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# Construction law quarterly

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## 1. Editorial

Stuart Ross, Director, Arup

Welcome to the final edition of *Construction Law Quarterly* for 2025. In this edition, we cover a number of different topics from points of principle on descoping to recent case summaries. The Building Safety Act features heavily given its important role in how the industry adapts to changing legal requirements.

Our first paper tackles the Court of Appeal decision in the case of *Triathlon*[1]. The Court of Appeal upheld the First-tier Tribunal's (FtT) approach, emphasising that the Building Safety Act (BSA)[2] places primary responsibility for remediation costs on developers, not the public purse. While government funding exists via the Building Safety Fund (BSF), the Court made clear this is a last resort and does not override statutory provisions dictating which connected parties should pay. Investors acquiring companies assume associated risks, even unforeseen ones such as those addressed by the BSA. The Court underscored that developers with ongoing interests in affected buildings remain at the top of the hierarchy for covering costs. The BSF, predating the Act, remains outside this framework, reinforcing the notion that public funding is not meant to relieve developers or their associates of their legal obligations.

Our second paper flows from the outcomes of *Triathlon*[1] insofar as the FtT's judgement clarifies how remediation contribution orders should be applied, emphasising the importance of corporate relationships, proper governance, and the equitable allocation of remediation costs among those closely associated with property developments. The FtT's judgement addressed the allocation of remediation costs linked to building safety, especially in the context of complex corporate structures and familial connections. The tribunal concluded that, in most cases, the financial and managerial links to Edgewater outweighed factors against making a remediation contribution order. Poor governance and record-keeping among the respondent companies heightened concerns about accountability. Crucially, the FtT emphasised that the financial burden should not fall on independent, external investors as shown by its decision not to order Edgewater (Brighton) Limited to contribute, due to its genuinely independent shareholding. Instead, those with close connections to the developments were considered responsible for ensuring remediation funds. The tribunal's clarification of 'defect', 'building safety risk', and 'associated persons' under the BSA is significant.

The third paper in this edition tackles the thorny issue of descoping. Recent case law confirms that, unless a contract explicitly allows it, employers cannot omit work simply to give it to another contractor. Omission is permitted only if contractual terms are clear and sufficiently broad. Employers seeking to exit an unfavourable contract may attempt to use termination clauses, but an unqualified termination right must be expressly stated. Courts generally uphold such clauses if freely negotiated. However, they may intervene if the contract is oppressive or does not compensate the contractor for lost profits. Contractors should carefully assess contract provisions regarding omissions and termination for convenience to ensure adequate protection.

Our final paper deals with letters of intent. Letters of intent, though a practical tool to commence work before a formal contract is signed, can lead to significant risks if not clearly defined. Key points include clarifying which letter applies, ensuring the scope, dates, termination terms, and expenditure caps are explicit and adhered to, and addressing insurance responsibilities. Failure to do so can result in disputes over payment and liability, especially if work continues beyond agreed limitations or if the formal contract is never executed. The Supreme Court advises parties to finalise agreements before work starts, but acknowledges this is not always feasible in practice.

As ever, should you have a short article or legal update that you would be interested in submitting for inclusion in a future issue please contact Rebecca Rivers at rrivers@emerald.com.

The content and the opinions expressed have been provided for information purposes only. It should not be relied on as a substitute for specific legal advice on any particular topic.

## 2. Court of Appeal upholds First-tier tribunal decision in Triathlon

Sarah Dyer, Partner, Gowling WLG; Sean Garbutt, Principal Associate, Gowling WLG

The Court of Appeal has upheld the decision of the FtT, on appeal from the Upper Tribunal (Lands Chamber), in Triathlon Homes LLP v Stratford Village Development Partnership & Others[1].

The Court of Appeal dismissed both grounds of appeal advanced by the Appellants, Stratford Village Development Partnership (SVDP) and Get Living PLC.

The Court also confirmed that the FtT had been correct in holding that:

1. It was just and equitable to grant Remediation Contribution Orders (RCOs) against the Appellants; and
2. Section 124 of the Building Safety Act 2022 (BSA) has retrospective effect.

Partner Sarah Dyer and Principal Associate Sean Garbutt acted for the successful Respondent, Triathlon Homes LLP (Triathlon).

