantly, the TCC emphasised that: *"Notwithstanding Sto Germany's failure to engage, the assessment is not made by default and Mulalley must prove its loss or damage by evidence".*

The TCC identified four key questions:

What costs were actually incurred?
Were those costs caused by the pleaded defects?
Were the costs reasonable?
What contribution is "just and equitable"?

Issues 1 & 2: Costs and Causation

Mulalley relied on detailed expert and factual evidence to establish its losses.

The court found:

- Total remedial costs incurred: £3,431,633.53
- Costs attributable to the defective cladding system: £2,025,499.62

The distinction was critical. While the overall project involved broader works, only those costs causally linked to the defective cladding system were recoverable against Sto.

Issue 3: Reasonableness of Remedial Works

On reasonableness, the court adopted a familiar stance seen in earlier building safety cases, citing *Martlet v Mulalley* [2022] EWHC 1813 (TCC).

The key principle is that courts are generally reluctant to second-guess remedial schemes with the benefit of hindsight.

Accordingly, once costs were properly evidenced and linked to the defects, the TCC treated them as a reasonable starting point.

Issue 4: Contribution: A "Just and Equitable" Apportionment

Mulalley's claim was ultimately one for contribution under the Civil Liability (Contribution) Act 1978. Under section 2(1), the court must determine what contribution is *"just and equitable having regard to the extent of that person's responsibility for the damage in question"*.

Mulalley's Submission

Mulalley argued that Sto's role should be treated analogously to that of a design professional (such as an architect), as the defects stemmed from the design and performance of the cladding system.

It contended that Sto should bear 90% of the responsibility.

The TCC's Findings

The TCC accepted that the contractor–designer analogy was appropriate, noting that such cases often result in contributions in the range of 67% to 80%.

As the court was bound by the default judgment, it found that Sto's liability necessarily included that:

- the Cladding System breached Building Regulations;
- Sto had made misleading statements about the Cladding System;
- The Cladding System was inherently defective; and
- The misleading statements and defects rendered the apartments unfit for habitation.

Crucially, the TCC determined that the Cladding System was the primary cause of the loss, even though there were additional workmanship issues (such as fire barrier defects). Those issues were viewed as derivative of the defective system itself.

Outcome

Balancing these factors, the TCC held that Sto was responsible for: 87.5% of the recoverable loss.

This resulted in an award of £1,772,312.17 in favour of Mulalley.

Key Takeaways for the Industry

This judgment offers several important insights:

A Rare Look at Section149 in Practice

The case provides guidance on the interplay between s.149 of the BSA 2022 and contribution claims, an area likely to expand as historic defect claims continue.

Building Liability Orders Are a Powerful Tool

The successful use of a Building Liability Order under s.130 of the BSA 2022, even following default judgment, demonstrates the court's willingness to pierce the corporate veil where appropriate.

Default Judgment Does Not Eliminate the Burden of Proof

Even without a defence, claimants must still prove causation, quantum, and reasonableness through evidence.

Courts Focus on Primary Responsibility

Where defects stem from a core design or product failure, responsibility is likely to fall heavily on manufacturers or designers - even where contractors' workmanship is imperfect.

A Measure of Reassurance for Contractors

The judgment may offer some comfort to design & build contractors facing large volumes of post-BSA claims. It shows that liability can be significantly shared (or shifted) where product defects are the dominant cause.

Final Thoughts

While this is a noteworthy and potentially encouraging decision for contractors, it should be approached with caution. The result itself is unlikely to surprise many construction litigators. Once the findings underpinning the default judgment were established, and in the absence of any contrary evidence from Sto, a substantial allocation of responsibility to the manufacturer was always a realistic prospect.

Nevertheless, *Mulalley v Sto* marks a positive development in building safety litigation. As more claims emerge under the BSA 2022, this decision is likely to serve as a useful reference point for how courts will handle liability allocation, contribution, and corporate accountability in the evolving post-BSA 2022 landscape.

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https://www.irwinmitchell.com/news-and-insights/expert-comment/post/102n7u4/mulalley-v-sto-a-landmark-building-safety-act-decision-and-what-it-means-for-con#page=1

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Jason is an active member of many fire professional communities, he Chaired the Nuclear Industry Fire Safety Coordination Committee (2017 – 2019), he is the Chair of the Institution of Fire Engineers (IFE) Special Interest Group for Industrial Fire and Risk, a Senior Examiner for the IFE, and IFE Charter applicant peer reviewer and a BSI Committee member for 7974-6. He has a detailed understanding for human behaviour during fire, his work supported the new development of 7974 Part 6:2019, application of fire safety engineering principles to the design of buildings and is a BSI technical steering group member for review of Approved Document B of the Building Regulations relating to means of escape for disabled people. In addition, Jason is BSI committee member for development of PAS9980 Fire risk appraisal and assessment of external wall construction and cladding of existing blocks of flats – Code of practice.

In previous roles Jason was responsible for leading fire research, analysis and event or loss investigation activities related to fire, building and fire or life-safety related matters, regulatory and/or legal support services. He applies safety case analysis, fire engineering and material science understanding to conduct external wall analysis for buildings of all sizes. He has vast experience of passive fire and active solutions.

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Value Engineering - Is it Truly Valuable?

by David Waddle, DipICArb FCIOB FAPM MCIArb AMICE , Regional Director, Construction Expert Witness at RIMKUS.

Introduction

Value Engineering is intended to bring value to a project often by saving time and money. Ironically it sometimes has the opposite effect.

What is meant by value engineering?

Value engineering was first developed in the USA during World War II and in its aftermath, when there were shortages of both skilled labour and materials. As a result of these shortages, manufacturers looked for acceptable alternatives. It was discovered that the alternatives often led to reduced costs, improved the product, or both.

In construction projects, most will be familiar with the process of one party suggesting alternative materials or design changes, which the team will consider and may develop. Some ideas may be adopted and others discarded. The idea being that, where these VE suggestions are adopted, they will save time and/or money without compromising quality or function.

It is often the case that the individual suggestions are put forward by the contractor as part of its tender submission or during the lead-in period following award of the contract. Or it may be an exercise which is instigated by the Employer. Engineering solutions will have been considered when the design was first developed; however, VE can be carried out in more detail once the contractor is involved, as it has access to a wider specialist supply chain and its own practical experience.

VE is not a cost-cutting exercise that relies on reducing scope or omitting items to reduce cost, nor is it about downgrading the specification below the level of performance set by the design team and Employer. The exercise seeks to reduce costs while delivering the same or better function or performance.

The best time for value engineering

VE can take place throughout the project design and construction period. The benefit of the VE exercise

is likely to lessen as the project progresses. Figure 1 illustrates the pattern of decreasing impact and increasing cost as the project increases[1].

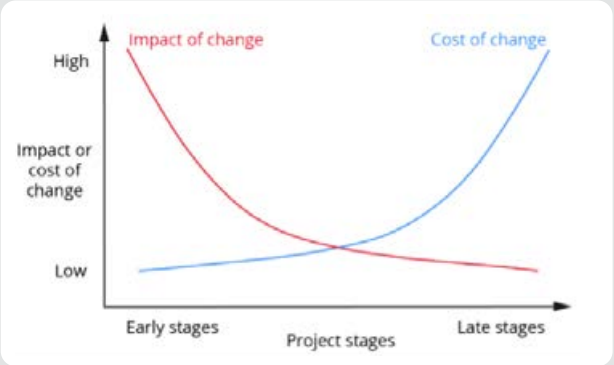


Figure 1

Introducing value engineering early in the process should lead to efficiencies in the project delivery and cost benefits to all. Well, that might be the theory, but it is not always the reality.

What is the reality?

First, I will provide the caveat that my day job is working on distressed projects. I appreciate that there are many projects that run very smoothly and are delivered on time and on budget. I know this because my previous day job was a contractor's project manager.

Back to my current day job. I have seen many examples where VE exercises did not quite develop as intended. Actually, when I use the word 'seen', I actually mean 'heard of', that is because often the only available 'records' are in fact people's recollection of what happened.

Yes, there may be an obvious change from one drawing revision to the next. But what instigated that change? The drawing is often (but not always) issued under the cover of an Architect's Instruction (AI), meaning that the change appears to be an Employer change, especially since the only record is the AI, which introduced the revision. Then, when the project is delayed, well, you can imagine.

All too often, as I set out to investigate the cause of a project delay, the evidence indicates that the delay was due to late design information. The designer will often state that the late design was due to the contractor's VE exercise, which then involved a complete redesign of 'abc', and all parties were aware of this and agreed to it at the time.

'Records, Records, Records'

Many of you will be familiar with the expression 'Records, Records, Records'. This mantra also applies to VE exercises.

It is true to say that there will almost certainly be a record of some sort of change in price, however, the basics are often missing, including:

- What? What was the change?
- Who? Who instigated the change?
- Effect? What was the expected effect in terms of time (programme) and money?
- Outcome? Were the proposed VE items implemented or declined?

The Irony

The purpose of the VE exercise is usually to save money or time or both[2], so it is ironic that the same VE items are often the cause of project delays and, therefore, additional costs.

There can be many reasons for this, it is all very much dependent on the specific circumstances, but below are some real-life examples taken from disputes that I have been involved with.

Case study 1

The project was a large steel-framed development constructed off a reinforced concrete (RC) slab, which in turn was supported by concrete piles. The contractor suggested that by changing from the intended RC slab to individual pile caps, there would be programme savings and therefore, cost savings.

The rationale being that the pile caps could commence sooner, as unlike the RC slab they did not require all the piling to be completed first. In turn, this meant the steel frame erection could commence sooner, and once the first-floor metal deck was installed, the revised ground-floor RC slab could proceed.

This all sounds reasonable and not controversial. However, timing was the key, the proposed VE change and its acceptance came very close to the start of on-site works, and, of course, the foundations were among the first activities to be constructed and were on the programme critical path. The second key point was that the structural engineer now needed to completely redesign the foundations.

What went wrong?

- There was no documentary record of the VE exercise.
- The redesign required the engineering resources to be taken from other design work.
- The revised drawings and schedules were 'late' in being issued compared to the original baseline programme.
- Moving design resources caused delays to other elements of the building.

With the foundation design delayed, the contractor submitted a claim for additional time and money.

Based on the documentary evidence, the foundation design was indeed late and caused a delay to the critical path works. Unfortunately, there were no records demonstrating how the design change came about, nor of the 'agreement' to issue the design in phases in accordance with a timetable provided by the contractor.

Ironically, rather than save time and money, the VE item did the opposite.

Case study 2

A speculative development consisted of a steel-framed building wrapped in a mixture of cladding and curtain walling - nothing remarkable. However, the main entrance area featured a heritage brick feature wall to tie it to the existing Victorian building next door.

As part of a VE exercise, the contractor suggested there could be savings if a modern steel-framing system (SFS) with brick slips were used rather than an actual brick wall. "Excellent", the design team said, and off they all went.

However, over the several months that followed, the contractor presented multiple samples of the available brick slips and even constructed several sample panels, all to no avail. The reason being the available brick slips just did not come close to matching the existing Victorian brickwork next door.

Fortunately, the building of the wall in question was not on the programme critical path; therefore, there was no delay to the completion date, but it did cause disruption and certainly increased costs rather than providing savings.

What is the answer?

The obvious point is to ensure everything is recorded – who instigated the VE exercise or suggestion. What was agreed, including the timings for the provision of information, sign-off, and so on.

Consider whether it might be appropriate to have a cut-off point. In the case of the brick slips, should the team have called it a day and reverted to the original design? A lot of time was spent sourcing and reviewing the various options, so factor this into the management process.

Where several VE items are introduced and implemented – usually at the pre-start of work or very early in the project, I would suggest taking the time to revise the programme to fully reflect the changes. Include any agreed design release dates. Demonstrate that the VE change will save time or, at a minimum, not increase time or delay project completion. This might sound like the most obvious point, however, I find it surprising how often it does not happen, and the entire team proceed on the basis of the original programme.

Case study 3

This example was a speculative office development in a city centre location. As work progressed, the developer had several different design ideas. Some were unusual, some complex, some were simply aesthetic. One idea that did not fall away was a conference room with glass walls, several levels up the building and cantilevered out over the central atrium.

This is slightly different and does not immediately stand out as value engineering, although to the developer, it was considered to increase the value of the whole development; therefore, in that sense, it could be said to be VE.

The team made the bold move to temporarily suspend all work on site. The design team went away and reworked the entire design to incorporate the conference room and a few other ideas. Once complete, the contractor priced the revisions as



part of a Variation Order. Part of this included reprogramming the works.

Everything agreed, work recommenced.

Unfortunately, the delivery of the project did not proceed as planned, and the handover was significantly late. The contractor faced difficulty demonstrating entitlement to any further extension of time because the works had been reprogrammed based on the revised design, and subsequently, little had changed. If the team had not made the bold move to suspend and reset the programme, then upon late completion, the contractor may well have blamed the entire delay on the initial changes.

And Finally

Value engineering can benefit everyone. It can provide an equal or better product and bring cost or time savings or both. For it to be truly successful, the whole process needs to be properly managed by all the parties.

Ensure the programme is updated to fully reflect the VE items, not just the work content, but also the design development. Include agreed release dates. Transparency is key.

And remember the old saying, 'Records, Records, Records'!

References

[1] RICS Practice Information 'Value management and value engineering', 1st Edition, January 2017

[2] It can also be that the VE exercise is instigated to find an improved end product, however, for the purpose of this article, the focus is on money and time.

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LM v Sussex ICB: Can you have capacity for residence if you lack capacity for care?

by Faria Jamali, Associate at Browne Jacobson.

In *LM v Sussex Integrated Care Board* (ICB) [2025] EWCOP 50 (T2), the Court of Protection held that capacity assessments for residence and care were inextricably linked and could not be artificially separated, finding LM lacked capacity in both domains.

The Judge disagreed with the evidence of the two experts and concluded that LM lacked capacity to make decisions relating to both care and residence, finding that these two capacity decisions were interlinked in this case and could not be separated when assessing capacity in these domains.

LM had been deemed by the experts to have capacity to make decisions about residence but not in relation to care and support arrangements. The concern with this finding was that if LM decided to live in a property where his care could not be commissioned, the ICB might not be able to fulfil their commissioning responsibility to LM.

Browne Jacobson acted for the ICB in this complex capacity case. We can provide advice to ICBs in relation to court of protection applications, particularly in cases in which P's capacity to make decisions in certain domains is unclear.

Background

LM is a 27-year-old male who was involved in a road traffic accident in 2013. As a result, he sustained a significant brain injury which affects most aspects of daily living.

The brain injury which LM sustained gives rise to a frontal lobe paradox (FLP). FLP is the discrepancy between an individual with frontal lobe damage performing well on cognitive tests and interviews, while struggling with everyday life. The frontal lobes are responsible for executive functions and damage can impair skills like planning and decision-making, even though the individual may be able to verbally describe what they should do. Consequently, such an individual can be misjudged as being more capable than they are, especially during formal capacity assessments. FLP is manifested by an individual's ability to "*talk the talk*" but not "*walk the walk*".

Around December 2020, LM moved to live at Placement 1. In December 2024, and in the context of LM's desire to move to a less restrictive environment, the judge approved LM's move to a community placement at Placement 2, which was intended to be a trial for six months. Unfortunately, LM did not settle at Placement 2 and there were concerns for his safety. On 4 March 2025, the judge ordered that it was in LM's best interests to live back at Placement 1 until further order and, upon a deprivation of liberty standard authorisation being granted, the proceedings were to be reconstituted as an application under section 21A, i.e. a challenge to the standard authorisation.

