Construction Annual Overview
Top 10 cases from 2024

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2024 was a significant year for developments in construction law. Highlights included determining whether a collateral warranty was a construction contract for the purposes of the Construction Act and the Courts grappling with the discretionary remedies to fund fire safety remediation works created by the Building Safety Act 2022 (BSA). The year also saw a re-emergence of claims under the Defective Premises Act 1972, which was new because the BSA extended the limitation period for liability to 30 years. Again, there were a surprising number of cases caused by or derived from smash-and-grab adjudications.

Digby Hebbard
Partner, Construction
+44 20 3036 7209
dhebbard@fladgate.com

Iain Taylor
Senior Associate, Construction
+44 20 3036 7412
itaylor@fladgate.com

Case 1: Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) [2024] UKSC 23

Issue: Are collateral warranties "construction contracts" under the Construction Act and can a party adjudicate under a collateral warranty.

Background:
Simply Construct (UK) was appointed to construct a care home in London. Under the building contract, Simply was obliged to provide collateral warranties to interested parties, including subsequent purchasers and tenants, as is commonly required of contractors. One warranty Simply provided was in favour of the tenant, Abbey Healthcare, which was entered c. 5 years after the building contract. The warranty was in industry-standard form, which Simply warranted that it had and would continue to carry out its obligations in accordance with the building contract.

A dispute arose between Abbey and Simply because Simply refused to attend the site to rectify alleged defects. Abbey referred the dispute to adjudication, claiming more than £5m for the costs of the remedial works. The adjudicator found for Abbey and Simply failed to comply with the decision.

Abbey, therefore, sought to enforce the Technology and Construction Court decision. The Court, however, found that the collateral warranty was not a construction contract within the meaning of s.104(1) of the Construction Act because it was not an agreement for "the carrying out of construction operations" it was entered years after practical completion of the underlying works and was not a contract for carrying out works. The adjudicator, therefore, lacked jurisdiction, and the decision was not enforced.

On appeal, The Court of Appeal overturned the TCC, finding that a collateral warranty could be a construction contract because the timing of a warranty (relative to the works it warranted) was not determinative of a construction contract. The Court held that the warranty was a construction contract because Simply warranted past and future performance of works under the building contract.

Judgement of the Supreme Court
This judgment was then appealed to the Supreme Court. The key issues for the Court were (a) the meaning of an agreement "for… the carrying out of construction operations" under the Construction Act and (b) whether the Abbey collateral warranty fell within section 104(1).

Regarding (a), the Court determined that a collateral warranty will not be an agreement for the carrying out of construction operations for the purposes of section 104(1) if it merely promises to perform obligations owed to someone else under the building contract. There must be a separate or distinct obligation to carry out construction operations for the beneficiary.

On (b), the Court determined that the warranty was not an agreement 'for' construction operations. Although the promises in the warranty covered past and future operations, they were "entirely derivative" because Simply promised Abbey what it had already promised to the Employer under the underlying building contract. A distinction was made between collateral warranties that replicate the undertakings provided in the original building contract and those that give rise to a stand-alone obligation to carry out construction works.

Standard form warranties are unlikely to be construction contracts and will not be subject to statutory adjudication. We anticipate that collateral warranties will now expressly provide for a contractual right to adjudicate disputes arising thereunder.

Case 2: Triathlon Homes LLP v Stratford Village Development Partnership and Others [2024] UKFTT 26 (PC)

Issue: What are relevant factors for the purposes of a Remediation Contribution Order under the Building Safety Act (RCO)?

Background:
The Building Safety Act (BSA) was introduced in response to the Grenfell Tower tragedy and concerns over building safety standards. A key element from the BSA armoury was the introduction of Remediation Contribution Orders (RCOs), which can be applied for by anyone with a direct interest in a relevant building, or indeed others with a more indirect interest, such as local authorities and the Secretary of State. Broadly, an RCO is a binding order of the First-tier Tribunal (FTT) requiring a "specified body corporate or partnership" to pay or contribute towards the costs incurred/to be incurred in remedying defects which pose building safety risks.

RCOs intend to target the original developers and landlords of unsafe buildings over 11 metres and entities deemed to be their "associates."