## How did the dispute begin?

Triathlon is a limited liability partnership which provides affordable housing at East Village, which is the former Athletes Village for the London 2012 Olympic Games. East Village is now a large permanent residential estate providing nearly 3000 new homes, most contained in 66 blocks of between 8 and 12 storeys.

The appeal concerns five buildings (the Blocks) in an area of the village known as N26. Triathlon is the long leaseholder of all or part of each of the Blocks.

The Athletes Village was owned and developed by a special purpose vehicle (SPV) called Stratford Village Development Partnership (SVDP). At the time of development, SVDP was wholly owned by the Olympic Delivery Authority (ODA). Following completion of London 2012, SVDP was sold into the private sector and, at the time of the application, was part of a corporate group which included SVPH1. SVPH2 and QDDAV, all of which were ultimately owned by Get Living PLC (Get Living).

The properties at N26 were subsequently leased to individuals by both Triathlon and Get Living, with ≈60% of the units leased by Triathlon, and the balance leased by Get Living.

Following the Grenfell Tragedy, inspections were undertaken across the village by the management company East Village Management Limited (EVML) which identified a number of building safety defects. Thereafter a waking watch was put in place and a remedial scheme for N26 designed and tendered.

The majority of the costs of the tender process and remedial works were funded by the Government's BSF.

Triathlon's share of the remedial works and professional fees were estimated at some £16 million (referred to in the judgement as the 'Major Works').

In addition, future costs of fire evacuation officers and fire alarm decommissioning to the conclusion of the works were estimated in the region of £760k as well as Triathlon's costs incurred in respect of the waking watch, fire evacuation officer, and tender of the remedial works at just over £1 million (referred to in the judgement as the 'Triathlon Additional Costs').

Triathlon applied for RCOs to be made against SVDP (in its role as developer) and Get Living (in its role as the parent company of SVDP as well as the freehold landlord entities SVPH-1 Limited and SVPH-2 Limited). Triathlon sought its share of the Major Works costs and future costs to be paid by SVDP/Get Living (together the Respondents) to EVML (as the entity that will be incurring the Major Work and future costs), with the historic Triathlon Additional Costs being sought to be paid to Triathlon.

The FtT heard by the Upper Tribunal President and Deputy President acting in their capacity as FtT judges had agreed with Triathlon and made five RCOs against the Appellants (one in respect of each of the Blocks), ordering them to pay in total:

- over £16 million to EVML in respect of the Major Works;
- a further £767 438 to EVML in respect of the costs of other remedial measures including the forecast cost of servicing and decommissioning temporary fire alarms; and
- over £1 million to Triathlon in respect of the Triathlon Additional Costs.

The Appellants appealed against the FtT's decision on two grounds, arguing that the FtT had erred:

- in 10 separate respects, in concluding that it was just and equitable to make the RCOs; and
- in concluding that an RCO can be made in respect of costs incurred before the relevant part of the BSA came into force on 28 June 2022.

## Court of Appeal upholds FtT decision

The Court of Appeal dismissed both grounds of appeal.

### Ground 1: Application of the 'just and equitable' test

The Appellants contended that the FtT had erred (in 10 separate respects) in concluding that it was just and equitable to make RCOs against SVDP and Get Living for the costs of the Major Works (for which EVML has funding from the BSF).

The Court of Appeal dismissed all 10 sub-grounds.

Some key points made in the judgement include:

- The 'unexpressed presumption' argument: the Appellants argued that the FtT wrongly created a 'presumption' that it is just and equitable to make an RCO against a party falling within the definition in section 124(3) of the BSA who has the means to fund the remediation works.

The Court of Appeal did not accept this. They commented that in the extracts the Appellants relied upon as purportedly creating this assumption, the FtT were making two different points. The first point was that the policy or 'central purpose' of the BSA was to place primary responsibility on the developer. This was not disputed and indeed was endorsed by the Supreme Court in its recent judgement in *URS v BDW* [3].

The second point that the FtT had been making was the 'public purse' point (also discussed further below). The Court of Appeal noted that while it is true that Government has made public funding available 'in the shape of the Fund', there is nothing to suggest that this was 'intended to displace the provisions of the Act which regulate which parties with a connection to the building should, if able to, contribute to the cost'.