LM is in receipt of Continuing Healthcare funding and the ICB is the responsible commissioner for his NHS care. The ICB was the respondent to the Court of Protection proceedings and was represented by Ian Brownhill from 39 Essex chambers.

Why was there a dispute on residence and care?

The central dispute arose from a disagreement between LM, the ICB (as responsible commissioner for LM's NHS Continuing Healthcare funding), and other parties as to whether LM's capacity to make decisions about his residence could be assessed independently of his acknowledged lack of capacity to make decisions about his care and support.

It was agreed by all parties, based on the reports of the single joint expert Dr Radcliffe and the assessments of the provider psychiatrist Dr L, that

LM lacked capacity to make decisions about care and support, and had capacity to make decisions about engaging in sexual relations. However, both Dr Radcliffe and Dr L had concluded that LM retained capacity to decide where he should live.

The question of residence capacity was critical because when the time came for LM to leave Placement 1 and move into the community, it was universally acknowledged by everyone involved in the case that he would need to do so with 24-hour one-to-one support.

The ICB had been searching for alternative placements for LM and had identified potential options, including three supported living placements requiring further exploration and care planning. The proceedings were being pursued on the basis that LM's stay at Placement 1 would end at some stage and he would move to another placement in his best interests. The core concern was that if LM was found to have capacity to decide where he lived, he could reject the care package that was to be made available to him and considered to be in his best interests – a likely prospect given he had previously told Dr Radcliffe he did not need such a care package.

Key issues for determination

The critical issue: Can residence and care be separated?

The central legal question before the court was whether LM's capacity to make decisions about residence could be assessed separately from his capacity to make decisions about his care and support.

The ICB submitted that an approach of considering questions of capacity by reference to self-contained silos i.e. separate issues was consistent with the principles of the Mental Capacity Act 2005, which was decision-specific. The ICB submitted that the decision in relation to capacity for residence and capacity for care were not linked and could be assessed separately. Therefore, an individual could have capacity to make decisions in relation to residence but lack capacity to make decisions in relation to care.

On behalf of LM, it was submitted that the starting point was that on the facts of this case the issues of residence and care were "*inextricably linked*". The judge was reminded that the determination of capacity is issue-specific, and that the options for LM's residence would include the support which LM needed. Therefore, a decision on capacity of care could not be considered without looking at where the care would be delivered. If someone lacked capacity for residence they would be deemed to in relation to care as they could not say that they wanted to live in a flat in Mayfair when the care would be provided in Sussex. That would be an impossible task for commissioners and thus the two issues of capacity of residence and care were inextricably linked.

The judge's decisions and reasoning

The judge concluded that LM lacked capacity to decide where he should live. Although Dr L and Dr Radcliffe had concluded otherwise, the judge could not accept their analysis. On the facts of this case, care and accommodation were so closely connected that they could not realistically be separated. LM's inability to appreciate his need for intensive support directly affected his ability to make a meaningful decision about accommodation. The level of care he required dictated the type of accommodation available, and LM had repeatedly asserted that he does not need support - a belief that illustrated his inability to understand the foreseeable consequences of rejecting care.

Conclusion

The judge concluded that LM lacked capacity both to conduct the proceedings and to decide where he should live.

This case illustrates that capacity assessments for residence and care should often be considered together, rather than in isolation. The judgment emphasises that whilst capacity is decision-specific, courts must avoid artificial compartmentalisation when the decisions are so closely interrelated that separation would be unrealistic. Where an individual's inability to appreciate their care needs fundamentally affects their ability to make meaningful choices about accommodation, those decisions cannot be artificially separated. This principle has been emphasised in other previous cases, such as *Liverpool City Council v CMW* [2021] EWCOP 50.

Practical takeaways



- Capacity assessments for residence and care should not be artificially separated where the decisions are factually interrelated. Assessors should consider whether an individual's care needs dictate the type of accommodation available.
- Clinicians and legal practitioners should be alert to the frontal lobe paradox, where an individual may present well in formal assessments but lack the ability to implement decisions in practice, i.e. individual's ability to "*talk the talk*" but not "*walk the walk*".
- Commissioners should consider the practical consequences of a finding of capacity in one domain but not another. In particular, whether a capacitous residence decision could undermine the ability to deliver a care package assessed as being in the individual's best interests.
- The court retains the ability to depart from expert evidence on capacity where the facts demonstrate that the expert's analysis does not withstand scrutiny, reinforcing the importance of thorough and well-reasoned capacity assessments.

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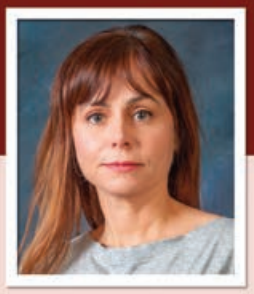
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Medico-legal services: Instructions from Claimants, Defendants and as a Single Joint Expert. Assessments can also be carried out in Italian. Dr Monaci has a good knowledge of Swedish and Spanish and has experience of working through interpreters.

Dr Monaci has completed the Cardiff University Bond Solon Expert Witness Certificates.

Dr Monaci receives approximately 60-70% instructions from Claimants and 40-30% from Defendants. In April 2024, Dr Monaci counted each new instruction received in the previous 12 months and found the percentages were as follows: 58% Claimant, 37% Defendant and 5% Jointly instructed. In April 2025, Dr Monaci calculated that in the previous 12 months, the split was divided as follows: 73% Claimants, 24% Defendants and 3% jointly instructed.

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Supreme Court clarifies JCT termination rules: Providence v Hexagon

by Gwilym Evans, Senior Associate at Stevens & Bolton LLP.

Termination mechanisms based on a two-notice procedure are common across commercial contracts. Typically, an innocent party may serve an initial notice (the 1st Notice) requiring a breach to be remedied. If the breach is not cured within a specified period, the innocent party may then issue a second notice (the 2nd Notice) bringing the contract to an end.

This structure provides a fair and predictable process: the defaulting party is warned and given a chance to correct the issue or misunderstanding, and the innocent party has a contractual route to termination that avoids the uncertainty of relying solely on common law rights.

The JCT suite adopts this approach across several clauses. A recent Supreme Court judgment has now examined how this mechanism works under clause 8.9 of the JCT Design and Build Contract 2016—a clause reproduced unchanged in the 2024 edition.

Clause 8.9 – overview

Clause 8.9 sets out the circumstances in which a contractor may terminate for employer default:

- **8.9.1 – 1st Notice for employer default:**
  The contractor may issue a 1st Notice for listed defaults, including non-payment.
- **8.9.2 – 1st Notice following suspension:**
  A 1st Notice may also be issued where the works have been suspended for a specified period for reasons not caused by the contractor.
- **8.9.3 – 2nd Notice to terminate:**
  If the issue identified in the 1st Notice continues for the stated period (usually 14 days), the contractor may terminate by serving a 2nd Notice. Under the unamended JCT, this must be served within 21 days after the 14-day remedy period expires.
- **8.9.4 – Repeated default:**
  Where an employer repeats a default that has already been the subject of a 1st Notice, the contractor may dispense with the 1st Notice and issue a terminating 2nd Notice within a "reasonable time".

The proper interpretation of clause 8.9.4 was central to the dispute in *Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC.*

The dispute

Hexagon failed to make an interim payment by its final date for payment. Providence responded by serving a 1st Notice under clause 8.9.3. One day before Providence could have issued the 2nd Notice to terminate, Hexagon cured the default by making payment.

Shortly afterwards, Hexagon again failed to make payment on time. This time, Providence issued a single terminating notice relying on clause 8.9.4, arguing that the employer had "repeated" the earlier non-payment and that a fresh 1st Notice was unnecessary.

Hexagon disputed the termination, arguing that because the earlier default had been remedied within the clause 8.9.3 window, Providence had not acquired the right to terminate and could not rely on clause 8.9.4.

Supreme Court's decision

The Supreme Court found in favour of the employer, overturning the Court of Appeal's earlier decision. Clause 8.9.3 is a "gateway" to clause 8.9.4.

The court held that a contractor can only rely on clause 8.9.4 if the right to terminate under clause 8.9.3 **had already arisen.** In this case, Hexagon's

late payment—made just within the remedy period—prevented the right to terminate from coming into existence.

As a result:

- The original 1st Notice was exhausted once the default was remedied.
- It could not be relied upon to support a later termination under clause 8.9.4.
- Providence should have served a **new 1st Notice** when the second non-payment occurred and waited for the contractual remedy period to expire.

Even though the second non-payment was the same type of default, it did not revive rights that had been extinguished when the employer remedied the first breach in time.

Why clause 8.9.4 exists

Much of the argument in the case concerned the purpose of clause 8.9.4. The court clarified that the provision is designed for a narrower situation:

- where the employer has not remedied the default identified in the 1st Notice,
- but the contractor has, for its own reasons (for example ongoing negotiations), **not served the 2nd Notice within the 21-day period** allowed by clause 8.9.3.

In such circumstances, if the employer repeats the same default, clause 8.9.4 prevents the employer gaining a second opportunity to remedy the breach.

However, where the initial default has been remedied in time, the "gateway" to clause 8.9.4 never opens.

Practical consequences

For contractors

The decision means that where an employer remedies a late payment within the clause 8.9.3 period, the contractor must **restart the two-notice process** for each subsequent late payment.

This may have commercial consequences:

- The employer can—intentionally or otherwise—stretch payment cycles without risking immediate termination.
- Adjudication offers little practical remedy during this period because the employer can still cure the default within the notice window.
- Cashflow-sensitive contractors may feel locked into a contract where delayed payments fall short of what was agreed or required.

For employers

The judgment avoids a scenario in which two late payments, perhaps caused by administrative error, could result in termination—a risk described by Lord Burrows as ***"a sledgehammer to crack a nut"***.

Employers are therefore protected from disproportionately severe consequences for isolated or remedied breaches.

Can parties agree something different?

Yes. The judgment turns on the standard JCT wording, but parties remain free to amend clause 8.9 where commercial considerations require a different balance.

Potential amendments include:

- Extending or deleting the 21-day limit for serving the 2nd Notice under clause 8.9.3.
- Allowing termination for repeated defaults regardless of whether the earlier breach was remedied within the notice period.
- Setting shorter cure periods for particular defaults, especially non-payment.

In sectors where cashflow is critical, giving contractors stronger protection against repeated late payment may be both commercially justified and mutually beneficial.

Conclusion

The Supreme Court's decision restores the orthodox understanding of clause 8.9: the two-stage process must be followed each time a default is remedied within the notice period. Clause 8.9.4 provides a useful shortcut only in limited circumstances where the right to terminate has already arisen but has not been exercised in time.

Parties should consider whether the standard JCT wording reflects their commercial risk profile—particularly in relation to payment obligations and cashflow—and amend it where necessary.

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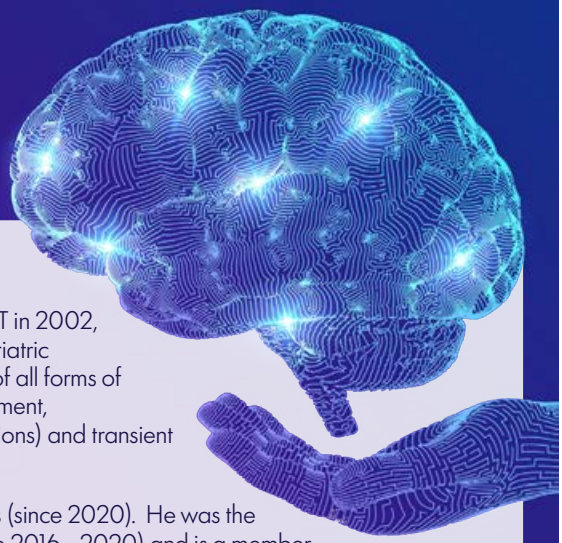
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Building Safety Remediation and Liability – Essendi v London Property Company

by Theresa Mohammed, Partner at Watson Farley & Williams.

In Essendi UK Hotels 2 Ltd v London Property Company Ltd [2026] EWHC 1354 (TCC) the Technology and Construction Court ("TCC") delivered another significant judgment on responsibility for cladding remediation in a post-Grenfell context, particularly involving buildings outside the scope of the Building Safety Act 2022.

The case concerned the presence of Category 3 ACM cladding with a polyethylene core on a multi-storey hotel, which both experts agreed posed an 'intolerable risk' of fire and required removal.

The court held that the landlord was in breach of both the 'good condition' covenant and the 'legal obligations' covenant under the lease by failing to remove and replace the cladding. It ordered specific performance requiring removal within six months and replacement within eighteen months.

Crucially, the judgment confirms that extensive building safety remediation works, including wholesale replacement of dangerous cladding systems, may fall within conventional repairing and compliance obligations in commercial leases. The court rejected arguments that mitigation measures could serve as a proportionate alternative, emphasising that "replacement is the only permanent solution".

The decision has potentially wide implications in relation to legacy defects, allocation of risk under historic contracts and the legal treatment of remediation works following evolving safety standards.

Factual background

The dispute concerned the Ibis London Wembley hotel, a 16-storey building reclad in 2005/2006 with Reynobond ACM panels containing a polyethylene core. At the time, the material was widely used and not generally understood to pose the severe fire risks later exposed following the Grenfell Tower fire in June 2017.

The court accepted that prior to Grenfell there was no sufficient basis to conclude that the tenant, which had procured the recladding works, knew or ought to have known of the risks inherent in Category 3 ACM panels. The evidence demonstrated a "general lack of knowledge of the fire safety risks of using ACM with a PE core" at the time of installation.

Following a sale and leaseback in 2007, the tenant became the operator under a lease which divided repairing obligations along traditional lines, with the structure and exterior (including cladding) ultimately falling to the landlord after a contractual 'cut-off date' in May 2017.

Post-Grenfell investigations eventually revealed that the hotel was entirely clad in Category 3 ACM. Independent reports in 2024 confirmed that the cladding system presented a significant fire risk and required removal. Hydrock engineers assessed the risk as 'high' and emphasised that removal of ACM was 'crucial'.

In July 2025, following expert advice that continuing operation could expose the tenant to prosecution and severe life safety risk, the hotel was closed. The landlord disputed liability for remediation works, leading to proceedings.

Legal points

The claimant advanced three principal legal bases for requiring the landlord to undertake remediation works. First, it relied on the landlord's covenant to keep the structure and exterior in good and substantial repair and condition. Secondly, it relied on the landlord's obligation to comply with statutory requirements, particularly under the Regulatory Reform (Fire Safety) Order 2005. Thirdly, it alleged

that the landlord's failure to address the cladding constituted a derogation from grant.

The claim was framed in substance as an attempt to secure what the court described as "a building safety remediation order" through private law mechanisms, in circumstances where statutory regimes such as the Building Safety Act did not apply to hotels.

The landlord's defence rested on two primary arguments. It contended that the works were not within the scope of its lease obligations. In particular, it sought to characterise the works as remediation of inherent defects rather than repair, suggesting that such obligations should fall outside the lease framework. It also relied on the tenant's historical involvement in specifying and installing the cladding system and on indemnity provisions under the original lease prior to the 2017 cut-off date.

The landlord further argued that removal was not necessary or proportionate, relying on mitigation measures including fire safety management strategies and proposed building modifications. It submitted that a risk-based approach under the Fire Safety Order allowed for consideration of proportionality and cost.

Finally, it challenged the reasonableness of the tenant's decision to close the hotel, suggesting alternative solutions could have avoided closure.

Court's decision

Building safety risk and the necessity of remediation

The court began with the factual and technical question of whether the cladding system required replacement. It noted that both fire safety experts agreed that the building presented an 'intolerable risk' under PAS 9980 principles.

