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1. Editorial

Welcome to the third edition of Construction Law Quarterly for 2026. Legislative reform, evolving contractual practices and significant judicial decisions continue to alter the legal framework within which contractors, employers, funders and advisers operate. This edition brings together four contributions addressing key developments in construction law, from the interpretation of bespoke contractual arrangements to the future of payment security in the supply chain.

The first paper examines the recent Technology and Construction Court decision in *Mace Construct Ltd v Baltic Investment Holdings Ltd*, in which David Streatfeild-James KC and Mathias Cheung of Atkins Chambers acted successfully for the claimant. The case concerned the legal status and effect of a Schedule of Derogations incorporated into an amended JCT Design and Build Contract 2016, which sought to qualify the contractor's design responsibility in relation to a series of listed items. Deputy High Court Judge Adrian Williamson KC granted the majority of the declarations sought by Mace, holding that the Schedule of Derogations did not override or modify the JCT Conditions but rather explained and supplemented them. The judgment addresses the courts' approach to giving effect to the totality of the parties' agreement, including bespoke provisions, and provides guidance on the interaction between hierarchy clauses and supplementary contractual documents.

The second paper analyses *CR Construction (UK) Company Ltd v Barclays Bank Ltd & Northern Gateway (FEC) No 7 Ltd*, the most recent TCC decision on the grounds on which a call on a performance bond may be restrained by injunction. Sean Wilken KC of Keating Chambers examines the court's application of established principles of autonomy and fraud, with particular focus to two issues: the procedural importance of joining the bond beneficiary to any injunction application, and whether autonomy operates differently as between a surety and a beneficiary. The paper identifies the implications of this distinction for the certainty of financial instruments in construction and, while acknowledging that elements of the court's reasoning may be obiter, concludes that the question warrants close attention from practitioners advising on performance security.

The third paper, contributed by Becky Johnson of Herbert Smith Freehills Kramer, addresses the government's recently published response to its consultation on late payment practices, which confirms an intention to ban retention payments in construction contracts, introduce a 60-day cap on payment terms for large businesses paying smaller suppliers, and set a statutory minimum interest rate for late payments of eight per cent above the Bank of England base rate. The paper considers the practical consequences of the proposed retention ban for contractors, developers and the wider supply chain, including the anticipated increase in demand for performance and retention bonds, the requirements for enhanced contract administration, and the expected anti-avoidance provisions in the forthcoming legislation. The author notes that draft legislation has not yet been published and that considerable detail remains to be confirmed.

The fourth paper, authored by Dr Armando Castra and Mr Sam Hillian Neave of UCL, considers Project Bank Accounts (PBAs) as a mechanism for payment security in the United Kingdom and Australia. Drawing on recent judicial scrutiny in Queensland and Northern Ireland, the paper analyses the legal nature of PBAs, their incorporation into standard form contracts including JCT and NEC4, and their limitations in practice. The authors argue that, as cash retention is phased out, PBAs represent an established and practical mechanism that merits further consideration by government, industry and advisers.

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 the journal editor at journals@icepublishing.com.

2. Paper 1: Mace Construct Ltd v Baltic Investment Holdings Ltd [2026] EWHC 976 (TCC)

David Streatfeild-James KC, Atkins Chambers
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David Streatfeild-James KC and Mathias Cheung acted successfully for the Claimant in *Mace Construct Ltd v Baltic Investment Holdings Ltd*.[1] This is a Part 8 claim concerning the effect of a Schedule of Derogations under an amended JCT Design and Build Contract 2016, which sought to carve out certain listed items of work from the contractor's design responsibility. The Court granted the majority of the declarations sought by the Claimant in relation to the interpretation and effect of the Schedule of Derogations.

2.1 Background

The Claimant ("**Mace**") was engaged by the Defendant ("**Baltic**") under an amended JCT Design and Build Contract 2016 ("**Contract**") to carry out the refurbishment of the Baltic Exchange Building, 38 St Mary Axe, London.

The parties are in dispute as to the liability and costs for various delays which occurred on the project, including delays resulting from changes to the design in the Employer's requirements and/or the need to obtain further planning approvals and consents, linked to the items listed in the Schedule of Derogations.