Decision:
The 5 no. buildings at issue were built as part of the Athlete's Village for the 2012 Olympics. In November 2020, fire safety defects were discovered, including a detective cladding system requiring urgent rectification.

Triathlon Homes, the long leaseholder, applied for RCOs to be made against the original developer and its parent company. The developer was balance sheet insolvent.

The FTT made RCOs requiring the developer and the parent company to contribute £16m towards the estimated remedial costs. The fact that the developer was financially dependent on its parent and was considered precisely the circumstances in which the ability to order payment from associated companies was intended for.

The FTT also stated that the potential for funding from the Building Safety Fund (a government scheme that provides funding to building owners to fix safety defect risks) was not considered a reason for the FTT not to make an award.

This is an important decision because RCOs will inevitably be a common route to funding fire safety rectification works, and this case illustrates how key provisions of the BSA are to be interpreted.

Very responsive team lead by a partner that has a deep understanding of our business. They go the extra mile to explain legal detail in easy to understand language.

- Legal 500, 2025

Case 3: Willmott Dixon Construction Limited v Prater and Others [2024] EWHC 1190 (TCC)

Issue: Guidance in relation to Building Liability Orders (BLOs)

Background:
Another key piece of the BSA armoury was the introduction of Building Liability Orders (BLO). These were introduced to address situations where developers and contractors cannot satisfy their liability for remedying building safety risks. So, the Court was given the power to extend this liability to any "associated" companies.

BLOs are similar tools to RCOs, but an order can only be made against those who are actually liable for the defects and their associated companies. As set out above, RCOs can be made against landlords (and developers) who are not responsible for the defects.

Further, liability for the purposes of an RCO can be established via the Defective Premises Act 1972 (i.e., where a dwelling is "unfit for habitation") or, as a result of a "building safety risk" and where it is considered just and equitable to do so.

These proceedings concerned allegations of fire safety defects in the external walls of a residential development. Wilmott Dixon claimed £47m for the costs incurred in relation to remediating the defects. The defendants included Prater Limited, the envelope sub-contractor; Prater's guarantor, Lidner Exteriors; and AECOM as building services engineer.

AECOM had concerns about Prater and Lidner's liquidity (they were likely liable for the defects) and applied for a BLO against Lidner's associated companies. The associated companies resisted the application, arguing that it should be deferred pending the result of Willmott Dixon's primary claim.

Decision:The Judge rejected the application for a stay, finding that BLO applications would normally be decided at the same time as the primary (defects) claim; in other words, the findings on the primary claim would determine whether there was the necessary relevant liability to which the BLO must attach.

This judgment is useful guidance for those bringing and defending applications for BLOs as it is the first reported case on the issue and confirms that (i) defendants may apply for BLOs to pass on any potential liability and (ii) BLO applications will generally be determined at the same time as the primary claim and not before.

Case 4: Vainker and another v Marbank Construction Ltd and others [2024] EWHC 667 (TCC)

Issue: Guidance on a claim under the Defective Premises Act 1972 (DPA)

Background:
Mr and Mrs Vainker engaged Marbank Construction Ltd for the development of a new-build house. The Vainkers also engaged SCD Architects (SCD).

The completed house included a range of alleged defects, including external brickwork and internal glass balustrades. The Vainkers claimed against Marbank and SCD for breaches of Section 1 of the DPA, alleging the works were not carried out professionally and/or workmanlike so that the dwelling was not "fit for habitation".

Decision:
The Court found that certain defects rendered the house unfit for habitation, and therefore, Marbank and SCD were in breach of the DPA. Of note was the finding that the glass balustrades posed a serious health and safety risk. For the purposes of the DPA and the "fit for habitation" test, the Court found, relevantly, that:

1. There may be a breach of duty with respect to a defect, which means that the condition of the dwelling is likely to deteriorate over time and render it unfit for habitation when it does so. In that case, the dwelling can be said to be unfit for habitation at the time of completion; and
2. It is appropriate to consider the aggregate effect of defects when determining whether the dwelling is unfit for habitation.

Claims under the DPA will inevitably increase now that the BSA has increased the limitation period to 30 years. This case provides useful guidance as to the meaning of "unfit for habitation," particularly the ability to take account of a defect that progressively gets worse (in this case, brickwork that deteriorated over time and caused water ingress).