In these circumstances, the FtT were therefore entirely justified in concluding that as between SVDP and Get Living on the one hand and the public purse on the other, it was 'difficult to see' why the public should fund the works 'rather than the developer and its associates who continue to own the buildings and who can (in the case of Get Living) well afford to fund the works'.

- Corporate identity: The Appellant's first point related to the changing identity of the ultimate beneficial owners of SVDP and Get Living, i.e. the fact that the investors who are now the beneficial owners of Get Living (and hence of QDDAV and SVDP) are not the same as those who initially bought SVDP from the ODA. The Court of Appeal agreed with the FtT that this was not relevant: 'if you invest in a company, you take the risk of unforeseen liabilities attaching to that company'.

The Court of Appeal also held that the fact SVDP was formerly in public ownership by the ODA, a public body, did not affect the current position.

The Appellant further argued that Get Living itself had no involvement with the development of the blocks in reality, the developer in the case was the ODA, who had developed the Blocks through its then subsidiary SVDP. It argued that Get Living was not therefore the type of associate that is the 'paradigm case' for an RCO, i.e. a development company which uses a thinly capitalised SPV to carry out developments, which it then winds up when it disposes of the development, thus avoiding long-term liability.

However, the Court of Appeal noted that the purchasers had the choice between acquiring the land, or acquiring SVDP. Having chosen to acquire SVDP, they took the risk of liabilities attaching to it. These included the risk (which the Court of Appeal accepted was quite unforeseeable) of a serious building safety crisis which Parliament addressed by 'far-reaching legislation under which the well-resourced parent of a poorly-resourced developer could also be made to contribute without being at fault in any way'.

- 'Public purse' issue: The FtT was right to say that the BSF is to be characterised as a last resort.

The BSA provides a 'complex set of answers' to the 'who pays' question, with a number of facets, making provision as to how the costs of remediation which would otherwise have fallen on the leaseholders (but from which the BSA protects them) should be borne. One 'discernible principle' identified by the FtT and reiterated by the Court of Appeal is that a 'developer responsible for the defect who retains an interest in the building should stand at the top of the hierarchy or cascade of those who will pick up the costs'.

The BSF, on the other hand, 'does not take its place in the hierarchy of those whom the Act contemplates as potential funders of the costs which the leaseholders are relieved from meeting', but rather 'stands outside the Act (and in fact, pre-dates it)'.

### Ground 2: Retrospectivityf

The Appellants had also argued that the FtT were wrong to conclude that an RCO could be made in respect of costs incurred before section 124 of the BSA came into force. This issue related to the approx. £1.1 million of costs that were incurred by Triathlon before 28 June 2022.

This ground of appeal was also dismissed.

The Court of Appeal cited the recent Supreme Court judgement in *URS v BDW*[3], noting that the judgement says 'in terms' that section 124 is one of the provisions of the BSA that has retrospective effect.

It also noted that there is 'no good policy reason why Parliament would have decided to 'penalise' leaseholders whose landlords (perhaps at the leaseholders' own instigation) had acted responsibly and got on with repairs' by carrying these out before 28 June 2022, when section 124 came into force.

## Key takeaways

This is a milestone decision from the Court of Appeal, considering a number of important issues for the whole industry including building owners, developers and leaseholders, as well as for construction professionals involved in legacy building safety disputes. The judgement provides an appellate level decision on the way the 'just and equitable' test will be applied by the FtT/Courts as well as the retrospectivity of section 124 of the BSA.

Following swiftly on the heels of the Supreme Court's recent judgement in *URS v BDW*[3], it reaffirms that the central purpose of the BSA is to place primary responsibility for building safety defects on the developer.

In particular, it confirms that defences seeking to rely on the change of ownership of corporate structures (even if long after the event of development) are unlikely to find favour with the Courts, who will apply the cascade or hierarchy of liability in which the developer and its associates sit at the top.

It may also prompt recipients of funding from the BSF to expedite RCO proceedings to recover those funds from those ultimately responsible (in light of the requirement in the grant funding agreement from the BSF that the recipient of funds must use 'all reasonable endeavours' to recover the outlay and hand this back to the Government).