Under the Contract, Mace was required to carry out and complete the design of the Works, and in particular:

- Clause 2.1.3 provided that Mace "shall be responsible for obtaining all consents necessary for the carrying out and completion of the Works (to the extent that these have not already been obtained) and shall comply with such consents and for the discharge of any conditions or reserved matters contained within the planning permission(s) for the Works without any adjustment to the Contract Sum and the Contractor shall not have nor make any claim for an extension of time under clause 2.25 or for loss and expense under clause 4.20".
- Clause 2.17 provided that Mace shall be "fully responsible and liable in all respects for the entire design of the Works regardless of whether it had been (a) prepared by or on behalf of Mace and/or (b) carried out on or before the date of the Contract".

The Contractor's Proposals contained, inter alia, a Schedule of Derogations, which set out a number of listed items of work and provided (among other things):

- By paragraph 1, that "Mace Construct Ltd are unable to take design responsibility, associated risk of any discrepancies, inconsistencies and inadequacy of the below listed items until the period of initial design development is complete on the 2nd February 2024, 6 working weeks from anticipated contract execution date (08 December 2023)"; and
- By paragraph 2, that "[o]nce the derogations listed in this document have been concluded and approval from all parties obtained, and formal instruction received Mace Construct Ltd will take design responsibility on the items listed above. Mace Construct Ltd will take design responsibility, excluding planning approval from the 2nd of February 2024, 6 working weeks from anticipated contract execution date (08 December 2023)".

Baltic's position was that the Schedule of Derogations was inconsistent with the amended JCT Conditions and so the latter should take precedence, by virtue of the hierarchy clause in clause 1.3 of the Contract which provides that "*[n]othing contained in any other Contract Document or any Framework Agreement, irrespective of their terms, shall override or modify the Agreement or these Conditions or the Schedule of Amendments*".

In an adjudication between the parties in 2025, the adjudicator, Mr Nigel Davies, decided against Mace on (among other things) the status and effect of the Schedule of Derogations. Mace therefore commenced Part 8 proceedings to seek final declarations from the Court as to (among other things) the status and effect of the Schedule of Derogations.

2.2 Decision

Deputy High Court Judge Adrian Williamson KC held that Mace's interpretation of the Contract on the effect of the Schedule of Derogations was to be preferred.[2]

The Judge started by noting that in the Schedule of Derogations, the parties were clearly agreeing that Mace's obligations in relation to the listed items were to be in some way limited.[3] He then concluded that "*the Court should give effect to the entirety of the agreement between the parties*", and it would be an odd result if no effect is given to the words in paragraph 2 of the Schedule of Derogations to the effect that Mace would take design responsibility "*[o]nce the derogations listed in this document have been concluded*".[4]

As to the effect of the hierarchy clause in clause 1.3, the Judge observed that "*[t]he courts have wrestled with this wording on a number of occasions and have, in general, concluded that effect can and should be given to the entirety of the contractual documents*", and "*[t]he Court is entitled to look with some initial scepticism at the proposition that carefully agreed bespoke provisions are not to be operated as the parties appear to have intended*".[5]

The Judge ultimately took the view that the Schedule of Derogations did not seek to override or modify the JCT Conditions but "*[r]ather it explains and supplements them, by clarifying how and in what way Mace is to perform its design obligations and undertake its design responsibility in relation to the listed items*".[6] As such, the Judge concluded the parties had agreed "*Mace's obligations were to be in some way limited*" in relation to the items listed in the Schedule of Derogations, and it could and should give effect to the Schedule of Derogations.[7]

On this basis, the Judge granted the majority of the declarations sought by Mace as to the incorporation and interpretation of the Schedule of Derogations, thus confirming that Mace did not take on any design responsibility or the associated risks for the listed items until the design solutions for those items were finally approved and instructed by Baltic.

3. Paper 2: CR Construction v Barclays/ Northern Gateway: the latest word on performance bonds

Sean Wilken KC, Keating Chambers

In *CR Construction (UK) Company Ltd v Barclays Bank Ltd & Northern Gateway (FEC) No 7 Ltd*[8] ("*CR Construction*"), the TCC most recently considered the bases on which a call on a performance bond could be blocked by an injunction.