Case 5: CNO Plant Hire Ltd v Caldwell Construction Ltd [2024] EWHC 2188 (TCC)

Issue: Can a "true value" adjudication decision be set-off against a "smash and grab" decision?

Background:
CNO Plant Hire Ltd contracted with Caldwell Construction Limited to carry out works at a housing development in Merseyside.

CNO brought a "smash and grab" adjudication alleging that Caldwell had failed to issue a valid payment notice or pay less notice to an interim application for payment, and therefore, the sum applied for was due. The adjudicator found for CNO and directed Caldwell to pay £253,000 plus interest and costs.

However, Caldwell did not pay this sum. Instead, Caldwell commenced an adjudication, seeking the proper valuation of the final account. Caldwell claimed this was a separate dispute from that decided by the smash-and-grab. The adjudicator decided that Caldwell was required to pay CNO £90,000.

CNO sought to enforce the first adjudication decision. Caldwell argued that the decisions should be "set off" against each other.

Decision:
The Court held that Caldwell should pay the £253,000 awarded in the first adjudication and refused to set off the two decisions. The Court did not accept that the two adjudications concerned different payment cycles because the subject matter and sums claimed in the two adjudications were the same. Therefore, the second adjudicator did not have jurisdiction to decide the dispute.

In reaching this conclusion, the Court applied the principles from Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 936 (TCC), the most critical of which is that when a party is required to pay a 'notified sum', such as via an adjudicator's decision on a smash and grab claim, that party can only commence a true valuation claim after it has complied with the immediate payment obligation.

This case reminds us that Courts will normally not enforce a "true value" adjudication where the amount awarded under a "smash and grab" adjudication remains unpaid, where the two adjudications relate to the same matters and items of work (even where the claims relate to different payment cycles).

Case 6: Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023] EWHC 2010 (TCC)

Issue: Can a "true value" adjudication be commenced if a "smash and grab" adjudication is on-going?

Background:
Henry Construction Projects engaged Alu-Fix (UK) Ltd for works at a boutique hotel in central London. Alu-Fix referred a "smash and grab" claim to adjudication, alleging Henry failed to submit a payment or payless notice in response to an interim application for payment from Alu-Fix in the sum of c. £257K.

Henry defended the smash-and-grab on the basis that it had submitted a valid PLN. At the same time, Henry commenced a separate "true value" adjudication, contending that Alu-Fix had been overpaid.

The two adjudications ran in parallel until the smash-and-grab decision was issued in Alu-Fix's favour. The adjudicator on the true value dispute stayed those proceedings pending payment of the smash-and-grab sum, which Henry duly made. Then, the adjudicator produced a decision to the effect that Alu-Fix had been overpaid and that Henry was due c. £190K.

Decision:
Alu-Fix failed to pay, and Henry commenced enforcement proceedings. Alu-fix's defence was that the Adjudicator in Henry's adjudication had no jurisdiction because, at the time of commencing the adjudication proceedings, Henry had not paid the amount due to Alu-fix.

The key issue for the Court was when Henry's "immediate payment obligation" crystallised (if at all). If it was before the date the true value adjudication was commenced, then following the authorities, including CNO, the true value adjudicator would be deprived of jurisdiction, and the decision would be deemed void.

The Court decided that Henry's payment obligation crystallised at the final date for payment of the interim application as no valid payment notice or pay-less notice had been issued. This meant that although Henry had commenced their true value adjudication before any decision on the smash-and-grab, it was still too late, even if such determination occurred after the event.

The Court, therefore, did not enforce the true value decision because Henry had failed to discharge its payment obligation to Alu-Fix before commencing the true value, and therefore, the Adjudicator did not have jurisdiction.

The very clear message from the Courts is that payment obligations, particularly established via smash-and-grab decisions, must be complied with before any action can be taken to recover the alleged overpayment. One remaining avenue to avoid falling on the wrong side of a smash-and-grab may be to seek an expedited determination from the Court via CPR Part 8 on the merits of the smash-and-grab itself.

Fladgate LLP have specialist expertise in the construction field and an in-depth understanding of the market. They are second-to-none in their ability to run complex, high-value construction disputes with real attention to detail and excellent value for money for the client.