On 6 November 2025 the Appellants, SVDP and Get Living PLC, were granted permission to appeal to the Supreme Court on ground two of appeal only: whether the Court of Appeal was wrong to conclude that a remediation contribution order under s124 BSA can be made in respect of costs incurred before that provision came into force on 28 June 2022. No permission to appeal was granted in respect of the just and equitable ground. We expect the appeal to be heard by the Supreme Court in 2026.

## 3. 76 Shades of Grey GR Ltd: remediation contribution orders – Grey GR Limited Partnership v Edgewater (Stevenage) Limited and others (2025) FtT[4]

David Sawtell, 39 Essex Chambers; Hannah McCarthy, 39 Essex Chambers; Nyasha Weinberg, 39 Essex Chambers

### Overview

Grey GR Limited Partnership ('Grey GR'), the landlord and Applicant, sought remediation contribution orders pursuant to s.124 of the Building Safety Act 2022 ('BSA 2022') against Edgewater (Stevenage) Limited ('Edgewater'), a developer and SPV, and a further 75 companies ('the Respondents') in respect of a building in Stevenage known as Vista House. Following a hearing in November 2024, the 'FtT' granted the orders by a decision handed down on 24 January 2025. In total, the Respondents were required to make payments totalling £13 262 119.08 on a joint and several basis.

This is the first time that the FtT has considered the question of remediation contribution orders since the Upper Tribunal (sitting as the FtT) decided Triathlon Homes LLP v Stratford Village Development Partnership & Others. The Vista Tower decision provides further clarity about the test of 'relevant defect' under s. 120 BSA 2022, as well as giving several examples of how the 'just and equitable' test under s. 124(1) BSA 2022 would be applied in respect of numerous respondents with greatly differing characteristics.

The Vista Tower building had previously been the subject of an earlier application for a remediation order against Grey GR under s.123 BSA 2022 by the Secretary of State for Levelling Up, Housing and Communities, which resulted in a remediation order being made in April 2024. The FtT's latest decision, therefore, represents how landlords who have themselves been required to remediate a defective building by way of a remediation order may seek to recover their outlay by applying for a remediation contribution order against the original developer or other parties.

### Factual background

Vista Tower is a 16-storey block over 45 m high which accommodates 73 residential properties. It was originally built in the 1950s/1960s as an office block and was converted into flats in 2015/2016. Extensive works were carried out to the external walls as part of the renovation.

The first respondent in the case was Edgewater, the original developer of Vista Tower, which had commissioned the conversion of the building from office space to residential apartments. Edgewater granted long residential leases for each of the flats, with a total premium paid for those leases of £15 633 725. The remaining respondents included multiple investors and associated companies.

In June 2018, Grey GR purchased the freehold from Edgewater, as part of a portfolio of ground rent investments for the Railpen Group, a pension fund.

After the Grenfell Tower tragedy raised concerns about fire safety in high-rise residential buildings, a Consolidated Advice Note (CAN) was issued in January 2020, mandating the removal of all combustible materials from such buildings. In March 2019, after assessing Vista Tower in Stevenage, local authorities identified hazardous combustible materials in the building but opted not to enforce action due to existing fire precautions. The CAN was later withdrawn on 10 January 2022, before updated fire risk guidance was issued by way of PAS 9980:2022, published on 31 January 2022.

Grey GR sought funding from the Building Safety Fund to remediate necessary works, which was granted in part in December 2020. The issues identified in 2019 and 2020 included combustible glazing, panels and a lack of cavity barriers/fire stopping. Interim measures imposed to maintain building safety, including a waking watch, were put in place at the building.

By mid-2023, significant progress was made in addressing internal compartmentation and fire-safety deficiencies, with new contractors engaged to complete the remaining remedial works. As of September 2023, at the final case management hearing in the remediation order proceedings, a specification of remedial works and a programme for carrying out those works was agreed.

On 17 January 2024, Grey GR entered into a grant funding agreement (GFA) with Homes England to address the fire safety defects in the building. The GFA requires Grey GR to seek legal remedies for any issues related to the building's design and construction, including claims against contractors and manufacturers. External remedial works commenced in January 2024 and are scheduled for completion by September 2025.