The facts were not unusual for a call on a performance bond. Northern Gateway ("FEC") was the Employer in relation to a development in Manchester — Victoria Riverside. FEC engaged CR Construction (UK) Company Ltd ("CR") as the Contractor on the development under a 2016 JCT Design and Build Contract ("the Contract"). As is usual, FEC sought and obtained a performance bond ("the Bond") provided by Barclays Bank Ltd ("Barclays") in respect of CR's performance under the Contract.[9]

The Bond's operative clause (clause 1) stated that Bond would respond to debt or damages unpaid by CR with Barclays making payment on receipt of the requisite notice. The notice was as stipulated at clause 5.3:

> "Any demand made by the Employer under this Deed must be accompanied by either:
>
> (a) what purports to be a certified copy of (i) a judgment of a court; (ii) an arbitrator's award; or (iii) a decision of an adjudicator, in each case against the Contractor in favour of the Employer under the Construction Contract; or
>
> (b) a certificate from the Employer that is purported to be counter signed by the Employer's Agent, purportedly based on the non-performance of the Contractor, to confirm the Contractor's breach, and any one of which shall be conclusive evidence for the purposes of this Deed as to any liability of the Contractor to which such judgment, or award or decision or certification relates".

The Bond further provided that its operation (and therefore payment) was not impacted by termination of the Contract.

It was common ground that CR failed to meet Sectional Completion dates (though the causes of that failure were and are firmly in dispute). As a result, liquidated damages were certified by the Employer's Agent — Arcadis. CR neither paid nor challenged the liquidated damages and eventually a call was made on the Bond. In the meantime, CR's employment as Contractor under the Contract had been terminated. CR alleged that this termination of CR's employment under the Contract was in fact a repudiatory breach which, after some delay, CR purported to accept.

As a result of the call, CR sought an injunction against Barclays. FEC was neither included in the application for an injunction nor was FEC served or provided with any papers. When FEC complained and sought copies of the papers and potentially to be joined to any application for an injunction, CR refused. Thus, an oddity was created; the party whose security was at issue and who actually knew about the development at issue was, if CR was to have its way, excluded from any application or hearing.

Unsurprisingly, FEC objected to that course of action and sought to be heard (a course of action that Barclays supported). After some considerable debate, CR consented to FEC being joined as an intervenor.

At the hearing, CR raised many and varied alleged bases for an injunction — so much so that some of the subsequent commentary has pointed out that the case could be an object lesson in the difficulties in obtaining an injunction. FEC and Barclays, unsurprisingly, focused on the wording of the Bond and in particular clause 5.3. Clause 5.3, they said, once complied with,[10] operated as notice under clause 1 and the Bond responded as a "hybrid" on demand bond. That was and is an entirely orthodox position and one which the Court accepted. That on its own, as both Barclays and FEC submitted, was sufficient to defeat CR's claim.[11] The injunction application therefore failed: none of the alleged bases for an injunction succeeded. All of that is as per the long-established authorities — *Harbottle, Edward Owen, Bolivinter*[12]– a bond in this format is to be treated as cash.

There are, however, two points about *CR Construction* that are unusual and require, I would suggest, some further expansion. The first is the role or otherwise of FEC. The second is the discussion of autonomy.

As to the first, the Bond was FEC's security and, if successful, the injunction application would have stripped FEC of that security. Further, instruments such as bonds are used to regulate cash flow on default such that the beneficiary is paid without debating the underlying dispute. FEC by exclusion would be deprived of its right to seek to protect its cashflow.[13] FEC therefore submitted that it was entitled to be present. The learned judge accepted that submission and in particular, in relation to costs.[14]

The learned judge was manifestly right so to do. The beneficiary's (here FEC) and the surety's (here Barclays) interests are not aligned.[15] The surety will be interested in its reputation as someone who does or does not pay on an otherwise valid instrument[16] and therefore on market and reputational risks in a wider context than that purely of the instrument at issue. The beneficiary will be concerned about its security, its cashflow and whether the beneficiary is protected on the project(s) at issue. Further, as indicated above, the beneficiary will know whether that which the defaulting party now says is correct per se or as a representation of the parties' various contentions — the surety will not. There are therefore principled and pragmatic reasons why the beneficiary should be joined and should be present at any application.

As to the second, it is established that financial instruments like letters of credit and bonds are autonomous from the underlying dispute. Thus, determining liability on the instrument — provided the instrument's requirements are met[17] — is not dependent on deciding the underlying merits of the dispute: the instrument is said to be autonomous. For this reason, a consideration of the underlying merits will, in the usual case, not be grounds for granting an injunction.