- Legal 500, 2025

Case 7: Providence Building Services Ltd v Hexagon Housing Association Ltd [2024] EWCA Civ 962

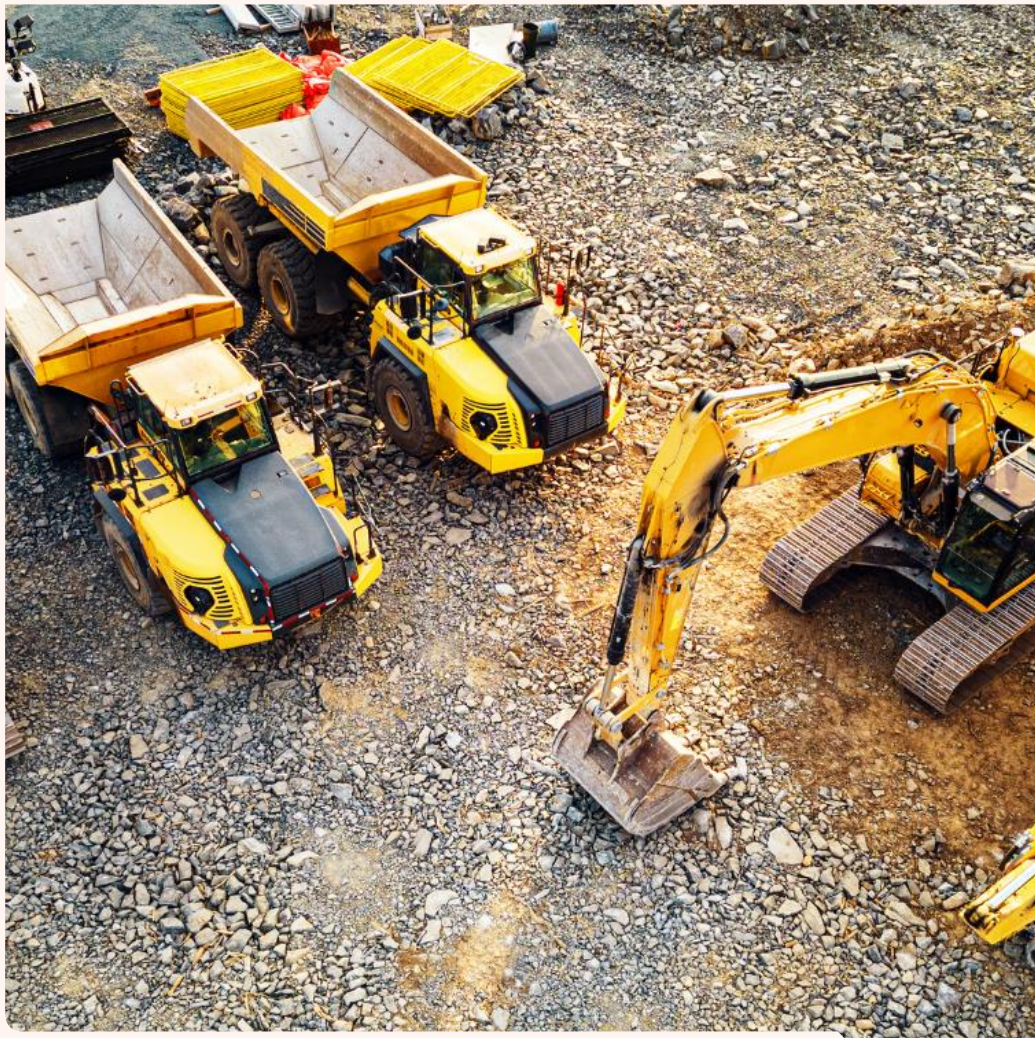
Issue: Termination under a JCT contract

Background:
Hexagon engaged Providence to design and build five blocks of social housing. Providence was entitled to monthly interim payments. After Hexagon's repeated failure to make interim payments on time, Providence notified Hexagon of this default as the first step in the contractual termination procedure. Hexagon remedied that default but was then late on a subsequent payment. Providence served notice of termination, which Hexagon challenged, contending that there was no right to terminate because the original default had been remedied.