On 10 May 2024, as referred to above, the FTT made a s.123 remediation order against Grey GR, at the instigation of the Secretary of State.

Grey GR, in turn, sought remediation contribution orders against the Respondents due to the significant design and construction defects, estimating costs of ≈£14.7 million for the remediation of the building.

The Respondents resisted the orders on the grounds that the defects identified were not 'relevant defects' for the purposes of s.120 of the BSA, and that it would not be 'just and equitable', per Triathlon, to do so. They also argued that the remedial works that had been undertaken by Grey GR went beyond the scope of an RCO, which they argued should be reasonably and properly incurred, if it were just and equitable to do so.

## Relevant defects

In the remediation order case of April 2024, the FtT had proceeded on the basis of an agreed specification of relevant defects. There was, however, some dispute in the remediation contribution order proceedings as to whether or not all of the works were in relation to relevant defects, and the correct quantum for those works.

The FtT decided that a 'defect' for the purpose of s. 120(2) BSA (broadly construed as 'anything done (or not done) or anything used (or not used) in connection with relevant works' and 'causes a building safety risk') was not limited to non-compliance with the Building Regulations. Non-compliance with the Building Regulations was "merely one not the only way in which something could be a 'defect'" [68].

A 'building safety risk' is defined at 120(5) of the BSA as 'a risk to the safety of people in or about the building arising from (a) the spread of fire or (b) the collapse of the building or any part of it'. The FtT considered that any risk above 'low' risk understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980[6], as an assessment that fire spread would be within normal expectations may be a building safety risk [72].

### 'Proper' and 'reasonable' scope of remedial contribution order

The FtT rejected the suggestion that the scope of an RCO should be restricted to that which is 'unavoidable' [80]. Instead, it decided that any such determination would be fact sensitive, and would depend on what was just and equitable in a given case. That exercise would be assisted by asking whether the remedial works were within 'a reasonable range of responses/costs', which on the facts before the FTT was deemed to be 'relatively wide' [83].

### 'Just and equitable'

Section 124(1) of the BSA provides that the FtT may make a remediation contribution order on the application of an interested person 'if it considers it just and equitable to do so'.

The FtT was guided by the Triathlon approach as to what would be 'just and equitable'. It took the view that the remediation contribution order jurisdiction is 'essentially not to be fault-based, providing a route to secure funding for remedial works, with the emphasis on protection of leaseholders/residents and helping to expedite remedial action' [79]. When deciding whether it was just and equitable to make or include certain costs in a remediation order, it was considered to be helpful to ask whether the relevant remedial works/costs were within a reasonable range of responses or costs [83]. In particular, while it was accepted that some of the remedial works were not proportionate [143], the advice to Grey GR was that they were necessary [144]. Following a detailed review of the different factors, the FtT considered that it acted reasonably to press on with these works [166].

As to whether a particular respondent should be specified in the order, the FtT elected to consider each of the respondents in turn and then to determine whether it would be 'just and equitable' to impose an order. The FtT accepted that the just and equitable test is broad, allowing for flexibility in determining liability to ensure funding for necessary remediation work is accessible and prompt or 'so that the money can be found' [349]. It also noted that the financial status of respondents should not significantly influence the decision to issue remediation contribution order [352].

Edgewater, as the developer, was a 'key target, at the top of the hierarchy of liability', in respect of whom there was 'no doubt that a RCO should be made' [350]. Notably, this conclusion was also reached on the basis that Edgewater had known of combustible materials in the external wall, and had failed to address any defects itself.

The Respondents had suggested that the FtT take account of the fact Grey GR was a substantial and sophisticated property investor which had been on notice of the fire defects, and which had chosen to purchase Vista Towers a year after the Grenfell Tower tragedy. The FtT acknowledged that Grey GR did qualify as an entity against which a remedial contribution order could be granted, but considered that Edgewater and its associates would be 'higher in the hierarchy of liability' than Grey GR.