What *CR Construction* discusses is what autonomy may mean as against the surety and the beneficiary. As against the surety, the Court held, as per long-standing authority, the only ground on which a surety can be precluded against paying on an instrument (if the wording so provides) is fraud.[18] Fraud undermines and removes autonomy. Thus, a surety, where the instrument wording so provides, can only have an injunction granted against it if there is strong evidence of fraud of which the surety is aware.[19]

Fraud was not substantively alleged in *CR Construction* and so the claim against Barclays was bound to fail. As FEC was not a party — at CR's instigation — no injunction could be granted against FEC in any event.[20]

What the Court did, however, was to consider whether autonomy meant the same in relation to the beneficiary as it did in relation to the surety. Applying *Simon Carves Ltd v Ensus UK Ltd*,[21] the Court stated that the instrument was less autonomous in relation to the beneficiary than it was in relation to the surety.[22] Thus, a beneficiary might be precluded from calling on an instrument if there was a clear contractual stipulation between the beneficiary and the defaulting party[23] precluding the beneficiary from so calling. Fraud was thus not the only ground on which an injunction could be granted as against a beneficiary.

In *CR Construction*, the argument was hopeless. The JCT 2016 Design and Build contains no stipulation against calling on an instrument, the Contract did not so provide and CR could point to no such stipulation. Thus, any consideration could be said to be *obiter*. That said, however, this possible erosion of autonomy requires some consideration.

It must be remembered that both the surety and the beneficiary are parties to the instrument at issue and there are reciprocal provisions (pay and be paid). Due, however, to the differing approaches to autonomy, the same reciprocity and the same wording (to pay and be paid) mean differing things to each party. Where there is a contractual stipulation in relation to a call on the instrument, and assuming the surety is unaware of that stipulation, the surety is obliged to pay but the beneficiary is not entitled to receive. That is odd and is quite capable of creating uncertainty in relation to instruments whose sole purpose, it might be said, is certainty.

Factually, it is possible that where there is a contractual stipulation against calling on the instrument, the beneficiary (if it is aware of that stipulation) is acting in bad faith in making a call. If the surety is aware of that bad faith, then the fraud exception to autonomy would apply. There is no difficulty in this case.

Assume, however, that is not the case — what is the basis for the imbalance?[24]

There are, it seems to me, two answers.[25]

First, at common law, it is well established that if X claims on an instrument, the instrument pays but the loss in fact suffered is less than the amount paid, then X must make restitution.[26] Here, X by calling on the instrument is in breach of contract and the damages will be the amount called.[27] X would be required to pay those damages or to repay the amount called. Thus, there would be the call and then a claim for instant repayment. Any money would, in essence, go round in a circle. The courts avoid that outcome by the concept of circuity of action; the action which starts the circle is blocked.[28] Here, therefore, the beneficiary's call would likewise be blocked.

The second would be that equity would assist the defaulting party. A beneficiary calling on an instrument when it was clearly barred from so doing would not have clean hands. Similarly, the balance of convenience would hardly favour a beneficiary in those circumstances.[29] An injunction could therefore lie.[30]

4. Paper 3: Ban on retention in construction contracts

Becky Johnson, Herbert Smith Freehills Kramer

The government intends to ban retention payments in construction contracts and introduce new statutory payment terms and minimum interest rates for late payments across all sectors.

The government consulted last year on a package of proposed legislative measures to improve business-to-business payment behaviour and stop late payments across all sectors. In its recently published response "Late payments: tackling poor payment practices" the government confirm that, among other measures, it intends to:

- ban retention of payments in construction contracts;
- introduce a 60-day cap on payment terms for large firms paying smaller suppliers; and
- set a statutory minimum interest rate on late payments at 8% above the Bank of England base rate.

The reforms aim to reduce the risk of insolvency for small businesses as a result of delayed or withheld payments and to improve cash flow across supply chains.

4.1 Ban on retention payments in construction contracts

The government consulted on measures to amend Part 2 of the Housing Grants, Construction and Regeneration Act 1996 by either:

- banning the use of retentions in construction contracts completely; or
- requiring retention monies to be held in segregated accounts or protected with insurance-backed instruments of guarantee.

The government has confirmed it intends to opt for the full ban on the deducting and withholding of retention payments under construction contracts — stating that the responses to the consultation demonstrated broad agreement with the problems caused by retentions.

Not everyone in the industry has welcomed the proposal. Some industry bodies have raised concerns that banning retentions could deter investor appetite by increasing perceived investment risk. There are also concerns that smaller developers will be disadvantaged as they rely on retentions to incentivise the timely rectification of defects.

Further consultation will follow on how best to implement the ban, with the government indicating a 12 to 24-month transitional period for contractual adjustments, financial planning, stakeholder engagement and the development of alternative assurance mechanisms.

4.2 New payment terms and statutory interest rate for non-payment

The government also plans to introduce a 60-day maximum payment term for large businesses paying smaller suppliers. The government proposes to implement this with an appropriate transition period no earlier than 2027.