Providence contended that the termination was valid because Hexagon had repeated a previously notified default.

Decision:
The Court accepted Providence's case that in circumstances where an employer under a JCT Contract had committed a specified default but that the right to termination had not arisen (because the specified default had been remedied), the contractor had an immediate right to terminate if the employer committed the same specified default (in this case, a failure to make payment on time).

Given the prevalence of JCT contracts, this case warrants careful attention because of the generous interpretation applied to the right to terminate for, in effect, repeated defaults.



Case 8: Bellway Homes Ltd v Surgo Construction Ltd [2024] EWHC 269 (TCC)

Issue: Can a "smash and grab" claim and a "true value" claim can be determined as part of a single dispute referred to adjudication?

Background:
Surgo Construction engaged Roundel Manufacturing as a subcontractor for the supply and installation of kitchens for a building development project. Roundel made an application for payment of £152,225.23. Surgo failed to serve a valid payment or pay less notice, and Roundel referred the claim to adjudication.

Roundel's claim was put forward on two bases: (i) Surgo failed to issue a payment or pay less notice, and/or (ii) if (i) fails, then Roundel was entitled to the sum claimed because that is the true value of the interim application.

The adjudicator rejected the first cause of action and accepted the second, finding that Roundel was due c. £148K. Surgo failed to comply and make payment, so Roundel commenced enforcement proceedings.

Decision:
Surgo resisted enforcement on the basis that multiple disputes had been referred to adjudication, which is prohibited. The Court rejected this, finding that the adjudicator had jurisdiction to determine the dispute on the alternate bases, as the single dispute referred was, in essence, the sum due to Roundel.

The case serves as an important reminder of the Court's general approach to determining an adjudicator's jurisdiction, namely, that the word "dispute" should be given a wide interpretation.

Case 9: BECK Interiors Ltd v Eros Ltd [2024] EWHC 2084 (TCC)

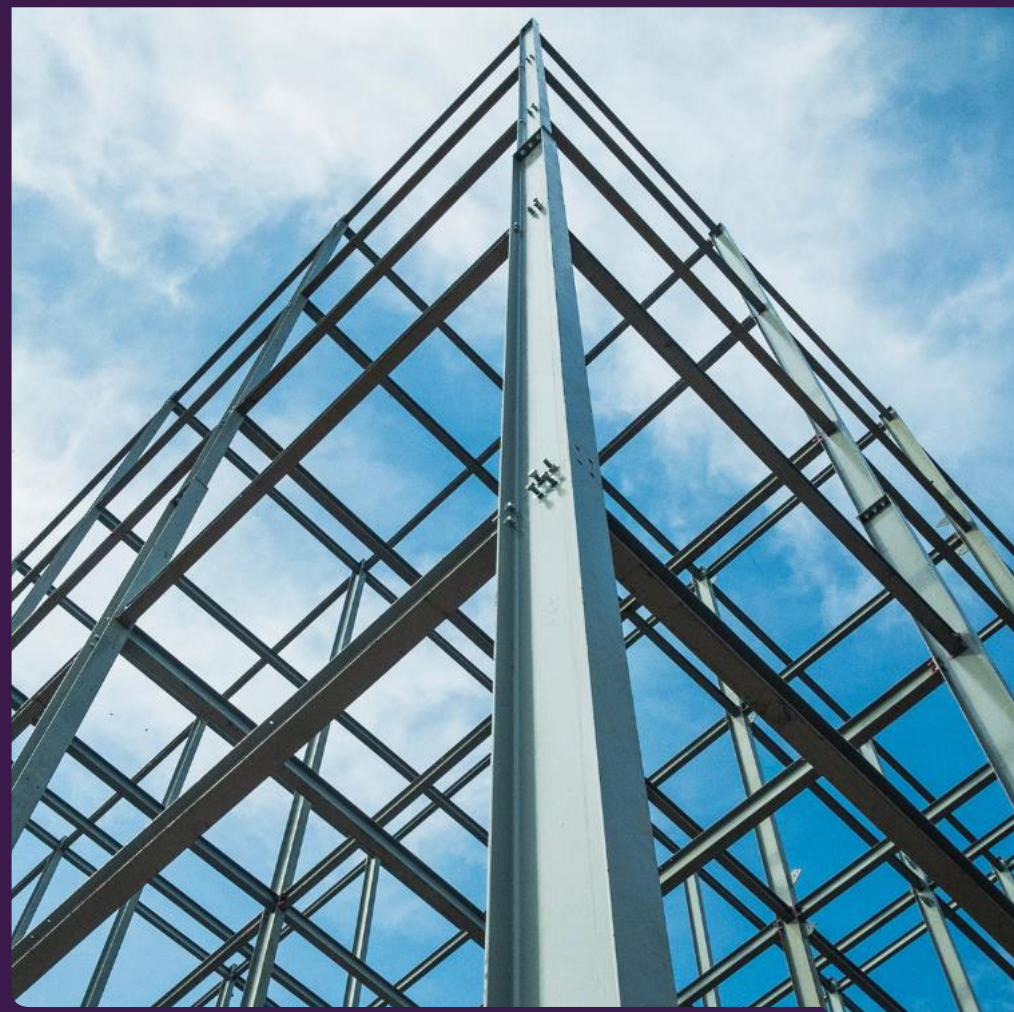
Issue: When can injunctions be used to prevent an adjudication from proceeding?