The FTT then considered each of the remaining respondents (numbering 90 at the time of the hearing) in turn, in accordance with the approach set out in Triathlon. This was the first time that the FTT had addressed the wide definition of associated persons under s.121. A number of general points were made in respect of power to make remediation contribution orders against associated bodies corporate and partnerships:

- The ability to issue remediation contribution orders against associated corporate bodies marks a significant shift in legal practice. While it does not pierce the corporate veil or impose unlimited personal liability, it allows for some erosion of corporate identity for specific remediation purposes [351].
- There was no automatic presumption that an associate would be made liable, particularly where these were associated by common directorship [357]. Rather, 'additional linking

factors' would be required, which may require explanation, and would be fact sensitive.

- The involvement of family members in the corporate structures and their roles in management was noted by the FtT, with the Tribunal considering these relationships and how they relate to the overall structure and accountability of the organisations involved [363]. For example, in its examination of the formal structure of ownership between Rivkah and Jacob Dreyfuss, who were spouses and each directors of multiple of the Respondents, the FtT noting the blurring between different entities and individuals [365].
- The possibility of substantial control and influence. On these facts, the financial relationships between Leslie Frankel (father and spouse of various other directors of the Respondents), and Edgewater as well as the other Respondents taken by the FtT to signify a critical link, even though Mr. Frankel was not himself a direct respondent. [368]

In a detailed schedule to the decision, the FtT concluded that all but 15 of the respondents should also be subject to a remediation contribution order. In relation to those companies where an order was made, the linking factors to Edgewater were determined to have 'outweighed' those factors against making an order [373].

The FtT noted that many of the companies had poor records and operated in a disorganised manner, suggesting a lack of proper governance typical of prudent property developers [371]. This raised concerns about company accountability in relation to financial dealings and obligations, particularly in respect of covering the costs related to fire safety remediation.

One point of particular significance is that the FtT considered that the burden of the cost should not fall on apparently external investors [372]. For example, the significant majority of the shareholding of Edgewater (Brighton) Limited (the second Respondent) was genuinely independent; it would therefore not be just and equitable to make a remediation contribution order against that entity [381]. It also took the view that those with closer ties to the development should ensure sufficient funds be made available for remediation. Finally, the FtT considered that it was just and equitable in this case to make the respondents jointly and severally liable [379].

### Conclusion

Although not binding, the judgement of the FtT provides useful clarity in respect of the approach of the tribunal to remediation contribution orders:

- It confirms the FtT's consideration of definitions of 'defect' and 'building safety risk' under s.120, as well as the 'just and equitable' approach as set out by the same tribunal in Triathlon.
- The case involved a corporate web of companies, which encompassed familial and other close relationships, and offers helpful guidance in respect of 'associated persons' for the purposes of s.121.
- It also demonstrates how a party may use the BSA for recovery of these costs: a remediation order was made against Grey GR, whereupon it sought remediation contribution orders against the Respondents. As noted by the FtT, Grey GR had also issued proceedings in the Technology and Construction Court against Edgewater and two of the other respondents for a building liability order under s.130 of the BSA, which paved the way for contributions from other parties down the supply chain.

## 4. Can an employer descope at its convenience?

Marc Wilkins, Beale & Co; Formerly Fenwick Elliott

Every now and then we are asked to advise clients who have had their contracts terminated or the remainder of their work under a contract removed part way through a job, not because of any actual or alleged wrongdoing on their part or because the project has been abandoned or unavoidably put on hold, but simply because the work is being given to an alternative contractor who is able to offer a more competitive price. Are employers entitled to 'descope' or terminate at their convenience in order to secure a better bargain elsewhere? As is so often the case, it depends on what the contract says.

Generally speaking, a contractor who is engaged to carry out works not only has an obligation to complete those works but also a corresponding 'right' to complete them. There are of course circumstances where that right may be lost; for example where the contract includes express provisions entitling an employer to omit work from the scope (e.g. where the employer's requirements in respect of certain elements of the work have changed or where the works are simply no longer required) or to terminate the contractor's employment such as where there has been a material breach or in the event of contractor insolvency. Such provisions serve an important purpose. However, while such contractual rights to omit works or terminate provide some flexibility over the scope of works and the opportunity to exit contracts where necessary, they may also provide employers with opportunities to swap contractors part way through a project simply to take advantage of a more competitive price being offered by another contractor for the remaining works.

The extent to which a descoping or termination provision provides the employer with the freedom to omit work or terminate will turn on the particular wording of the provision; however, there are some guiding principles, which we highlight below.