The reforms would also introduce a statutory interest rate for late payments in all commercial contracts, set at a minimum of 8% above the Bank of England base rate. Businesses will no longer be able to negotiate alternative remedies or lower interest rates for late payments.

For many commercial construction contracts, 60-day payment terms may not represent a dramatic shift. However, the introduction of a minimum interest rate of 8% above the Bank of England base rate is likely to have a more significant impact. For example, the standard form JCT contracts specify that the interest rate for late payment will be 5% above the base rate.

4.3 Alternatives to retention payments?

The absence of retention payments means that clients will no longer have access to a dedicated cash reserve to fund the rectification of defective work. Consequently, developers will be concerned that the supply chain will lack the incentive to return and correct defects. This may result in a greater focus on quality assurance, including compliance monitoring from the client's professional team or a clerk of works to check that work is compliant.

We also expect more attention being placed on contract administration to ensure that defective work is not included in interim payments, or payments corrected if defects are discovered later.

It is likely that the legislation will contain anti-avoidance mechanisms to preclude alternative structures that have the net effect of clients and contractors withholding cash until the end of the defects correction period. We will need to wait until the legislation is published to determine what may or may not be permitted. The impact of the new rules on contracts that operate staged payment mechanisms will need to be carefully checked when the legislation is published.

Currently, clients often avoid performance bonds due to the cost involved, and many contractors will have limited bonding capacity. However, in the absence of retention, clients might start to look to strengthen the performance security package. Performance bonds typically expire at practical completion and therefore will not cover the defects correct period. Retention bonds may be an alternative, but they will carry a cost which clients will need to fund and may not be readily available (particularly an on-demand basis).

The response to the consultation acknowledges that a larger and more sophisticated surety market will be required to support the construction sector if retentions are no longer a means of mitigating risk of defective works.

4.4 Wider legislative context

The government's reforms sit alongside a wider set of reforms which aim to improve payment culture and enhance accountability within large organisations, which include new enforcement powers for the Small Business Commissioner, who will be able to investigate poor payment practices, adjudicate disputes and impose significant financial penalties for persistent offenders of non-payment.

4.5 What happens next?

The draft legislation to implement these changes has not yet been published, and so the full picture, including transitional provisions, remains to be seen. Implementation of the retention ban will involve further technical consultation, and more detailed government guidance would be expected. The government plans to work with the Construction Leadership Council and construction clients in relation to the concerns around build quality and surety alternatives. It also plans to work with the financial services sector to identify ways of developing the surety market for the construction sector.

5. Paper 4: Trust, transparency, and payment security: project bank accounts in UK and Australian construction law

Dr Armando Castra, UCL
Mr Sam Hillian Neave, UCL

5.1 Introduction

Project Bank Accounts (PBAs) or the underlying concept of the 'trust account', have been proposed as a solution to late payment and insolvency since the mid-1990 s. Specifically, the Latham Report (1994), in the UK, recommended the use of dedicated trust accounts that delineated funds between projects with the aim of direct payments to the supply chain as well as siloing the impacts of insolvency, which was, and continues to be, a prevalent risk in the sector. Foreign jurisdictions have also adopted the framework, such as Australia, where PBAs are incorporated into both public and private construction projects in Queensland.[31]

Therefore, PBAs could be seen as a natural progression of construction payment security legislation. Yet, despite increased attention in recent years, due to increased insolvencies, and as the industry's travails in domestic and international cases, they are still relatively obscure, and on the fringes of the sector's payment regime. The concept also suffers from criticism related to its administrative burden, adding complexity to its relatively unknown existence.[32] Yet as insolvency and late payment are still a significant problem in the construction industry, and new legislative changes, such as those abolishing cash retention, have the potential to perpetuate these issues, in turn, PBAs might be revived as a relevant "tool". In this article, we explain what they are, how they have been incorporated in standard forms of contracts and the judicial scrutiny they have undergone and what is next.