The court rejected the landlord's reliance on mitigation measures. Whilst acknowledging that additional precautions might reduce risk, it held that such measures could not eliminate the fundamental danger posed by combustible ACM panels. The evidence showed that ignition risk could be reduced but not prevented and that consequences remained severe if ignition occurred.

The court rejected the suggestion that piecemeal measures were a viable alternative, stating that leaving "the vast majority of the highly combustible category 3 ACM cladding panels in place" could not be justified. Replacement was therefore treated as both necessary and proportionate.

Repair, remediation and lease obligations

Although the landlord sought to distinguish between 'repair' and 'remediation', the court did not treat that distinction as legally determinative. Instead, it focussed on the breadth of the lease obligations.

The good condition covenant was interpreted as extending to remedying fire safety defects in the building fabric, even where those defects arose from original construction. The court treated the presence of dangerous ACM cladding as placing the building out of 'good and substantial condition'.

In parallel, the legal obligations covenant incorporated duties under the Fire Safety Order. The court held that the presence of ACM cladding amounted to a fire safety risk requiring action by the 'responsible person' and that contractual mechanisms permitted enforcement of those duties.

Importantly, the court held that compliance with statutory duties could require substantial capital works, including replacement of cladding systems, and that such obligations could be enforced through lease covenants.

Knowledge, historical responsibility and risk allocation

A central issue was whether the tenant's historical involvement in the cladding works shifted responsibility back to it. The court rejected this argument, finding that the tenant had no knowledge – and could not reasonably have had knowledge – of the fire risks prior to Grenfell.

The indemnity and remedial provisions in the earlier lease were therefore not engaged. The allocation of risk under the current lease placed responsibility squarely on the landlord for the structure and cladding after the cut-off date.

This aspect of the judgment is particularly significant for construction professionals, as it underscores that historical compliance with then-current standards will not necessarily determine liability where risks only become apparent later.

Reasonableness of the closure decision

The court found that the tenant's decision to close the hotel was reasonable. It relied heavily on expert advice, particularly the opinion that "the hotel should close until the ACM cladding is removed".

The court emphasised that a party acting on competent expert advice in a safety-critical context would rarely be found unreasonable. It also recognised the relevance of reputational risk and the risk of criminal liability in assessing commercial decisions.

The closure was therefore held to have been caused by the landlord's breaches and was recoverable in damages.

Final orders

The court concluded that the landlord was in breach of both the good condition covenant and the legal obligations covenant. It granted an order for specific performance requiring removal of the ACM cladding within six months and replacement within eighteen months.

Further implications

The decision has far-reaching implications for construction contractors, developers and building owners.

First, it confirms that remediation of fire safety defects may fall within existing contractual frameworks without the need for bespoke statutory intervention. Contractors involved in historic projects may therefore face renewed scrutiny of work carried out in accordance with past standards.

Secondly, the case illustrates that courts will assess building safety obligations through a contemporary lens. Materials that were compliant at the time of installation may nonetheless render a building non-compliant today, giving rise to substantial remedial obligations.

Thirdly, the judgment does not set practical distinctions between repair and remediation in the legal analysis of obligations. Where contractual language is sufficiently broad, courts may treat large-scale remediation as falling within ordinary repair or compliance duties. This has immediate implications for how contractors draft warranties, limitation clauses, and risk allocation provisions.

Finally, the reasoning on mitigation and proportionality demonstrates judicial scepticism toward partial solutions where significant life safety risks remain. For contractors involved in remediation packages, this emphasises the importance of holistic design solutions rather than incremental upgrades.

Conclusion

Essendi v LPC is an important decision in the evolving landscape of building safety litigation. It demonstrates the courts' willingness to impose substantial remediation obligations through conventional contractual routes and to prioritise life safety over cost or historic compliance arguments.

The message is clear that legacy design choices and material specifications remain legally and commercially relevant long after completion and the boundary between repair and remediation may offer little protection where the contractual allocation of risk is sufficiently broad.

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A significant portion of my workload is comprised of numerous cases involving the use of combustible materials in the build-up of external walls, alongside other alleged fire safety deficiencies. My instructions generally involve compliance with guidance, regulations and contracts, organising fire tests for systems and materials.

I specialise in the application of Part B of Building Regulations, the Regulatory Reform (Fire Safety) Order 2005& the design and installation of fire fighting systems in England and Wales. Taking instruction in relation to the cause, origin and spread of fire and have worked on a number of significant matters in this field.

I have extensive experience including the preparation of reports under CPR for Civil and Criminal cases and an extensive CV of cases and formal instructions, as well as attendance at court, adjudications and mediations

I have worked throughout the UK (including the Channel Isles & Scotland), Asia, Europe and Africa. Specialising in working with clients who have fire safety issues, whether they be civil or criminal matters.

Recent cases include: Provision of expert support arising out of construction defects, exposing our client to potential prosecution due to alleged non-compliant external wall build-up; expert reports following post-fire prosecution; application to have a formal notice withdrawn, contractual disputes between landlords and tenants.

I have been involved in fire safety since 1981, initially as fire officer, then subsequently as a fire consultant and engineer.

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When the Specialists Mark Their Own Homework

by James Byrne & Giles Mooney KC at Deka Chambers.

RAIB Investigations, Coroners' Constrained Powers, and Why Families Must Still Press

Introduction

The recent collision between two trains at Bedford is a sober reminder of how suddenly lives can be lost on the railway, and of the machinery that swings into action when they are. Whenever there is a serious railway accident, the Rail Accident Investigation Branch investigates and, in time, publishes a report on what it considers to have caused the accident and how a recurrence might be avoided. That report will be the work of acknowledged experts, and it will rightly carry great weight. But it will also, if recent history is any guide, come to dominate any inquest that follows and to narrow what a coroner is permitted to examine.

This article is about that consequence: about the limited powers the courts have so far held that coroners have to question or reject the conclusions of the RAIB and its sister body the Air Accidents Investigation Branch; about why, in our view, those conclusions should still be tested rather than taken on trust; and about why the inquest remains vital ground for the families who will later bring civil claims, where the deference shown to these reports falls away. We write not in the abstract, but from experience.

Beginning at Sandilands

We come to this subject not as theorists but as the barristers who sat with bereaved families through the inquest into the worst tram disaster in this country for more than a century. On the morning of 9 November 2016, a tram derailed at the Sandilands curve in Croydon, having entered a sharp bend at roughly three-and-a-half times the permitted speed. Seven people died and more than fifty were injured, several seriously. Representing the families, we watched an inquest that, for all its length, was hemmed in from the outset.

The Rail Accident Investigation Branch had reported in 2017 that the most likely cause of the accident was a temporary loss of awareness, a possible "micro-sleep", on the part of a driver who had an otherwise unblemished record and had driven that same stretch hundreds of times. The RAIB's chief inspector told the inquest jury the crash was "absolutely" the product of excessive speed. That much was not seriously in dispute. What was in dispute was everything that sat behind the moment of derailment: the systemic failures, the inadequacy of the operator's risk assessments against known human factors, and, most pointedly, an incident ten days earlier in which a tram had taken the very same bend at dangerous speed and very nearly overturned, an incident that had not been properly investigated.

The senior coroner declined to hear oral evidence from the management of Transport for London or Tram Operations Limited. Her reasoning rested squarely on the line of authority that began with the Norfolk helicopter case: because there was, in her judgment, no credible evidence that the RAIB investigation was incomplete, flawed or deficient, she considered herself "not permitted to call further evidence." The jury returned a conclusion of accidental death. The families called it a farce and said justice had been suffocated. We understood why. People who were, on any view, well placed to speak to the systemic causes of seven deaths never entered the witness box.

That experience is the reason we write. The disquiet it left is not about any single coroner's exercise of discretion. It is about a structure that, taken to its logical end, can leave the most important questions about how people died beyond the reach of the only public, judicial inquiry many families will ever get.

A closed shop investigating itself

The RAIB is, in form, an independent statutory body. Under section 7 of the Railways and Transport Safety Act 2003 it must investigate serious railway accidents and must try to determine what caused them but, critically, it "shall not consider or determine blame or liability." Its purpose is the improvement of safety, not the apportionment of fault. That is a perfectly sensible design principle. No-blame investigation encourages candour; witnesses speak more freely if they are not building a case against themselves.

But the design has a less comfortable feature that is rarely examined in the courtroom. The expertise that makes the RAIB authoritative is drawn overwhelmingly from within the industry it investigates. Its inspectors are, in many cases, former railway engineers, operators and managers, people who have spent careers inside the very organisations and the very culture under scrutiny. That is precisely what equips them to read the marks on a sleeper or reconstruct a sequence of events from damaged infrastructure. It is also precisely what should make us cautious about treating their conclusions as beyond challenge. An investigation conducted by insiders, however technically excellent, carries an inherent risk of shared assumptions, professional sympathies, and blind spots about systemic and managerial failings that an outsider might press harder. There is nothing improper in any of this. It is simply the nature of a specialist body that recruits from a single industry. The "closed shop" is a feature, not a scandal, but features have consequences, and one consequence is that the body marking the homework was trained in the same school.

Our experience is that the RAIB defends its reports fiercely at inquests and can be notably cloth-eared to criticism of its methods or the scope of what it chose to examine. That institutional confidence is understandable. It is also exactly the dynamic that the law, as currently interpreted, tends to reward.

The coroner's hands, largely tied

The courts have built a high wall around accident-branch conclusions. The governing principle, drawn from R. (Secretary of State for Transport) v HM Senior Coroner for Norfolk [2016] EWHC 2279 (Admin), through HM Senior Coroner for West Sussex v Chief Constable of Sussex [2022] EWHC 215 (QB), and consolidated in R. (Mid and West Wales Fire and Rescue Service) v HM Assistant Coroner for Carmarthenshire and Pembrokeshire [2023] EWHC 1669 (Admin), is straightforward to state and formidable in effect. Where one of the statutory accident investigation branches has investigated, a coroner should treat its findings as the evidence as to the cause of the accident, and should not re-investigate the same ground, unless there is "credible evidence" that the investigation was "incomplete, flawed or deficient."

The threshold is, in the courts' own words, a "high hurdle." It is expressly "all or nothing": either the investigation can be relied upon in full, or it cannot be relied upon at all, and there is to be no cherry-picking between conclusions. Minor criticisms do not suffice. Nor does the wisdom of hindsight, the observation that conclusions could have been better expressed, or even the identification of a discrete error, because an inspector "does not have to be and cannot be infallible," and a sound investigation can still produce an incorrect conclusion. The rationale is the public interest in avoiding duplication and respect for specialist expertise. A coroner, the West Sussex court said, should be "very slow" to find that an expert investigation was incomplete, flawed or deficient.

We do not quarrel with the principle that resources should not be squandered on duplicative inquiries. But the practical effect, as Sandilands illustrates, is that the gateway to a fuller inquest is guarded by a test that is exceptionally difficult to satisfy before the very evidence that might prove the investigation deficient has been heard. There is a circularity here that ought to trouble us: the families could not show the investigation was deficient without exploring the systemic failings, and they were not permitted to explore the systemic failings because they had not first shown the investigation was deficient.

Challenge it anyway

None of this means the door is bolted. It means counsel must approach it with strategy and persistence rather than resignation.

First, the "high hurdle" is a hurdle, not a prohibition. The authorities expressly contemplate that an error may, on proper analysis, reveal that an investigation

proceeded on a false premise and was therefore deficient. The task at the pre-inquest review is to identify, with precision and credible material, the specific respect in which the branch's investigation was incomplete; a line of inquiry it never pursued, a near-miss it failed to examine, an assumption it never tested. Generalised dissatisfaction will fail. A focused, evidenced challenge to a defined gap is a different matter.

Second, the scope of an inquest and the reliability of an accident-branch report are distinct questions. A coroner retains a duty under sections 5 and 10 of the Coroners and Justice Act 2009 to ascertain how the deceased came by their death, and in Article 2 cases, the broader circumstances. The RAIB's no-blame remit may simply not have covered matters such as regulatory failure, managerial decisions, the engagement of Article 2 that fall squarely within the coronial function. Those are arguments about jurisdiction and scope, not about second-guessing the cause of derailment, and they sit outside the Norfolk line.

The civil courts are a different country

Here lies the point families most need to hear. The deference shown to accident-branch reports in the coroner's court does not travel into civil litigation. In Rogers v Hoyle [2014] EWCA Civ 257, the Court of Appeal confirmed that an AAIB report is admissible as evidence in a negligence claim; admissible, examinable, and open to challenge in the ordinary way, with the court free to weigh it against other evidence and reach its own conclusions on fault. The civil court is not bound to treat the report as conclusive, is not engaged in the "all or nothing" exercise, and, crucially, is concerned with liability, the very thing the branches are forbidden to determine. The report becomes one piece of evidence among many, to be cross-examined, contradicted and, where appropriate, rejected, rather than a finding the tribunal must accept whole or not at all.

That contrast is precisely why the inquest, for all its constraints, remains worthy arena to test your case. The inquest is the first and often the only forum in which the relevant material is brought into the open under judicial supervision, on oath, and at public expense. Even where a coroner feels bound by the Norfolk line to treat the branch's conclusions as the cause of the accident, the inquest process still surfaces the raw material from which a civil claim is built. The supplementary factual evidence an inspector may be asked to give, the documents that can be prised from the branch by application to the High Court, the disclosure of underlying physical evidence, raw data, measurements and expert technical reports that the RAIB will release even when it will not act as an expert witness, all of this is gold dust to the civil practitioner. Witnesses are identified, accounts are pinned down in a setting where they cannot easily be revised later, the operator's documents are tested in public, and the systemic picture begins to take shape, however imperfectly the coronial conclusion reflects it.

In other words, the value of a proactively conducted inquest is not measured solely by the verdict it produces. A constrained conclusion can sit alongside an evidential record that proves decisive once the matter moves to a forum where the report enjoys no special deference. Counsel who treat the inquest as a dress rehearsal for the civil claim, using the pre-inquest review to define the deficiency arguments, using questioning of the inspector to extract every admissible fact, using the disclosure machinery to its limit, do their clients a service that long outlasts the inquest itself.

The lesson of Sandilands is not despair. It is diligence. Counsel and solicitors should treat the inquest as the opening, not the close, of the accountability process: press the scope arguments hard, build the evidenced case on any genuine deficiency, extract every admissible document, and carry that material into the civil arena where the deference falls away.

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He is also qualified to provide more conventional 'Health and Safety' and Fire risk consultancy to firms operating in lesser regulatory regimes (by lieu of an NCRQ Diploma and other qualifications) and is a certified Functional Safety Engineer for Safety Instrumented Systems, in addition to carrying Chartered and European Engineer statuses.

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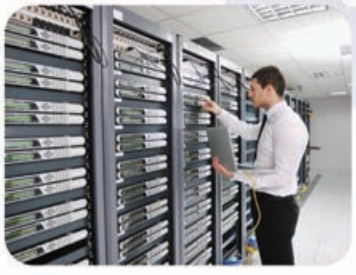
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Lost in translation: appointing an expert who will avoid international business valuation pitfalls

by Neil Rudd, Associate Director in the Forensic Services Team at Crowe U.K. LLP.

Introduction

In an increasingly globalised economy, business valuations have developed a habit of refusing to stay neatly within national borders, with valuers having to navigate multiple jurisdictions, regulatory frameworks and economic environments. While the fundamental valuation methodologies remain unchanged, the reality is that international valuations introduce layers of complexity that can turn what initially appears to be a walk in the park into a hike through the woods.