### Omission of work

As a starting point, there is no general right to omit work from the scope contained within a construction contract. Generally speaking therefore, an employer would not simply be able to omit some or all of the remaining scope of work in order to give it to an alternative contractor    if he has entered into a bad bargain, then that is the bargain he should be stuck with.

That position is, generally speaking, supported by the courts. While contracts will often include express provisions entitling the employer to vary the scope of the contractor's work to adapt to changes in the requirements of the particular project, for an employer to be entitled to omit work, the contract must expressly say so. Even then, the law imposes limitations on such entitlement. There are two principal bases on which even an express right to omit work may be limited. They are: (i) the amount of work which can be omitted, and (ii) the ability to redistribute omitted work to others.

### The amount of work that can be omitted

As a general principle, an employer cannot remove all the remaining work from a contractor's scope or omit such a large element of it that the omission would change the fundamental characteristic of the works. This goes back to the fundamental principal that the 'basic bargain' struck between the employer and the contractor must be honoured, and that the employer cannot use the omissions clause to escape from what he considers to be a 'bad bargain' so as to get a better bargain with another contractor. Therefore, where a significant amount of work remains to be carried out and all of the remaining work is omitted, a court is likely to find that such a large omission violates the parties' basic bargain.

### The ability to redistribute omitted work to others

The question of whether a contract entitles an employer to omit work for the purpose of giving it to another contractor has been the subject of recent cases before the English and Scottish courts, and the current guidance from the courts can be summarised as follows:

A contract for the execution of work confers on the contractor not only a duty to carry out the work but a corresponding right to complete the work which it contracted to carry out.

Clear words are needed if the employer is to be entitled to remove work from the contractor in order to have it done by somebody else.

There are circumstances where work may be omitted and given to others provided the contractual provisions relied upon are wide enough to permit the omission. The employer's motive or reason for instructing the omission of the work is irrelevant.

### Termination

Where the variation provisions of a contract do not provide an employer with the right to omit the remainder of the work in circumstances where it wants to exit what it might see as a bad bargain, contractors may find employers look to operate the termination provisions of the contract as an alternative means of removing the contractor instead. There is no general right to terminate 'at will' or 'for convenience'. To be able to do so, the contract must provide (in clear terms) an unqualified right to terminate without any cause or reason, on giving notice. In such circumstances, termination will be at the sole discretion of the employer.

The courts will normally uphold well-drawn termination at will clauses they will generally be seen as part of the commercial bargain reached between the parties which the court will be reluctant to interfere with. However, there are limited circumstances in which the courts may not give effect to a termination for convenience provision, such as where the contract does not provide for the original contractor to be compensated for loss of profit and overhead contributions it would have received on the balance of the work. Although where both parties are commercial entities and have freely negotiated and concluded a contract, the courts would be unlikely to interfere in the bargain reached unless the complainant suffered from bargaining weakness which put it at a serious disadvantage, and where the contract in question is oppressive. That would be a high threshold to get over.

### Comment

While there are reasons why an employer may reasonably require the flexibility to descope work, whether by omission or termination for convenience, from a contractor's perspective it is important to understand (i) the scope and implications of the variation or termination provisions in contracts they are signing up to and, in particular, whether the bargain being entered into is capable of being changed significantly at the employer's sole discretion and at potentially very short notice, and (ii) whether there is any protection afforded to the contractor by way of clear provisions for the valuation of omissions, or in the event of termination at will, which provide for the contractor to be compensated for losses such as loss of profit and overhead contributions that would have been earned on the balance of the work.

## 5. Good intentions, but unintended consequences?

*Laura Bowler, Associate, Fenwick Elliott*

Letters of intent are commonly used within the Construction Industry as a way of starting work (such as procuring materials, preparing site and, in some cases, commencing work) before a formal construction contract has been entered into. Also known as 'comfort letters', their purpose is fairly constant to enable a contractor or subcontractor to commence an aspect of the works with some assurance that they will get paid and be in line for the 'formal' contract, while preserving the ability of the main contractor or employer to limit its commitments early on. Despite their frequency of use, because letters of intent do not have any standard format, their precise effect can vary widely from a letter which merely expresses a party's intention to enter into a contract, but which creates 'no liability in regard to that future contract',[7] to a binding contract that ends up governing the whole of the works.