Background:
Eros Ltd engaged Beck Interiors Ltd to fit out a part of the Mandarin Oriental hotel in London. The parties fell into dispute. Eros commenced 2 adjudications in March 2024 and then a further 4 adjudications in May 2024. Eros also notified Beck of a further intended adjudication.

Beck applied to the Court seeking an injunction to prevent Eros from issuing any further adjudications without prior consent, claiming that the 4 adjudications from May 2024 should be immediately withdrawn.

Decision:
The Court refused the application for an injunction, finding that Eros' approach in each individual adjudication was not unconscionable, unreasonable or oppressive. The Court recognised that the commencement of the adjudications was spread over a short period, and Beck was broadly content with the timetables proposed by the adjudicators or requested. The Court considered this was consistent with the Construction Act and, specifically, the right to adjudicate "at any time" and, moreover, that it was neither unreasonable nor oppressive for the adjudications to continue.

This decision is a timely reminder that the Courts are very reluctant to intervene in ongoing adjudications and/or the statutory right to adjudicate.



Case 10: BDW Trading Ltd v Ardmore Construction Ltd [2024] EWHC 3235 (TCC)

Issue: Can adjudication be used to determine a claim under the Defective Premises Act 1972?

Background:
Basingstoke Property Company Limited employed Ardmore Construction as contractor for the development of apartments. Practical completion took place between 2003 and 2004, and 2005 the building contract was assigned to BDW. In 2020, fire safety defects were identified, leading to an adjudication brought by BDW against Ardmore, claiming damages of more than £15m. The adjudicator found Ardmore liable for breaches under the building contract and the Defective Premises Act 1972 (DPA) separately.

Ardmore refused to comply with the adjudicator's decision, and BDW brought enforcement proceedings.

Decision:
Ardmore disputed the adjudicator's decision on various grounds, including that the adjudicator had no jurisdiction to determine a claim for breach of the DPA because it was not a claim "under the Contract" as required by the Construction Act. The Court disagreed and determined that a claim could be brought under the DPA in adjudication proceedings because "under the contract" should be given a wide meaning and include claims "arising out of" the Contract.

Ardmore also challenged the decision on grounds of natural justice. They claimed it was inherently unfair because of the relative differences in historical records. The judge also rejected this argument for several reasons, including Ardmore's deficient record-keeping and BDW's disclosure of documents requested by Ardmore during the adjudication.

The Judge also dismissed Ardmore's claim that the passage of time alone would mean that the proceedings were inherently unfair because adjudication provisions may be relied upon "at any time".

This decision is extremely significant. It means that claims arising from dwellings being "unfit for habitation" can be referred to adjudication. The case also highlights the extended limitation periods introduced by the BSA 2022, which can allow claims under the DPA to be brought 30 years after the completion of a project.

Watch this space because Ardmore has been granted permission to appeal to the Court of Appeal.

Fladgate LLP
16 Great Queen Street, London, WC2B 5DG
T: +44 (0)20 3036 7000 E: fladgate@fladgate.com

fladgate.com

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