This article explores the practical realities of international and cross-border valuations, highlighting issues that solicitors should consider when selecting, instructing and assessing expert valuation evidence. It examines key pitfalls to avoid, highlighting how seemingly innocuous yet inappropriate assumptions can undermine both the valuation, an expert's credibility and, in turn, the weight given to expert evidence.

Same toolkit, more moving parts

The reassuring news is that valuers do not require a completely new box of tools, with International Valuation Standards setting out three principal valuation approaches that are equally applicable in both domestic and international arenas:

- Market approach: Comparing the asset with an identical or comparable asset for which price information is available.
- Income approach: Converting projected cash flows to a single current value.
- Cost approach: Using the economic principle that a buyer will pay no more for an asset than the cost to obtain an asset of equal utility.

The less reassuring news is that everything around these tools becomes more complicated. Stability is not universal, with political, economic and regulatory risks rearing their ugly heads. Also, because not all numbers are created equal, data reliability must also be considered.

For solicitors, these additional layers of complexity mean that the choice of expert is particularly important. Experience in domestic business valuation does not necessarily equate to experience in cross-border matters. An expert should be able to identify jurisdiction-specific risks, explain how they have been addressed, and demonstrate where local specialist input has been obtained where necessary.

Market approach: when comparable isn't comparable

The market approach relies on identifying comparable companies from which market value information can be obtained. Such market value information may be available because a comparable company has been acquired or is listed on an exchange with actively traded shares. This process of identifying comparable companies may appear straightforward, until you remember that comparable across borders can mean anything from "almost identical" to "shares the same planet".

One issue can be accounting consistency, as comparable companies may prepare financial statements under different accounting standards (e.g. IFRS vs US GAAP). Without appropriate adjustments, the market value information derived from information within the financial statements can become misleading. This is a "don't compare apples with oranges" situation.

The question of whether market value information is impacted by local risk conditions must also be considered. Information derived from a stable, developed market may look very appealing...right up until it is applied to a business operating in a jurisdiction where political stability is more of an aspiration than a reality.

There is also the issue of liquidity and marketability of the comparable company. A listed company is often assumed to represent a reliable benchmark. However, a listing does not guarantee actual trading activity. Some shares are technically traded, but in the same way that an old dusty treadmill is technically used.

From a solicitor's perspective, these issues provide useful areas of enquiry when considering expert evidence. Understanding why particular comparables have been selected, and whether accounting, regulatory and market differences have been appropriately addressed, can help assess the robustness of the valuation methodology.

Income approach: an assumption minefield

The income approach, which typically involves forecasting cash flows for the business being valued and discounting them to present value, is capable of producing very precise numbers. Unfortunately, precision and accuracy are not always the same thing, with this approach requiring consistency between cash flows, currency and discount rates. A flawed assumption, once embedded in a spreadsheet, can have far-reaching and unintended consequences.

For example, a discount rate incorporating the political, economic and regulatory risks associated with the eurozone as a whole will likely align more with the larger eurozone economies. This is not a "one size fits all" discount rate that can be applied to all eurozone companies though, given the vastly different risk profiles within this large and diverse economic area. Applying a discount rate derived from one economic environment to cash flows generated in another is rather like using a Mediterranean weather forecast to plan what clothes to take on your UK holiday...it is unlikely to end well.

Local tax regimes, which are rarely straightforward and sometimes surprising, can lead to undervaluing or overvaluing a business if they are not fully understood. For example, did you know that in Hungary, companies can donate up to 80% of their corporation tax liability to eligible sports clubs instead of paying it to the state treasury? If this is misunderstood, a valuer may overstate future tax payments, not realising they are already forecast under donations, artificially depressing forecast cash flows and undervaluing the business.

Solicitors should pay particular attention to assumptions for which small changes can have a large impact on value. Discount rates, growth assumptions and tax treatments are often among the most contentious aspects of a valuation and can substantially influence the expert's conclusion.

Cost approach: balance sheets and the illusion of simplicity

The cost approach appears reassuringly straightforward: value the assets, deduct the liabilities, and arrive at equity value. Internationally, however, this simplicity can be deceptive. Differences in accounting standards, valuation practices, and approaches to estimates and assumptions mean that asset and liability figures may not be prepared on a basis that is aligned with a business valuer's expectations.

A prominent example is the differences in lease accounting rules between IFRS and US GAAP. Depending on the situation, leased assets may or may not be recognised on balance sheets. Approaches to the recognition and valuation of intangible assets can also be wildly different under different regimes.

Particular assets and liabilities may rely on the work of other specialist valuers, for example a RICS valuation of a property by a chartered surveyor. While RICS is aligned with International Valuation Standards and is used in many jurisdictions, other local property valuation methodologies may have instead been employed, leading to misleading asset values on a balance sheet.

A keen awareness of potential differences is key in order to address whether and how adjustments to asset and liability values should be applied. In short, while the cost approach may promise a neatly balanced answer, in practice the balance sheet may be decidedly wobbly and demand a very careful second look.

Where a valuation relies substantially on balance sheet values, solicitors may wish to understand whether the expert has independently assessed the underlying asset and liability values, or whether they have relied upon figures prepared under local accounting or valuation conventions.

Practical takeaways for solicitors appointing expert witnesses

If you have a case involving an international or cross-border business valuation, and need to appoint an expert witness or consider the robustness of a report provided, the following practical takeaways are worth bearing in mind:

- International valuation experience: An expert should be able to demonstrate experience of dealing with cross-border valuations, differing accounting frameworks, and jurisdictional risk factors.
- Global footprint of the expert's firm: Will the expert have good access to local expertise and information in the required jurisdictions, if required?

- Early engagement: The earlier an expert is engaged, the earlier they may be able to make you aware of potential challenges relating to data availability, accounting differences and local tax considerations, for example.
- Scrutinise key assumptions and data sources: Are assumptions regarding political risk, economic conditions, taxation, accounting standards and market comparables clearly explained, evidence-based and capable of withstanding challenge?
- Understand the sensitivity of valuation conclusions: Sensitivity analysis can help identify the assumptions that are driving the expert's conclusions and highlight areas likely to attract scrutiny from the opposing side.
- Allow sufficient time for the valuation process: International matters may involve additional investigations, translation of documents, reconciliation of accounting differences and consultation with local specialists, which can make them more complex and time-consuming than their domestic counterparts.

Ultimately, the selection and instruction of an expert in an international valuation matter requires more than an assessment of technical valuation credentials alone. Solicitors should ensure that the expert is equipped to identify and navigate jurisdiction-specific risks, explain their assumptions clearly, and, where necessary, coordinate with local specialists. In many cases, the most significant valuation risks arise not from complex valuation theory, but from relatively straightforward misunderstandings of local accounting, tax, legal or economic conditions.

Remember, the devil is in the detail, and the detail sometimes speaks a different language.

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Litigation and Valuation Experience;

Gareth Smyth has provided reports and expert evidence for both Claimants and Defendants in litigation cases, as well as on a jointly appointed basis in respect of:

- Full company and partial ownership valuations.
- Divorce and Matrimonial proceedings.
- Valuing the interest of an exiting shareholder.

Recent Expert Witness Experience

- Valuation of family operated convenience store c. £500,000 revenue in matrimonial proceedings.
- Valuation of Construction business c. £13m revenue matrimonial proceedings.
- Valuation of Marketing Agency c. £2.5m revenue matrimonial proceedings.
- Shadow Expert Report that resulted in a costs order against the Respondent.
- Valuation of Car Repair Garage for shareholder dispute.

He has also given numerous valuations to company directors to satisfy disputes on share ownership, provide starting points for negotiation of both full and partial sales to internal and third parties, as well as for the purpose of share options and other circumstances in which an independent valuation are necessary.

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A short treatise on pension sharing and offsetting

by Peter Crowley, Actuary & Owner of Windsor Actuarial Consultants Ltd

Pension sharing usually involves a reduction in total pension income.

It's because pension is "sold" using the cash equivalent (CE), actuarially pushed **down**.

Pension is then purchased using market annuity rates, which are actuarially pushed **up**.

So there is a gap between buying and selling price which works against the parties.

Maybe 10% - 20% of the income.

For offsetting, it seems logical to value the pension at a level between the two.

Removing the margins added to the annuity – adding back those removed from the CE.

Unfortunately, CE's are not reliable – especially public sector ones.

Therefore, we adjust annuity rates in offsetting to remove the margin.

That's it.





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Windsor Actuarial Consultants is an independent firm of actuarial consultants with considerable expertise in derivatives and pensions. Our excellent actuarial consultancy is complemented by our cutting-edge software and technical support.

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Peter Crowley, established **Windsor Actuarial Consultants** in 2005, combines a wide experience of financial products and pensions with a commitment for explaining the concepts in plain English.

Peter also advises solicitors and other professionals on the individual aspects of pensions in divorce, compensation on the loss of pension rights, pensions mis-selling and reversions. He has produced a substantial number of reports on this subject,involving cases of varying complexity, and including overseas pensions

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Wills with international connections: know your client

by Nick Marshall, Partner & Kevin Winters, Associate at Brodies LLP.

International connections are now a routine feature of private client work. A client may live in the UK but own assets abroad (or vice versa), may be working in the UK or abroad on a short-term basis or be part of a family whose wealth and succession planning span several jurisdictions.

Will validity - the 'hooks'

The Wills Act 1963 (the "1963 Act") provides a framework for recognising the formal validity of wills i.e., whether they have been properly executed. These rules are of particular importance where a client has connections with different countries, but they can be easily overlooked. In broad terms, a will is to be treated as properly executed where it is signed in accordance with: -

- the law of the place where the will was signed;
- the law of the place where the testator was domiciled or habitually resident (either when executed or at the testator's death); or
- the law of the place of which the testator was a national.

Additionally, if a will is seeking to deal with immovable property (real estate), it will be valid in respect of that immovable property if it is signed in accordance with the law of place where the property is situated.

This means a will prepared abroad may be capable of taking effect in the UK, even where its format is unfamiliar (albeit an opinion from a foreign solicitor may be required to satisfy our courts). It also means UK advisors must understand a client's connections with other countries.

The 1963 Act framework (which is mirrored in many other countries) is helpful for internationally mobile clients. But it should not lead to quick conclusions: depending on the limb (or 'hook') of the 1963 Act being relied on, further investigations may be required regarding the deceased's personal position to support the analysis. For example, to definitively establish their domicile or habitual residence at the relevant time.

UK wills

UK advisors should be familiar with the provisions of the 1963 Act, and it should always be at the forefront of their minds when working with international clients. We have seen occasions (albeit, rarely, thankfully) where wills prepared for international clients under Scots law or the law of England & Wales have not been validly executed because assumptions have been made and there was no 'hook'.

Imagine, for example, a Scots law will is being prepared for a client who is living temporarily in Scotland for work, and they sign it (in accordance with Scots law) when they are back 'home' visiting family. There would be real concerns as to whether such a will has been validly executed. Has it been signed in accordance with law of the place of domicile, habitual residence, nationality or execution? Probably not. It is incumbent on advisors not to make assumptions and to make full enquiries as to a client's past movements and future intentions.

Why "valid" is not the whole answer

Even if a foreign will is capable of recognition in the UK under the 1963 Act, that does not necessarily mean that it covers all the testator's assets or that it avoids administrative difficulty.

It may have been prepared for a particular country. It may have been drafted with local assets in mind or at a particular point in time (and not necessarily reflect any change in circumstances). It may also seek to sit alongside another will(s). It may use legal terminology from another jurisdiction which is difficult to translate across borders. Some (or all) of these matters may warrant consideration where

a foreign will purports to decide the succession to UK estate.

It can be tempting to make one of two assumptions about a foreign will: that it must be ineffective in the UK, or that it must be fine because it was validly prepared abroad. However, one mustn't be too hasty.

There are fundamental differences between different legal systems. For example, common law jurisdictions tend to recognise the role of an executor, whereas civil law jurisdictions usually do not. Even if a foreign will has been validly executed (in accordance with the above framework), it does not mean that it is a useful document in each jurisdiction.

Cross-border planning needs joined-up advice

In reality, international estate planning rarely involves a single will.

A client may have advisors in more than one country, each dealing with a different part of the picture: different wills for different assets; distinct administrative procedures; and, potentially, different tax liabilities attaching to the same assets. That may be entirely appropriate. But it also increases the risk that documents prepared in different jurisdictions will 'clash' with each other.

A UK private wealth lawyer with cross-border experience can help identify how the UK rules interact with the client's broader arrangements. This may involve consideration of the following matters: the status of a foreign will; how multiple wills 'fit' together; whether additional documents are needed; and whether, when and from whom advice from another jurisdiction should be sought.

The practical message

A will executed in a different jurisdiction may still be recognised as valid for UK estate purposes. UK law recognises that modern clients may live, invest and plan across borders. Equally, though, a will, even one prepared in the UK, might fall foul of the rules if one of the 'hooks' is not available. At the very least, UK advisors should query the consequences of a client signing a document outside of the UK.

The existence of flexible rules should not encourage quick conclusions or assumptions. Domicile remains imperative for succession analysis, but recent changes have put a new focus on long-term residence for UK inheritance tax purposes. More than ever, advisors must ask the probing questions to understand a client's background and their future intentions. Know your client. And know the 'hooks'.



Mr Ross S. Delston CAMS, CTCE

Attorney + Expert Witness - Anti-Money Laundering Compliance

Ross S. Delston is an independent American attorney, Certified Anti-Money Laundering Specialist (CAMS), Cryptocurrency Tracing Certified Examiner (CTCE), and former U.S. banking regulator (FDIC) with over 40 years of experience in the financial services sector. He has specialized in Anti-Money Laundering / Countering the Financing of Terrorism (AML/CFT) issues for over 20 years.

Ross has acted as a testifying or consulting expert on AML issues in numerous civil and criminal cases, including on behalf of the U.S. Attorney's Office, Southern District of New York, in U.S. v. Prevezon, a civil forfeiture case involving the proceeds of a massive Russian fraud. He testified virtually on behalf of plaintiffs in a Toronto court for over three days in Joint Liquidators of Stanford International Bank v. Toronto-Dominion Bank, arising out of one of the largest Ponzi schemes in recent decades.

Ross has been a consultant to the International Monetary Fund (IMF) since 1997 on AML/CFT and banking matters and has participated in the AML/CFT assessments of nine offshore financial centers, including Saint Vincent, Bermuda, and Jersey. He has also been a consultant to the World Bank, 1998 – 2014, on banking regulation, resolution, and systemic crisis issues.

Ross has been quoted on AML and banking subjects in the New York Times, Times of London, Washington Post, New Yorker, Wall Street Journal, Reuters, the Nikkei (Japan), and the Hindu Business Line (India). He also speaks on these topics at conferences and seminars throughout the world.

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Beyond Mediation: Exploring Expert Determination and Early Neautral Evaluation

by Abbie Coleman & Tamara Davis, Associates at Collyer Bristow.

When parties consider alternative dispute resolution (ADR), the focus is often on mediation, arbitration, or straightforward negotiations. However, a number of alternative ADR mechanisms can offer equally effective, and n some cases more suitable, routes to resolving commercial disputes.

In this article, we explore two such mechanisms: expert determination and early neutral evaluation. Each has distinct advantages and is particularly well suited to specific types of disputes.