Lawyers would always advise parties to enter into a formal contract rather than commence work under a letter of intent, but this is not always practical. If you must use a letter of intent, try to keep in mind some of the following tips.

### Saying it is 'subject to contract' won't stop a contract coming into existence

It is not uncommon to find 'subject to contract' (or similar wording) at the top of a letter of intent. This is because for whatever reason the parties cannot yet agree the 'formal' contract and do not want the letter of intent to govern their entire relationship. However, this conditional wording is not a magic bullet; where significant work has been done and paid for, the courts will be reluctant to find that there was no contract.

In RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co. KG[8], the employer had sent a letter of intent containing a draft contract and a clause which set out that the terms would not be binding until signed by both parties. While the formal contract was never signed, the court decided that, following the letter of intent, the actions of the parties (such as carrying out works and varying the delivery programme) created a binding contract. This was despite the fact that the letter of intent did not contain many of the detailed provisions that would be expected of a contract.

### Be clear which letter of intent applies

By their nature, letters of intent can be informal and arise through correspondence between the parties. Where proposals have been sent back and forth, it is vital that the parties are clear, before work starts, as to which letter is 'the' letter of intent. The case of Arcadis Consulting (UK) Limited v AMEC (BCS) Limited[9] shows the pitfalls of getting this wrong. In that case, the court had to choose from three competing sets of terms. One of the biggest differences between the various terms was a liability cap which, if incorporated, limited the subcontractor's liability to £610 000 (in a claim for over £40 million).

### Have a clear scope, a start date, an end date and a termination option

Many people do not fully consider the terms of a letter of intent because it is only intended to get things moving and they expect it to be replaced with the formal contract. It is vital, however, to be clear about the scope of work to be performed, when the letter of intent starts and expires (and what is going to happen when the expiry date is reached), and what limit of expenditure is authorised.

It is just as important to stick to the agreed limitations (or formally record any changes) because it is easy for lines to become blurred once work has commenced. Once lines blur, disputes can often begin. One of the dangers of letters of intent is that work continues outside the authorised scope or expiry date in order to keep things moving while the formal contract is negotiated. This can be problematic because, if the formal contract is never agreed or signed, arguments arise often about the applicable terms[10] and, most frequently, about extra payment. In those circumstances, contractors and subcontractors cannot be sure of additional payment where the expenditure cap has been exceeded even if they have done extra work[11].

### Insurance

It is easy to overlook the insurance position when agreeing a letter of intent, but it is very important that this is considered and dealt with. Who will be liable if, for example, there is a flood or a fire caused by the works under the letter of intent? Who is going to insure the works during this period? An employer's insurer might not cover the works, or any damage caused, which could leave the contractor or subcontractor exposed to a liability that they might not be able to meet. Make sure the letter of intent says which party will be responsible for taking out insurance for which risks, and then double check that the insurance is in place.

### Conclusion

The Supreme Court says that parties should 'agree first and to start work later'[12]. As we know, that is not always realistic. Letters of intent can be useful, but risky if not properly used.

**REFERENCES**

1. Triathlon Homes LLP V Stratford Village Development Partnership & Others [2025] EWCA Civ 846.
2. Building Safety Act, [2022]
3. URS Corporation Ltd (Appellant) v BDW Trading Ltd [2025] (Respondent) UKSC 21.
4. Remediation Contribution Orders -Grey GR Limited Partnership v Edgewater Stevenage) Limited and others [2025] FTT.
5. Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2024] UKFTT 26 (PC).
6. PAS9980 Fire Risk Appraisal of External Walls and Cladding of Flats – PAS 9980.
7. Turriff Construction Ltd v Refalia Knitting Mills [1971] 9.B.L.R. 20.
8. RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co. KG [2010] UKSC 14.
9. Arcadis Consulting (UK) Limited v AMEC (BCS) Limited [2018] EWCA Civ 2222.
10. See Spartafield v Penten Group [2016] EWHC 2295 (TCC) for more details.
11. See Diamond Build v Clapham Park Homes [2008] EWHC 1439 (TCC).
12. Lord Clarke in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co. KG [2010] UKSC 14.