Expert determination: a specialist solution for technical disputes

Expert determination is a private dispute resolution process in which the parties appoint an independent expert to decide a particular issue. The expert is selected for their technical or industry expertise, and typically conducts their own investigation to reach a decision based on their specialist knowledge. This form of ADR particularly appropriate where disputes (in full, or in part) turn on technical issues such as:

- share or business valuations in shareholder disputes
- accounting issues in partnership disagreements
- whether technical obligations contained within a commercial contract were in fact performed by a party

One of the key advantages of expert determination is its efficiency. Because the expert will be determining a specific issue, the process usually requires limited procedural steps and often dispenses with extensive submissions. This can make it a faster and more cost-effective alternative to litigation or arbitration.

Another important feature is flexibility. The parties can agree whether the expert's decision will be binding. They can do so at the outset of their relationship by including a clause to that effect in their contract, or can agree this at a later stage once a dispute has arisen and expert determination is required. Even if expert determination is decidedly non-binding, it can still be valuable in narrowing the issues and/or providing insight into the merits of a claim.

However, expert determination is not without limitations. Because the expert's focus is technical rather than legal, legal arguments may not be fully addressed making it less suitable where disputes involve a significant overlap between legal and technical issues.

Early Neutral Evaluation: Testing the Strength of Your Case

Early neutral evaluation (ENE) involves instructing an independent third party, often a retired judge or senior lawyer, to provide a non-binding assessment of the legal merits of a dispute.

Despite its name, ENE does not always occur 'early on' at the very outset of proceedings. It is actually most effective once pleadings have been exchanged and the parties' positions have been properly articulated.

The evaluator reviews the available material and provides an informed view on the likely outcome were the case (or a particular issue therein) to proceed to trial.

This can be particularly useful where it is suspected that one or both parties have an overly optimistic view of their case. An objective assessment from an experienced evaluator can help recalibrate expectations and encourage constructive settlement discussions, in light of a more informed understanding of litigation risk and the potential costs associated with that.

As an ENE decision is non-binding, parties remain free to continue with the litigation in the event that its outcome does not facilitate terms being agreed. Given the ENE is conducted on a without prejudice basis (just like other forms of ADR) the judge who presides over the ENE cannot have any involvement in the litigation itself, nor can the judge presiding over the litigation have sight of the ENE decision. This is advantageous for the same reason other forms of without prejudice ADR are advantageous, namely that parties can engage openly and freely in the process without concerns about any concessions or statements being utilised in the litigation.

The caveat is that the ENE judge will have sight of more limited documentation than a judge would at final trial in litigation, particularly where the parties have not yet exchanged disclosure and/or witness statements at the time the ENE takes place. That is a facto to be considered in light of what information in anticipated to be revealed by disclosure and witness evidence.

In practice, ENE can be thought of as a form of "reality testing": whilst it does not provide a binding determine of the dispute (or particular issues therein), it often still plays a valuable role in bringing parties closer to resolution. Or at the very least, having another reference point for further settlement negotiations.

Key Takeaways

While mediation and arbitration remain popular and effective forms of ADR, expert determination and ENE are valuable alternative which are often underutilised. When deployed strategically, they can significantly reduce the time, cost, and uncertainty associated with disputes.

Selecting the appropriate mechanism will depend on the nature of the dispute, the parties' objectives, and the commercial context. At Collyer Bristow, we regularly advise client on the full spectrum of ADR option and work closely with them to identify the most effective route to resolution in each case.

If you would like to discuss any of the issues raised in this article, please get in touch with a member of our Commercial Disputes team.

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Why scrutiny matters when it comes to CRU and personal injury settlements.

by Ashley Sturrock, Partner at Digby Brown.

Introduction

This article considers the issues relating to an appeal made on behalf of a pursuer who Digby Brown represented following a claim for personal injury.

Ever since the combining of several benefits into one unitary benefit (Universal Credit), the ability to scrutinise your client's CRU certificate has never been more important. The result of Universal Credit is that they have swept into Universal Credit, benefits that were not previously offsetable. The result being that you may be faced with a large CRU certificate for benefits not related to the accident. We want to ensure that every client receives the compensation they are entitled to and not be penalised as a result of the circumstances out with the accident that determines their benefit entitlement.

Background

The pursuer was involved in an accident at work and subsequently received compensation from his employer following a claim for personal injury. A large component of the compensation allowed for loss of earnings sustained by the pursuer.

However, the pursuer and his partner subsequently claimed Universal Credit following the accident. The Compensation Recovery Unit thereafter issued a certificate containing a considerable sum of benefits that were recoverable from the pursuer's compensation.

The current legal position

At present, when a compensator is liable to pay damages in a personal injury case, they are required to check with the Department of Work and Pensions for any recoverable benefits.

Section 8 of the Social Security (Recovery of Benefits) Act 1997 provides, in schedule 2, which benefits can be offset against specific heads of claim, for example income replacement benefits can be offset against loss of earnings or care benefits against costs of care. The purpose of this ultimately is that a claim for personal injury will put you back in the position you would have been in had an accident not occurred, and so an injured party cannot be doubly compensated for their loss of earnings and also any benefits they received in lieu of their earnings.

Universal Credit is a single benefit that replaced previous individual benefits that were easier to determine whether they were income replacing benefits versus other benefits. The result is that injured parties can now be faced with sizeable CRU certificates where the DWP seeks to recover Universal Credit which may contain elements because of how it is calculated, that are not income replacing benefits.

The problem is compounded by the DWP's refusal to provide a breakdown of the individual elements of Universal Credit.

How do we overcome this?

In the appeal of the CRU certificate we undertook for the pursuer, the pursuer and his partner had undertaken a joint application for Universal Credit. We challenged the CRU certificate on the basis that not all of the Universal Credit paid was as a consequence of his accident.

Specifically, the tribunal had to determine:

- Whether elements of the Universal Credit were paid as a result of the pursuer's accident or for other reasons.
- Whether the law allowed for apportionment of Universal Credit to reflect different reasons for payments of the amounts paid.

The DWP sought to argue that Universal Credit is a single, indivisible benefit and that cannot be broken down into individual benefits.

As part of our preparations for the appeal, we sought comment from a benefits expert to examine the pursuer's benefits application and universal credit breakdown.

Decision

The Tribunal held that.

- The pursuer and his partner were not entitled to Universal Credit prior to the accident due to their combined earnings.
- All Universal Credit paid initially was found to be directly as a result of the pursuer's accident.
- However, that a change in circumstances (the pursuer's partner stopping work due to health reasons) resulted in an increase in their entitlement and that was not due to the pursuer's accident.
- The appeal was allowed in part, and the recoverable amount was reduced to reflect the amount paid as a result of the change in circumstances.
- The Tribunal found no binding authority precluding apportionment of the amounts of Universal Credit to reflect different reasons for payments of those amounts.

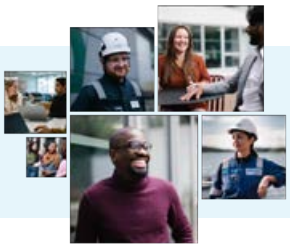
Conclusions

The outcome clarifies that in situations where Universal Credit entitlement changes for reasons unrelated to the accident, it is possible to challenge the proportion of benefits paid as a result of an accident.

Obtaining a detailed breakdown of your client's benefits, reasons for obtaining benefits, whether any benefits application was made on a joint basis and possibly comment from a benefits expert will allow you to assess the CRU certificate and the likelihood of successfully appealing a proportion of the amount of recoverable benefits.

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BAM



Police misconduct and use of force: criminal test to apply – but limited retrospective effect

by Mark Knowles, Legal Director at Weightmans.

The long-awaited reforms arising from the Police Accountability Rapid Review (the Rapid Review) have now been implemented through the Police (Conduct) (Amendment) Regulations 2026 (SI 2026/597). These come into force on 30 June 2026 and amend the Police (Conduct) Regulations 2020 to change the 'Use of Force' Standard of Professional Behaviour to:

> *"Police officers only use force when they honestly believe this to be necessary. The force used should be necessary, proportionate and reasonable."*

This represents one of the most significant developments in police misconduct law in recent years and will be of particular interest to police forces, professional standards departments, and those involved in police misconduct investigations and proceedings.

Two points are especially important.

1. Use of force is now assessed by reference to the Criminal Law Test

In 2023, the Supreme Court decided that the civil law test is the applicable use of force in police misconduct proceedings (it having previously been understood to be the criminal law test). This meant that if the officer acted out of an honest but mistaken belief that they or others were in immediate danger, they could rely on that belief only if the mistake was objectively a reasonable one. This contrasts with the subjective criminal law test which enables the officer to rely on an honest belief regardless of whether that belief was mistaken, or, if mistaken, regardless of whether the mistake was a reasonable one to make.

The Rapid Review, conducted by The Rt Hon. Sir Adrian Fulford and Tim Godwin OBE QPM, was commissioned following the acquittal in October 2024 of Met Police officer Martyn Blake charged with murder of Chris Kaba and concerns of complexity, confusion and delay in the accountability systems when police officers use force. Officers cleared in criminal proceedings could nevertheless face misconduct findings simply because a different legal test was applied. The reviews noted the potential for seemingly inconsistent results depending on the nature of the proceedings (criminal, misconduct) and that significantly protracted proceedings in which different tests are applied is not simply speculative. They recommended that misconduct proceedings involving use of force should apply the same legal test as the criminal law. The Government accepted this.

The practical consequence is that when determining whether an officer's use of force breaches the relevant standard, decision-makers must the focus is on whether the force used was necessary, proportionate and reasonable according to the circumstances as the officer honestly believed them to be.

Importantly, this does not mean that misconduct proceedings now operate under the criminal standard of proof. Misconduct proceedings still apply the civil standard of proof. Also, as noted in the Rapid Review, it would be a misconception to suppose that an officer's contention that they held an honest but objectively unreasonable belief will be accepted, however implausible. A highly implausible belief relied on by an officer is unlikely to be found to be honestly held. Also, police officers will not be able to use disproportionate force. It must always be reasonable, proportionate and necessary.

For forces, this will impact decision making at every stage of the process, from initial identification of a conduct matter, referral/recording decisions, case to answer assessments and through to proceedings/appeals. Appropriate Authorities, investigators and those conducted proceedings will need to ensure that allegations involving breach of the use of force standard are assessed according to the new test/standard.

This change is also expected to provide greater protection for officers making split-second decisions under pressure, supporting forces in recruitment and retention in critical roles.

2. The reforms are not retrospective (generally)

The second key feature of the change is that they do not generally operate retrospectively. The new use of force standard will not apply to allegations against a police officer/former police officer which came to attention before 30 June 2026 (or any allegation coming to attention after that a) which relates to such earlier matter and b) at a time when that earlier matter is being handled under relevant legislation). There is an element of retrospective effect for allegations coming to attention on or after 30 June 2026 though because the new use of force standard will apply when assessing that matter (even where the force took place before 30 June 2026).

This is a significant point for police forces. There may be a temptation to assume that ongoing investigations or proceedings involving use of force can now be reassessed under the new test. That is not the case.

Some considerations for forces would be:

- They will find themselves operating two different legal regimes (in terms of the use of force test to apply) simultaneously for some time.
- Investigations and misconduct proceedings which are live before 30 June 2026 will apply the civil law test. There will be no need to amend existing notices of investigation and referral to proceedings for example. Any notices served on or after that date, but concern allegations known prior to it, will still apply the old test.
- Professional Standards Departments will need to identify carefully which regime applies to each case and ensure investigators, legal advisers and panel members are directed accordingly.

Looking ahead

The Government has presented the reforms as a measure designed to provide greater certainty for officers who are required to make difficult and often split-second decisions involving force. The Home Office will be updating its Statutory Guidance of 2020 to assist forces with these changes (and changes made in 2024/2025 as regards officer misconduct hearing chairs, presumption of dismissal for gross misconduct and presumption of accelerated hearings for former officers to name a few).

Mark Knowles is a Legal Director at Weightmans LPP and has significant experience in police misconduct, performance and vetting matters. He advised the Met Police on the Home Office Police Accountability Review, the Rapid Review and represented it in the seminal vetting case of Di Maria v Commissioner of Police of the Metropolis.





Boult v Together Personal Finance Ltd

by Robert Paterson, Partner at Wedlake Bell LLP.

Boult v Together Personal Finance Ltd **[2026] EWHC 809 (Ch) raises what Michael Green J described as "the interesting issue as to the proper application in modern times of the 400-year-old rule in *Pigot's Case* (1614) 11 Co.Rep. 26." The rule provides that a material alteration to a deed or other instrument after execution by one party without the knowledge or consent of the other renders it void.**

Together Personal Finance Limited, a finance company, had lent money to Ms Myranna Boult on the security of her home. It brought possession proceedings. Ms Boult defended the proceedings, relying on the rule in Pigot's Case, on the basis that the legal charge which the finance company was seeking to enforce had been altered in manuscript after execution to include another property owned by her, a field to the west side of her house with a separate title number. That was indeed the position. The alteration had been made in the erroneous belief that the field was to be included with the house as security for the finance company's loan to Ms Boult. The amended legal charge was then registered at HM Land Registry on the titles of both the house and the field.

At first instance, the judge in the County Court found in favour of the finance company, concluding that the rule in Pigot's Case was not engaged because (a) the alteration was an accident or mistake and (b) was not material. He made a possession order and gave a money judgment in favour of the finance company.

By reference to Chitty on Contracts (36th edn) Michael Green J identified two elements to the rule: first, the alteration must have been made deliberately (the promisor is not discharged if the alteration is made by accident or by mistake); second, the alteration must have been material.

He held that the first limb of the rule was not satisfied:

> *"The simple fact of the matter is that, whether or not the solicitor was acting under a mistaken belief as to what the Legal Charge was to cover, they deliberately added a new property to the Legal Charge after it had been signed by the Appellant and without checking with her (or seemingly their client) that this was what was agreed. They then made it potentially enforceable against the Field by registering it against the Field's title number. This was therefore a deliberate alteration, on behalf of the Respondent, designed to affect the rights and obligations under the Legal Charge, in that another property was made subject to the security."*

He also held that the judge below had erred on materiality: he had been wrong to be influenced by the fact that the finance company had reversed the alteration when it found out about it and had only sought to enforce its rights against the house, so that Ms Boult had not suffered any actual or potential prejudice:

> *"At the time the alteration was made by the solicitor and the Legal Charge was registered against the Field, there was clearly 'potential prejudice' to the Appellant. She was at risk of enforcement action being taken by the Respondent against the Field. Because of her experience with Blemain Finance, she thought that she had been the victim of a fraud. It was only by chance that she discovered what had happened; and it was only actually reversed after the police had become involved."*

He went on to say:

> *"The point of the rule in Pigot's Case is to deter people from doing this sort of thing. The Judge should have found that the alteration was material at the time it was made and the Legal Charge was accordingly void at that point. Whatever happened subsequently, such as the Respondent removing the charge over the Field and only seeking to enforce against the House,*

is irrelevant to the question of whether this was a material alteration at the time it was made."

The appeal succeeded as regards the order for possession, but, on the basis of the limited grounds of appeal relied on by Ms Boult, the money judgment was allowed to stand.

The rule in Pigot's Case may be old, but its application and the policy informing it reflect what many would regard to be common sense. Michael Green J's decision supports the obvious proposition that it is unwise to fiddle with any legal document once it has been signed. This is particularly the case when it comes to a mortgage or charge and is almost certainly applicable with equal force to any deed.

This article is for general information purposes only and does not constitute legal advice or a comprehensive statement of the law. Specific legal advice should always be sought in relation to individual circumstances.

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Richard Morton combines his work as an experienced expert witness with his design work as head of a busy award-winning practice.

His view is that expert architectural evidence should always be based around the knowledge and experience of an architect with day-to-day involvement in live construction projects.

Richard's design work over forty years includes high-end residential projects, hotel, listed buildings and City of London office buildings.

He specialises in older people's housing and care-homes and was recently a member of the government Older People's Housing Taskforce. Richard is much in demand as an expert, receiving instructions, often repeat instructions, from a wide range of major solicitors.

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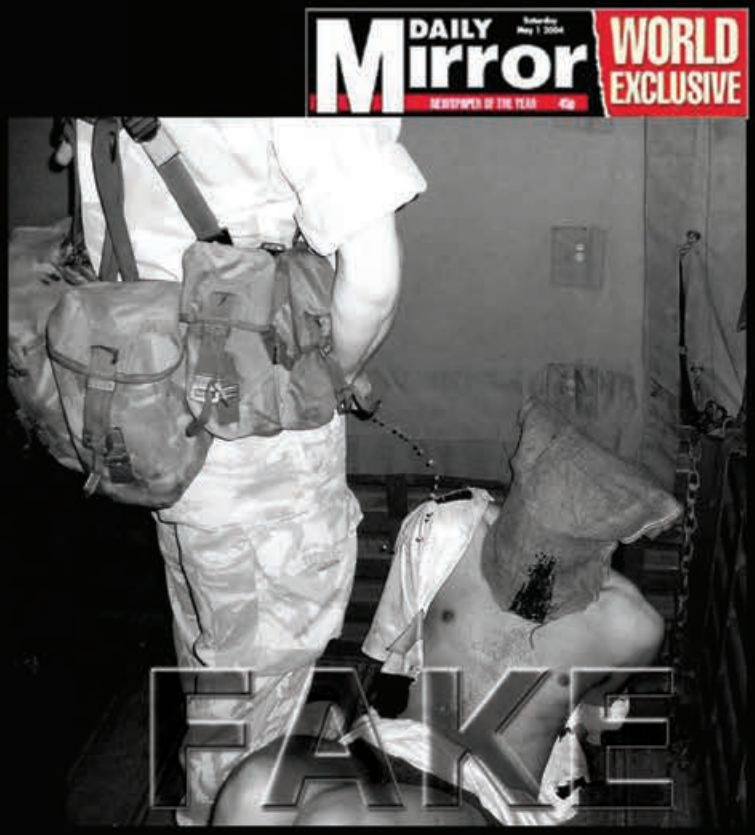
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Lights, camera, attestation: the role of video recordings in will challenge cases

by Jacob Ward, Paul Hardwick, Partners & Mollie Biggadike, Associate at Macfarlanes LLP.

Will challenges are an exercise in reconstruction. The key witness is no longer able to speak for themselves. The question is whether, at a particular moment that may be long in the past, a now-dead person had capacity to understand their will. In one famous example, the court asked whether, if it had been thought advisable to rouse the deceased from her coma and read her the clauses of her will, she could have understood them. It is hard to imagine a more difficult question for a judge to determine.

Judges must therefore piece together a picture of the testator's intention, state of mind and health, from the evidence that remains. That may include medical records (before and after the testator's death), witness accounts, solicitors' attendance notes and documentary evidence. This is an imperfect exercise, stitched together after the event and where no single source can tell the whole story.

An uncommon but powerful form of evidence is the use of recordings of the testator themself. Where such evidence is used, it can be compelling: as the Australian case of *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 put it, "perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at the time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will."

Such recordings are often regarded with caution by testators. There are natural concerns that small imperfections or mis-speakings will be used to suggest the testator lacked capacity. The evidence may be criticised as illegitimate or staged, especially if it is possible that persons were present off camera.

The recent decision in *Patel v O'Sullivan* [2026] EWHC 801 (Ch) lends further encouragement to the strength of recordings as evidence of capacity, even where some of those weaknesses are present. HHJ Jarman KC (sitting as a High Court Judge) had a positive reaction to the use of recorded video evidence taken by two of the Defendants, capturing the testator's wishes around the time that a contested will was signed.

One of the claims in *Patel v O'Sullivan* concerned the validity of Kantaben Patel's will dated July 2020 - which replaced a will signed a month previously in June 2020. After Kantaben's death in December 2020, her daughter (the Claimant) challenged her will on the basis of want of knowledge and approval and undue influence exerted by the testator's son and the testator's sister-in-law. The Claimant sought to uphold the June 2020 will, which was more favourable to her. There were no challenges to the July 2020 or the June 2020 will on the ground of testamentary mental capacity.

After setting out the legal principles applicable to both lack of knowledge and approval and undue influence, HHJ Jarman KC considered and accepted evidence (including from the solicitor who drafted the July 2020 will), including the following:

1. the testator had sufficient command of the English language to instruct her solicitor in the meetings she had with him and understand the contents of her will before signing it;
2. the testator chose to execute a new will in July 2020 because the June 2020 will did not reflect her wishes;
3. there was evidence of the Claimant's controlling behaviour over the testator, including in relation to the June 2020 will; and
4. video recordings of the testator taken by her son and her sister-in-law, a few days before the July 2020 will was executed and on the day of the signing of the July 2020 will.

Taking this evidence in the round, HHJ Jarman KC came to the "clear conclusion that the testator did know and approve of the contents of the July 2020 will". The judge added that he was "comforted in this conclusion by the video recordings of her", which showed her "speaking fluently and unprompted at least while the recording lasted and alert".

The judgment went on to quote the transcript of two of the videos (translated into English from the testator's native Gujarati), in which she tells the person behind the camera: "I have brought you both to the solicitors, you have not forced me and I have asked you to take me" and "everything was done the way I wanted them done and I have not been forced in any way". These statements provided support for the judge's existing conclusions in relation to the testator's free will, wishes, knowledge and approval of her will and the process leading up to its signing. Where the testator's health may have been peripherally relevant to the judge's factual assessment of whether she was susceptible to undue influence (as she was diagnosed with terminal cancer in March 2020), HHJ Jarman KC also appeared to take comfort from the image of the testator's (physical and mental) health from the recordings, commenting (as above) that she seemed "alert" and able to speak "fluently".

Notably, the judge appeared to give more weight to (and directly quoted from) the footage where the testator spoke freely to the camera, rather than the video where she responded to questions asked by her son, one of the Defendants. HHJ Jarman KC described the son's video recordings as showing him "putting matters to his mother about her wishes, some of which were leading in nature, with her agreeing in a few words". The judge did not criticise these recordings outright, but the distinction drawn suggests that unprompted natural testimony will carry more weight than prompted answers.

The timing of the video recordings also mattered. HHJ Jarman KC's focus on the video recordings made on the day of the testator's visit to the solicitor's office suggests that the closer in time a recording is to (a) the giving of instructions by the testator in relation to a will; and (b) the actual signing of a will, the greater its probative value. This aligns with the approach taken to the contrasting contexts of the video evidence adduced in the Canadian testamentary capacity cases of *Walker v Walker* 2025 BCCA 64 and *Carinci v Carinci* 2023 ONSC 6094.

Despite the use of timing and context as guardrails to the utility of video recordings in *Patel v O'Sullivan*, it is clear that the videos do not need to be otherwise sophisticated, lawyered or prepared (indeed, the opposite might be true). Contemporaneous videos, taken on a mobile phone in the car to and from the solicitor's' office where the testator spoke conversationally to her family members, were treated as persuasive evidence of both the testator's knowledge and approval and that her genuine wishes – rather than those of others – were being put into effect. What matters is authenticity, timing and context.

What was also undeniably helpful in this case, coupled with the video recording evidence, was the verbal testimony of the solicitor who had drafted the will. This was supported by contemporaneous attendance notes, showing a structured method of taking instructions and explaining provisions of the will to the testator, plus detailing the testator's reasons for departing from her previous June 2020 will. As such, the case reinforces the importance of solicitors following best practice when preparing wills, which can carry decisive weight in court if the will is later disputed.

Video evidence will not be right for every case. But where it is appropriate, it may be more compelling than any other source of evidence (and particularly helpful in cases where there is a high evidential burden; see our previous article). The question of capacity is a question for the judge not for a doctor, and the right video recording (especially when coupled with other compelling evidence) can transport the judge to the time and the place the will was made so that they can judge for themselves.



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What are the risks of using AI in pharmacy?

by Natasha Ricioppo, Senior Associate, Joanne Staphnill, Consultant Solicitor & Tracy Sell-Peters, Partner at Keystone Law.

Artificial Intelligence (AI) is increasingly being integrated into healthcare settings, including pharmacy practice. Current and anticipated uses include clinical decision-support systems, prescription-checking software, patient-facing chatbots, and workflow automation tools.

AI is widely expected to improve efficiency and patient care, but also introduces new legal, regulatory, and professional risks. Historically, there has been limited guidance on the use of AI by pharmacy professionals, but regulators are now responding. In April 2026, the General Pharmaceutical Council ("GPhC") published a new position statement on the use of AI in pharmacy, recognising both the opportunities and risks.

The GPhC's guidance emphasises that AI should support, rather than replace, professional judgment. Pharmacists remain accountable for the decisions they make and for the care provided to patients, regardless of whether AI tools form part of their decision-making.

Lessons from other professions

There have not yet been any reported clinical negligence cases against pharmacists in respect of their use of AI. However, incidents involving other professions give an indication of the risks for pharmacists and how the courts might approach cases.

In Ayinde v London Borough of Haringey [2025], the High Court held that legal professionals have a professional duty to verify caselaw authorities before relying on them. The court was highly critical of the submission of AI-generated material that had not been independently checked, and emphasised that reliance upon generative AI does not excuse professional failings.

This and other publicised incidents involving legal services highlight some themes:

- over-reliance on AI outputs;
- failure to identify inaccuracies or "hallucinations";

- automation bias, where professionals defer to AI recommendations rather than exercising independent judgment; and
- failure to independently verify AI-generated information.

Impact on clinical negligence claims

Although generative AI can hallucinate a caselaw precedent, it cannot hallucinate a drug or prescription, so the pharmacist's role in dispensing medication may not be significantly affected.

However, many risks still exist. The Independent Prescribing Rollout and expanded "Pharmacy First" scheme are examples of how pharmacy practice is changing. These are areas where AI could be used to help support pharmacists, for example when prescribing, in medication reviews, and when giving advice to patients.

As AI becomes increasingly integrated into pharmacy services, the key issue is unlikely to be whether it is acceptable in general for AI to be used, but whether the pharmacist's reliance on it in a particular instance was reasonable and defensible.

The Bolam test will still apply, so pharmacists will generally not be negligent if their actions would be supported by a responsible body of professional opinion. The difficulty in future may be proving what a reasonable pharmacist should do, given that AI in pharmacy is relatively new, and that AI might be used to support aspects of pharmacy practice that are also relatively new. Cases such as Ayinde v London Borough of Haringey suggest that, in principle, the AI output should be verified, but expert pharmacy evidence would still be needed to explain what steps a reasonable pharmacist should take in the particular circumstances of the case.

Even if expert evidence is available, in such a swiftly developing area the Bolitho principle may be particularly important. This provides that, even where a body of professional opinion supports a particular approach, courts may still examine whether that approach is capable of withstanding logical analysis.

Where an AI system is alleged to have contributed to patient harm, disputes may arise about whether the harm resulted purely from clinical negligence, purely technology failure, or a combination of both. The injured patient could include clinical negligence and product liability allegations in the same action. Alternatively, the patient might sue only the pharmacist, leaving the pharmacist and their indemnifier to decide whether to face the difficulties and costs risks involved in bringing a contribution claim against the AI provider.

Disputes could involve multiple parties, including pharmacists, pharmacy owners, and AI providers, along with insurers or indemnifiers for most or all of them. Determining where responsibility lies, and apportioning losses, could become significantly more complex than in pre-AI clinical negligence claims.

Regulatory and Fitness to Practise risks

A key regulatory risk will be over-reliance on AI-generated outputs. While AI may assist with medicines optimisation, prescribing support, and patient communications, pharmacists must continue to exercise independent professional judgment. The GPhC guidance confirms that decisions affecting patient care should not be delegated entirely to automated systems.

The GPhC also highlights the importance of understanding the capabilities and limitations of AI systems. Pharmacy providers should ensure that staff receive appropriate training and are equipped to identify potential inaccuracies, bias, or errors in AI-generated recommendations. Locum pharmacists may face particular pressure if they have limited time to familiarise themselves with AI-supported systems and processes at a new location.

The use of AI also requires consideration around transparency, governance, and data protection. Organisations implementing AI-enabled services should ensure that appropriate policies, monitoring arrangements, and safeguards are in place, particularly where patient information is processed or clinical decisions are influenced by automated systems.

Failure to implement appropriate safeguards may expose pharmacists and pharmacy providers to regulatory scrutiny. Where patient safety concerns arise, AI-related errors could also lead to Fitness to Practise investigations against individual pharmacists, concerning competence, professional judgment, or professional misconduct.

Liability and insurance considerations

The use of AI in pharmacy also complicates the insurance or indemnity arrangements for claims. Pharmacy providers should consider whether their use of AI is adequately reflected in their existing medical indemnity arrangements.

The GPhC requires pharmacists to have "adequate and appropriate" indemnity. The Insurance Act 2015 imposes a 'duty of fair presentation', meaning that if material information is not presented when the policy is purchased, insurance cover can be withdrawn or reduced later on. Therefore, before purchasing insurance or an indemnity arrangement,

pharmacists should take stock of what AI tools they use or plan to introduce, get guidance on whether that information needs to be communicated to the intended insurer or indemnifier, and make sure that errors involving the use of those tools are within the scope of their cover.

Embedding AI safely in practice

Whilst AI has the potential to improve efficiency and support clinical decision-making, its use should be accompanied by appropriate governance, oversight, and risk management processes. Organisations introducing AI-enabled services should ensure that staff understand the limitations of these technologies and that clear accountability for decision-making is maintained.

Practical safeguards include:

- understanding the limitations and potential failure points of AI systems;
- maintaining clear audit trails and documentation of AI-assisted decisions;
- independently verifying AI-generated recommendations and information;
- keeping up to date with evolving GPhC guidance and wider regulatory developments;
- complying with data protection and confidentiality obligations; and
- providing appropriate staff training and governance arrangements for AI-enabled services.

As the legal and regulatory framework continues to develop, pharmacists should view AI as a tool to support decision-making rather than a substitute for professional expertise. In the meantime, the risk is likely to remain with the pharmacist rather than the technology.



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In 1994 Bernadette qualified as a Fellow of the Chartered Institute of Arbitrators, became a Chartered Arbitrator of the Chartered Institute of Arbitrators in 1999 and undertook in 2014 the Chartered Institute of Arbitrators Diploma in International Commercial Arbitration.

In 2020 Bernadette completed the Hunt ADR mediation skills training course and is now a Civil and Commercial Mediator and an online Mediator.

Bernadette's scope of work encompasses the various roles associated with the CDM Regulations, dispute management, fire safety, defective external walls, monitoring of construction works, defects and health and safety.

Guidance is provided to clients, developers, contractors and designers at various stages throughout the life of the project from inception to management of the finished project.

Projects worked upon include hotels, retail premises, offices, gyms, live work units, restaurants and residential accommodation.

Bernadette holds the Cardiff University Bond Solon Expert Witness Certificates (civil and also criminal) and the University Aberdeen Bond Solon certificate.

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Expert comment: what the latest fraud headlines mean for consumers, platforms, businesses and financial institutions

by Jane Anderson, Legal Director & Garon Anthony, Partner at Irwin Mitchell LLP.

Recent headlines point to a fraud landscape that is both expanding and changing shape.

One set of figures, reported by the Express[1], suggests that identity fraud in the UK rose by 38.7% between 2017 and 2025, reaching 242,003 reported cases.

The same reporting says plastic card fraud remains the most common category, accounting for 87,818 cases, while insurance fraud recorded the sharpest increase, rising by 290.5% to 16,461 cases.

A separate report, covered by The Independent[2], says that more than two-thirds of fraud cases reported to Lloyds originated on Meta platforms, and that the average claim for those trying to recover money has increased to more than £500.

Taken together, these reports reinforce a point that banks, payment firms, businesses and consumers increasingly recognise: fraud is no longer a narrow issue confined to one point in the transaction chain. It is embedded across the way people shop, communicate, insure, borrow and manage their identity online, while the financial and operational consequences often land most immediately on financial institutions asked to detect, prevent, investigate and reimburse losses.

What do these figures suggest?

First, fraud appears to be becoming more diversified. It is not confined to one product, one sector or one customer journey. Payment card misuse, account fraud, insurance-related deception and social media-enabled scams all sit within the same wider pattern: criminals are exploiting fragmented digital systems and the large volume of information that individuals and organisations now share online.

Secondly, the reported growth in insurance fraud is striking because it suggests fraudsters are adapting quickly to sectors where onboarding, claims handling and verification processes may have become increasingly digital.

Thirdly, the continued prevalence of plastic card fraud is a reminder that older methods do not disappear simply because new ones emerge. Fraud is cumulative. New channels are added, but established vulnerabilities remain.

From the perspective of banks and financial institutions, that means anti-fraud strategy can no longer focus only on the payment moment. It increasingly requires investment across customer authentication, account monitoring, mule detection, complaints handling, data sharing and reimbursement processes, all against a backdrop of rising regulatory scrutiny and growing expectations that firms will intervene before losses crystallise.

Why the platform point matters

The Lloyds figures are particularly significant because they focus attention on where fraud may begin, not just where the financial loss is eventually felt. If a large proportion of fraud cases are linked to adverts or interactions on social media platforms, that has implications for the wider debate about responsibility, prevention and redress.

For banks and payment firms, this is a particularly acute issue.

UK reimbursement rules for Authorised Push Payment ("APP") fraud which is where a victim is tricked into making bank transfers to an account that poses as a legitimate payee, have increased the incentives on financial institutions to prevent losses and compensate victims, even where the initial deception may have originated elsewhere in the digital ecosystem.

That helps explain why debate is intensifying around whether platforms, payment providers and other intermediaries should shoulder a greater share of responsibility where scams are enabled upstream. Claimant firms reportedly pursuing cases on behalf of those who say they lost money after responding to fraudulent adverts on Facebook or Instagram are therefore testing not just platform liability, but a broader allocation-of-risk question that matters directly to the financial sector.

What this means in practice

For consumers, the headlines are a reminder that fraud prevention is no longer just about being cautious with bank details. It also involves scrutinising online adverts, checking whether sellers and service providers are genuine, and acting quickly when something feels wrong. Speed matters, both in reporting a suspected scam and in preserving records of messages, adverts, payments and account activity.

For businesses, these reports underline the need to look beyond conventional cyber security. Fraud risk increasingly sits at the intersection of compliance, customer experience, advertising controls, payment processes and complaints handling.

Organisations should be asking whether their verification procedures are robust, whether customer warnings are clear, whether suspicious patterns are being escalated effectively, and whether their contractual arrangements allocate risk appropriately across suppliers and platforms.

For banks and financial institutions, the direction of travel is especially clear.

Public scrutiny is increasing, regulators expect firms to strengthen anti-fraud controls and customer outcomes, and reimbursement models mean that financial institutions may carry substantial cost even where the scam originated on a third-party platform. In practice, that raises difficult questions about where firms should focus investment, how far they can or should rely on customer warnings, how they identify vulnerable customers, and how they collaborate with receiving firms, platforms and law enforcement. Even where liability is contested, the reputational, operational and complaints burden can be significant. For many institutions, the commercial imperative is not only to respond to fraud claims efficiently, but to improve controls at source, disrupt mule activity, enhance intelligence sharing and evidence clearly that governance and systems are keeping pace with the way fraud now occurs.

Looking ahead

These headlines do not tell the whole story, and they should always be read with care in light of the methodology behind the underlying reports. But they do point in the same general direction.

Fraud is becoming more embedded in everyday digital activity, more expensive for victims and more difficult to treat as a problem for one sector alone. For banks and financial institutions, the challenge is particularly acute because legal responsibility,

customer expectation and operational exposure are increasingly concentrated at the point where money moves, even when the deception started somewhere else.

The practical question is no longer simply whether fraud risk is rising, but whether legal frameworks, platform controls, reimbursement models and cross-sector cooperation are evolving quickly enough to allocate responsibility fairly and reduce losses in a meaningful way.

For consumers, businesses and financial institutions alike, the message is clear: prevention is critical, early intervention matters, and the legal and commercial consequences of fraud increasingly begin long before any payment is made.

Reference

[1]www.express.co.uk/finance/personalfinance/2213321/insurance-fraud-cases-surge-290

[2]www.independent.co.uk/money/meta-fraud-facebook-whatsapp-lloyds-bank-b2991312.html

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When can an Adjudicator's Decision be challenged? A case analysis

by Sam Beer, Legal Director & Ruvi Atukorala, Associate at Hill Dickinson.

In the world of adjudication, the process is fast paced and intense. In such circumstances, understandably, there are occasions in which the Adjudicator gets the law wrong. If that happens, can you challenge the Decision?

The answer is yes, and the process whereby an adjudicator's decision may be challenged is set out in Part 8 of the Civil Procedure Rules Part 8 (**a Part 8 Claim**).

In this article, we consider two examples of Part 8 Claims:

- **Kingsmead v Laycock [2025] EWHC 2617 (TCC)** (Kingsmead)
- **United Utilities Water Ltd v Northstone (NI) Ltd (t/a Farrans Construction) [2026] EWHC** (UU)

one of which was successful and one of which was unsuccessful.

Part 8 scope

Before focusing on the detail and outcome in the two cases, UU and Kingsmead, it is helpful to set out the generally accepted scope of a Part 8 Claim.

A Part 8 Claim is a pathway used to seek the court's decision on a question of law, interpretation or principle. It operates to resolve specific points of dispute; and, importantly for the purposes of this article, has become a common tool to oppose an application to enforce an adjudicator's decision.

The basis on which a Part 8 Claim can be referred are limited and may not always be appropriate depending on the facts at hand. Namely, there must not be any material disputes surrounding the facts - the court will not decide what actually happened, rather it will only consider what the law requires.

Kingsmead

In Kingsmead, the referral to a Part 8 claim followed a Part 7 enforcement application referred by Laylock. Kingsmead made the Part 8 Claim on the basis that they considered the Adjudicator had made a legal error in arriving at his decision – a matter of law which was suitable for Part 8 determination.

Summary of facts

Kingsmead was engaged as the main contractor on a residential construction project at Seacombe, Wirral. Laylock was engaged by Kingsmead under a sub-contract to carry out plumbing and electrical works associated with the project (Works).

In July 2023, Kingsmead issued the sub-contract for execution along with the attached programme setting out provisional start dates but with a fixed duration of 105 days (July Programme). Kingsmead later issued an accelerated programme in August

2023 (August Programme) which accounted for project delays but maintained the projected completion date set by the July Programme.

During the course of the project, Laylock was delayed in carrying out their Works and Kingsmead leveraged liquidated damages (LDs) on account of the alleged delays.

Laycock issued an adjudication on the basis that there was not an agreed completion date within the sub-contract and, in consequence, Kingsmead was not entitled to leverage LDs.

The adjudicator sided with Laylock, arguing that the August Programme was not validly incorporated and therefore there was no agreed contractual completion date and instead set a reasonable completion period.

Kingsmead was ordered to pay Laylock £27,895.26 plus VAT in addition to the adjudicator's fees. Kingsmead disputed the decision.

In the context of the dispute, Laycock applied to the courts to enforce the decision. In response, Kingsmead issued a Part 8 claim. Specifically, Kingsmead's position was:

1. the July Programme was the contractual programme
2. via the incorporation of the July programme there was a completion date or period
3. the adjudicator had made a clear error of law by way of their failure to consider the programme presented in the Adjudication was a validly incorporated contractual document and in concluding that there was no completion date.

The decision

The Judge detailed the gateway requirements to a successful Part 8 claim, which includes the adjudicator having made a clear error, and applied the three criteria laid out in part 9.4.5 of the TCC Guide:

- there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest
- that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement and
- the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore; and further that there should in all cases be proper proceedings for declaratory relief.

In allowing Kingsmead's Part 8 claim, the Court ruled that the adjudicator fell into clear error by not considering the legal effect of the July programme. There was no dispute as to whether the July programme had been provided to Laycock, and given that the July programme was referenced in the subcontract, this material issue satisfied all the TCC gateway requirements.

UU

In UU a dispute arose from a major infrastructure project under an NEC3 contract. The contract was heavily amended to include a bespoke (milestone-based) payment regime with payments administered through the digital platform, CEMAR.

UU issued a payment notice (PA-70) for a negative sum requiring Farrans to pay UU circa £3.27 million.

Farrans disputed the PA-70 on two grounds:

1. the CEMAR showed an incorrect due date and
2. PA-70 did not amount to a demand for payment from the contractor to the employer.

The dispute was referred to adjudication. In finding in favour of UU, the adjudicator ordered Farrans to pay the negative valuation sum of £3.27 million.

Farrans resisted payment and brought a Part 8 claim challenging the validity of the notice and whether a pay less notice was required.

Part 8 Proceedings

The headline issue in the case was whether Farrans had suitable grounds to bring a Part 8 claim by application of Part 8 requirements/the TCC Guide.

Farrans argued that the primary Part 8 issue was simple: was PA-70 a valid payment notice?

Farrans argued that for a notice must be free from ambiguity and clear so that the parties know what to do about it and when. In addition, the dates to which a notice relates must also be clear and unambiguous. If an incorrect date is set out, a notice would be invalid. Farrans asserted that this test was not satisfied. PA-70 contained an incorrect date and was not free from ambiguity

UU disputed Farrans analysis. UU argued that matter was not suitable for determination in Part 8 as the issues were complex. In particular, UU asserted that there was a substantial factual issue/dispute as to whether the contractual notices contained on CEMAR were incorrect and misleading. The determination of this issue relied on the application of the 'reasonable recipient' test ie the understanding of the actual recipient of the contractual notice

based on their actual contemporaneous knowledge. The assessment of the 'reasonable recipient' test required oral evidence and elaboration that was not capable of being determined during the limited time available for a Part 8 hearing.

The decision

In giving Judgment in favour of UU, HHJ Kelly held that:

1. the Part 8 claim was inappropriate; Farrans arguments were not short points of contractual construction and required factual investigation and an understanding of how CEMAR operated in practice.
2. the adjudicator acted within jurisdiction and applied the 'pay now argue later principle'.
3. the validity of the payment notice was contingent on the 'reasonable recipient' test where contractual background, commercial context and how parties operate the regime in practice were requisites to be assessed.

Based on the above rulings, the adjudicator's award was enforced, and the notified sum was payable.

Commentary on Part 8 claims

In both the UU case and the Kingsmead case, the Court applied the criteria of 9.4.5 but the outcomes were very different. However, the decisions perhaps serve to challenge the perception of what type of issues are suitable for Part 8 determination. In UU, the matter concerned the validity of a payment notice. This has been a productive area for those seeking to resist enforcement. However, on the facts in UU, there were factual issues that resulted in HHJ Kelly's Judgment that the matter was not suitable or Part 8. In contrast, the issue in Kingsmead was unusual in the context of historic Part 8 claims. Nevertheless, the Court concluded that the issue satisfied the test in the TCC Guide leading to Kingsmead's success on its Part 8 Claim.

For further insight onto the rise of Part 8 claims in Construction, read our Challenging Adjudication: Part 8 Claims Rise article. If you'd like to learn more about how we can support your construction business find out more about our Construction and Engineering expertise, or contact us today.

This article was co-authored by Paralegals, Maya Pierre-Louis and Gabriel Foster.

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John has over 30 years in the private sector as quantity surveyor and project manager involving commercial and health service projects, both traditional and under PFI. He is experienced in dispute resolution and providing wider management consultancy. John has over 15 years' experience working in Central Government as a quantity surveyor, project manager, regional project manager, programme manager, claims negotiator and manager of a large multi-disciplinary design office. On Civil projects, John was project manager of three Crown Courts and major office accommodation re-location projects. On Defence projects, John acted on projects for RAF, Army, USN, USAF and NATO including being the Group Manager for Estates Works Consultants (EWC) on MOD bases in Eastern England.

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Where are court rules heading in the age of AI?

by Amanda Savage KC & Helen Evans KC at 4 New Square Chambers.

In just one week there have been two different updates on the likely direction of travel for court procedures in view of AI; one from the Civil Justice Council's Working Group and the other from the Technology and Construction Court. Amanda Savage KC and Helen Evans KC explain what's going on and why.

The overall direction of travel

The CJC Working Group has been looking at how courts should respond to AI use across a range of work, including skeleton arguments, witness statements and expert reports, as well as use of AI in disclosure[1]. Its final report is not yet ready but in late June 2026, it published a brief Update.

The CJC's June 2026 Update confirms that the *"direction of travel"* is:

- Maintaining the current position for AI use in professional legal drafting (i.e. it is not likely to be necessary for lawyers to sign declarations about whether AI has been used in producing documents such as pleadings or skeletons);
- Introducing "proportionate transparency" in relation to expert evidence; and
- Recognising the distinct and evolving challenges posed by litigants in person.

This is not entirely the same as the guidance on AI contained in the new TCC Guide, published on 1 July 2026, as explained below.

Legal drafting

It appears unlikely that the CJC Working Group will impose a requirement for Court documents (such as statements of case, skeletons) to contain a statement by the legal representative explaining whether and how AI has been used.

There are obvious advantages of this.[2] In particular, it is hard to see how any *meaningful* statement as to the use of AI can be given without the legal representative providing quite detailed information. This could be onerous and would be liable to intrude upon the legal representative's "workings" or thought processes and infringe the party's privilege.

On the other hand, it is clear that the use of AI in these documents is causing problems: there have been a significant number of cases recently heard in Court and in the Tribunals dealing with actual or suspected "hallucinations"[3]. This suggests that, contrary to the optimism in the CJC's Interim Report and Consultation, the addition of the legal representative's name on the document – which carries with it (or should carry with it) an acceptance by the legal representative of his or her professional responsibilities and compliance with professional obligations – is not yet providing sufficient.

Perhaps for this reason, the TCC Guide takes a more nuanced position. It says that *"whether and to what extent legal representatives should disclose their use of AI will depend on the context. However, any doubt as to whether the fact that AI has been used should be mentioned must be resolved in favour of disclosing such use"* (p. 9) [4]. Other jurisdictions have also made indications favouring transparency: see for instance the decision of the Irish Court of Appeal in Guerin v O'Doherty [2025] IECA 48 (at para. 74).

Witness statements

The CJC's June Update also states that *"the group is actively exploring whether a proportionate and workable approach can be developed for witness statements, including whether any form of disclosure would enhance, rather than complicate, the administration of justice"*.

The use of AI for trial witness statements strikes us as problematic. The purpose of a trial witness statement is to give the evidence that the witness would give if giving oral evidence in chief, and it should be in their "own words". The whole point of Practice Direction 57AC when it was introduced in 2021, was to move away from a mechanical recitation and analysis of documents and/or an "over-lawyering" of statements. It is hard to see how the use of AI to generate trial witness statements could be in keeping with that philosophy and the requirements of PD57AC- which are re-emphasised in the recent TCC Guide (p. 89).

The CJC seem to recognise this and propose there should be a rule requiring a declaration that AI has not been used for the purpose of drafting such witness statements.

The position seems to be different for non-trial witness statements where it is proposed by the CJC that the position should be in line with that for statements of case and skeleton arguments.

Experts

Experts already occupy a different position to legal representatives in their dealings with the court. For instance, they are expected to be clear about what data they have relied on, and what they have and have not reviewed (see e.g. CPR PD35 para 3.2-3.3). The TCC Guide provides that any calculations produced by software such as Excel should be disclosed, setting a precedent for disclosure of some tools (p. 101). So should AI use be any different?

The CJC's reference to "proportionate transparency" in its June 2026 Update is intriguing. It suggests that the CJC will impose some type of formal, specific requirement that experts disclose their AI use. Whether that is done by amending the experts' statement or producing guidance requiring a specific explanation within the body of the report (or by some other route) remains to be seen.

One thing that is clear is that cross-examination into the process by which expert reports have been produced is likely to increase- as has been the experience since the introduction of CPR PD 57AC governing the process for producing witness statements.

© Amanda Savage KC and Helen Evans KC, 4 New Square Chambers, July 2026

This article is not intended as a substitute for legal advice. Advice about a given set of facts should always be taken.

Reference

[1] For a helpful summary see the article by Isabel Barter and John Williams: AI and the Courts: The Civil Justice Council's Consultation on Preparing Court Documents – 4 New Square Chambers

[2] Some of which are flagged in the Interim Report and Consultation.

[3] For instance: R (Ayinde) v LB Haringey, Al-Haroun v Qatar National Bank [2025] EWHC 1383, UK and R (on the application of Munir) v Secretary of State for the Home Department [2026] UKUT 81 and Cork and another v Mark Smith [2026] EWHC 1199 (Ch).

[4] It then goes on to remind legal representatives of the need to protect confidentiality in any data in respect of which AI is used and to check the accuracy of any research of case citations generated by AI>

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Mr Kumar undertook his foot and ankle fellowship at Wrightington Hospital. He was granted a Fellowship of the British Orthopaedic Foot and Ankle Society, which he used to gain experience in ankle arthroscopic surgery under the internationally renowned Professor Van Dyke at Amsterdam.

Mr Kumar is involved in teaching and training nurses, physiotherapists, medical students and Orthopaedic Registrars. He has students from the University of Manchester who undertake various clinical attachments with him. He is an Honorary Senior Lecturer and examiner for the University of Manchester Medical School.

Mr Kumar provides a high quality, patient-centred foot and ankle service. His experience covers the entire spectrum of orthopaedic foot and ankle disorders. Besides the more common foot and ankle procedures, he performs ankle replacements, ankle arthroscopy, complex hind foot fusions, deformity corrections, and ligament and tendon reconstructions about the foot and ankle.

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Delayed Referral in Suspected Cancer: A GP Expert Witness Perspective on Breach, Causation, and Missed Opportunity

by Dr Samah Boulis, GP Expert Witness.

Abstract

Delayed referral for suspected cancer remains one of the most litigated and clinically significant areas in primary care negligence. For clinical negligence solicitors, these cases sit at the intersection of evolving guidelines, diagnostic uncertainty, and the realities of time-pressured consultations. This article examines how delayed referral claims arise, how they are analysed from an expert witness standpoint, and where the strongest—and weakest—cases tend to lie.

Why Delayed Referral Cases Matter

Timeliness is a critical determinant of cancer outcomes. Even relatively short delays in referral can result in disease progression from a potentially curable stage to one where treatment is palliative. In medico-legal terms, delayed referral cases are often compelling because they present a structured framework for analysis:

- Established national guidance defining thresholds for urgent action
- Discrete and identifiable clinical decision points within primary care
- Potentially quantifiable harm in terms of stage migration, treatment burden, and prognosis

Yet they are rarely straightforward. General practice operates in a setting of low prevalence and high uncertainty—most symptoms that could indicate cancer do not. Clinical decision-making must therefore balance the risks of over-investigation against the consequences of missed or delayed diagnosis.

Central to this framework in England has traditionally been the Two Week Wait (2WW) referral pathway, ensuring patients with suspected cancer are seen by a specialist within two weeks. These pathways are grounded in guidance from the National Institute for Health and Care Excellence (notably NG12), which provides symptom-based thresholds for urgent referral.

However, since October 2023, the NHS has reformed cancer waiting time standards, replacing the Two Week Wait target with the Faster Diagnosis Standard (FDS). This standard requires that patients referred with suspected cancer receive a diagnosis—or have cancer ruled out—within 28 days of referral. The emphasis has therefore shifted from speed of first specialist assessment to timeliness of diagnostic resolution.

Urgent suspected cancer referrals (still commonly referred to as "2WW") remain in clinical use and continue to be guided by NG12 criteria. However, they now function within a broader diagnostic pathway that prioritises rapid investigation, often through straight-to-test models, rather than an initial outpatient appointment.

From a medico-legal perspective, the FDS does not alter the legal test for negligence, which continues to be determined by established principles of reasonable clinical practice. However, it is increasingly relevant as contextual evidence of expected timeliness within the NHS. In particular, it reinforces the importance of prompt referral decisions in primary care, as any delay may postpone entry into a pathway designed to deliver diagnosis within 28 days.

These pathways frequently form the benchmark against which GP conduct is judged—but crucially, they operate within, not instead of, established legal tests for negligence.

The Legal Framework: Bolam and Bolitho in Practice

In determining breach of duty, the court relies on principles that are both longstanding and highly relevant to modern general practice. The foundations lie in Bolam v Friern Hospital

Management Committee, subsequently refined by Bolitho v City and Hackney Health Authority. Together, they provide the framework within which GP decision-making is scrutinised in delayed cancer referral claims.

Under Bolam, the central question is whether the clinician's actions would be supported by a responsible body of reasonably competent general practitioners. It recognises that medicine is not an exact science and that a range of acceptable clinical approaches may exist, particularly in the early presentation of potentially serious disease.

However, Bolam does not operate in isolation. The refinement introduced by Bolitho requires that any such body of professional opinion must also withstand logical analysis. It is not sufficient for a practice to be merely accepted; it must be capable of withstanding scrutiny as rational, evidence-based, and consistent with the assessment of clinical risk.

In practical terms, this dual test is critical in delayed referral cases. A decision not to initiate urgent investigation or referral may be defensible if supported by a responsible body of opinion. However, where that decision appears to disregard recognised risk factors, established referral thresholds, or national guidance—such as that issued by the National Institute for Health and Care Excellence—it may fail the logical scrutiny required under Bolitho.

Accordingly, the expert's role is not simply to identify whether a decision was made by some practitioners, but to assess whether it represents a defensible standard of care when measured against both professional consensus and reasoned clinical judgment.

Establishing Breach of Duty

In delayed referral cases, breach usually hinges on deviation from accepted practice. The following factors are central:

1. Guideline Adherence

Failure to follow established referral thresholds—particularly for "red flag" symptoms—can strongly support breach. However, guidelines are not absolute rules. A defensible departure may exist where:

- Symptoms were atypical or transient
- Examination findings were reassuring
- Safety-netting was robust and documented

2. Documentation Quality

The medical record is often decisive. Poor documentation can transform a defensible decision into an indefensible one. Experts scrutinise:

- Symptom duration and evolution
- Examination findings
- Differential diagnoses considered
- Explicit safety-netting advice

Absence of evidence frequently becomes evidence of absence in legal proceedings.

3. Safety-Netting

Clear, documented safety-netting can mitigate liability even where referral was not immediate. Conversely, vague or absent advice significantly strengthens a claimant's case.

Causation: The Harder Hurdle

Even where breach is established, causation is often the battleground.

The key legal question:
Would an earlier referral have made a material difference to outcome?

This requires careful oncological expert analysis:

- Tumour biology and growth rate
- Stage progression timelines
- Survival probabilities at different stages

Not all delays are causative. Some cancers are aggressive enough that earlier detection would not have altered prognosis. Others, particularly colorectal, breast, and some skin cancers, are far more sensitive to delay.

From an expert standpoint, causation opinions must be:

- Evidence-based
- Quantified where possible (e.g. loss of chance)
- Transparent about uncertainty

Common Litigation Themes

Certain patterns recur in delayed referral claims:

Missed "Red Flag" Symptoms

Examples include persistent rectal bleeding, unexplained weight loss, or haematuria. These cases often have strong prospects if documented clearly but not acted upon.

Repeated Consultations Without Escalation

Multiple attendances with evolving symptoms raise concern. A single missed opportunity may be defensible; repeated inaction is harder to justify.

Over-Reliance on Initial Diagnosis

Anchoring bias—persisting with a benign diagnosis despite changing features—is a frequent issue.

Inadequate Follow-Up Systems

Failure to track test results or act on abnormal findings can convert system errors into negligence claims.

What Makes a Strong Case for Solicitors?

From an expert witness perspective, strong claimant cases typically include:

- Clear guideline-triggering symptoms
- Good documentation of those symptoms
- No referral or significant delay
- Evidence that earlier diagnosis would likely have improved outcome

Weaker cases often involve:

- Vague or poorly recorded symptoms
- Reasonable alternative diagnoses
- Appropriate safety-netting
- Uncertain or minimal impact of delay on prognosis

Practical Insights for Case Selection

For solicitors assessing potential claims, early expert input is invaluable. Key questions to ask at the outset:

1. What exactly was documented at each consultation?
2. Did the symptoms meet referral thresholds at that time?
3. How long was the delay?
4. Is there credible evidence that earlier diagnosis would have altered staging or survival?

Conclusion

Delayed referral for cancer remains a high-stakes area of clinical negligence litigation. For expert witnesses, the task is to disentangle hindsight from contemporaneous reasoning, and to apply both clinical and legal standards rigorously.

For solicitors, success lies in identifying cases where breach and causation align—not merely where an adverse outcome has occurred.



Ultimately, these cases are not just about accountability. They highlight the enduring challenge at the heart of general practice: making high-consequence decisions under uncertainty, where the cost of delay can be profound.

Dr S. Boulis, GP Expert Witness



As a GP expert witness, I prepare independent reports in clinical negligence cases, with a focus on informed consent, standards of care and decision-making in primary care.

My overriding duty is to the Court. All reports are prepared in accordance with CPR Part 35, Practice Direction 35, and the Guidance for the Instruction of Experts in Civil Claims (2014).

I welcome instructions from clinical negligence solicitors and counsel in England, Scotland and Northern Ireland.

If you would like to discuss a potential instruction or expert witness query, please feel free to get in touch: **spboulis@doctors.org.uk**

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Phil provides clinical negligence reports covering all aspects of acute and general medicine including preliminary and full liability and causation, condition & prognosis and life expectancy reports. He has experience of conferences with counsel, joint expert statements, and he has given evidence as an expert in clinical negligence and coroner's court cases. He has over 10 years of medico-legal experience, with over 350 expert opinions provided. Approximately 50:50 defendant:claimant split.

He is responsible for the streaming, rapid risk-stratification, and safe discharge of 30+ acute medical patients daily. Expert in managing time-critical conditions outside of traditional inpatient wards. Deep familiarity with NICE guidelines for the variety of acute medical presentations such as venous thromboembolism, acute chest pain and community acquired pneumonia. Specialist interests include ambulatory emergency care, acute kidney injury, sepsis, DVT/pulmonary embolism and life expectancy reports.

He is also an independent medical examiner at the Royal Free London NHS Foundation Trust. The role involves the scrutiny of medical records to establish cause of death, liaising with the clinical team involved with the care of the deceased, and the deceased's family. Coroner referrals are made when necessary and clinical governance/organisational learning issues are also highlighted as and when appropriate.



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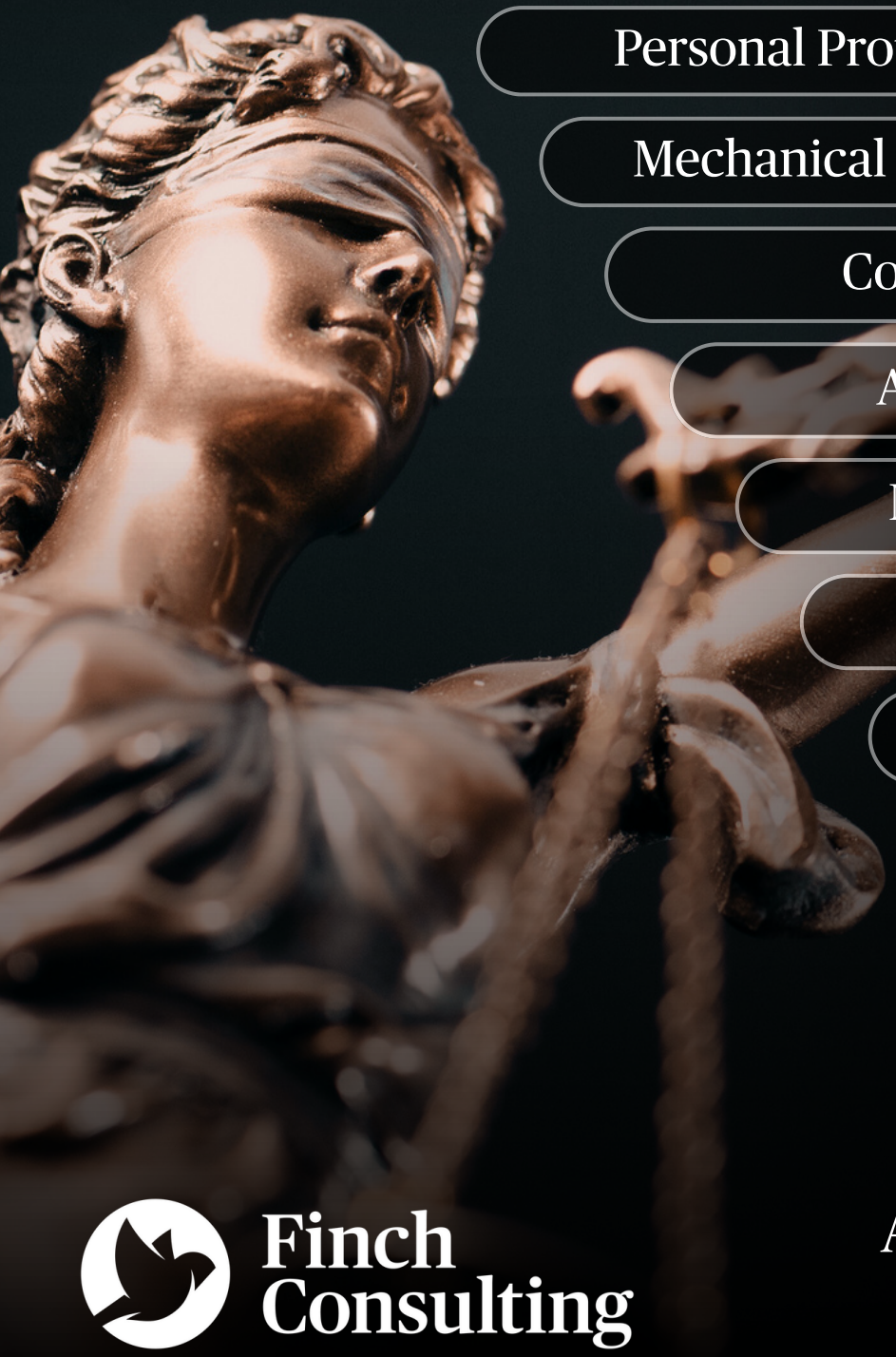
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