5.2 Project bank accounts: legal nature and practical purpose

The function of a Project Bank Account is twofold. First, from a legal perspective, the central premise of a PBA is that they are impressed with trust obligations, requiring separation between the trustee's general assets and project payments, insulating them from insolvency. For construction practitioners, a PBA serves as an operational tool that is defined as "a ring-fenced bank account from which payments are made directly and simultaneously to a lead contractor and members of the supply chain".[33]

Of central importance is whether a PBA satisfies the requirements of establishing a valid trust, that is, the three certainties related to intention, subject matter, and objects. The first requirement is more explicitly satisfied in the Australian state of Queensland, for example, where intention is provided in the governing legislation. Conversely, no such legislation exists in the UK, therefore requiring the language of the construction contract to establish intent, such as those provisions within the NEC3, JCT and PPC2000. Project Bank Accounts satisfy the second requirement, that is, subject matter, by segregating each project's funds. If, for instance, trust funds were commingled with the general property of the trustee-builder then delineating subject matter becomes complicated. Thirdly, PBAs nominate subcontractors and major suppliers as their intended beneficiaries, however, this becomes complicated when these stakeholders are engaged sporadically and are required to execute a trust deed; in other words, they have to 'opt-in' to the protective measure.

A subsequent matter of law is then what type of trust a Project Bank Account constitutes. One interpretation may be that because the accounts impute active duties on a contractor, that is holding the funds with an obligation to distribute them, they constitute an express trust. Another interpretation may be that they establish a Quistclose trust, given they arise for a specific and defined purpose.

Another consideration on the legal nature of PBAs, and one that greatly differentiates Australia and the United Kingdom, is whether the accounts are implemented through statute or contract. Where statutorily imposed trusts, such as those in Queensland, cannot be contracted out of, contractually implemented trusts rely on agreement between parties to take effect.

In practice, PBAs encourage the construction sector to depart from the traditional, fragmented cash flow process, which is exponentially riskier further down the supply chain, given the accumulation of late payment, misuse, and insolvency. The framework embraces transparency through delineating trust and non-trust assets, fair distribution through expediated payment terms, and reduces power imbalances between supply chain members by imposing affirmative duties.

This is not to say that Project Bank Accounts are a silver bullet to address the systemic financial issues facing the construction sector. Indeed, there are several limitations to the framework, including how administrators are to be paid as highlighted in *Re PBS Building (QLD) Pty Ltd (2024) QSC 108*[34] and the pending legal action against *ISG*.[35] There is also the normative criticism that the accounts restrict the working capital of contractors, despite 80% of the work performed by subcontractors and specialist trades. Anecdotally, low awareness of the mechanism, and it's perceived legal and administrative burdens, are also significant barriers to increased usage.

Nonetheless PBAs are recognised as an important step forward in relation to strengthening payment security in construction, demonstrated through increased integration with leading standard form contracts.

5.3 PBAs in standard form contracts: JCT, NEC and Australian standards

In the U.K., standard form contracts are the primary vehicle for the integration of Project Bank Accounts into a project's payment procedure. There are three major forms which give PBAs their contractual effect: JCT and NEC.

In 2016, the *Joint Contracts Tribunal* (JCT) published its PBA supplement to facilitate the accounts on projects where they are mandated. The supplement involves a deed by which the trust is established, naming the beneficiaries, such as the main contractor and subcontractors. To address the earlier concern related to the sporadic engagement of subcontractors, the JCT supplement requires additional deeds to be executed upon award of subsequent subcontracts. The effect of the JCT PBA supplement is that upon receipt of payment to the main contractor, the funds are considered to be held on trust for enjoyment of the beneficiaries.[36]

Similarly, the *New Engineering Contract 4* (NEC4) incorporates PBA provisions, facilitating accelerated payments and ring-fencing funds from administrators if a party becomes insolvent. Importantly, the 2020 NEC4 update includes options related to the level of involvement of employers in the PBA's administration, facilitating digital PBAs, and updating payment oversight.[37]

The Western Australian Government has integrated PBAs into AS2124, the Australian Standards construction contract for publicly funded projects valued over AUD$1.5 million. Similar to the U.K. models, AS2124 requires the execution of a trust deed to establish the PBA, in addition to ongoing statutory declarations and financial reporting requirements during the delivery phase.[38]

The continued integration of PBAs into standard form contracts in both Australia and the United Kingdom signals that there is already a framework and meaningful tool to ensure fairer payments in the construction sector.

5.4 Judicial scrutiny: Australia and the U.K

The premise of the 'Project Bank Account' is being tested in real time not only on construction projects across Australia and the United Kingdom but also in their respective courts. The gradual evolution of PBAs now faces its greatest challenge in the *Re PBS Building (QLD) Pty Ltd (2024) QSC 108*[39] and the pending legal action against *ISG*.

The former, heard before the Supreme Court of Queensland, asked the fundamental question on how administrators are to be paid in the instance where the main contractor is insolvent, and the only considerable assets, totalling AUD$390,861.30, are protected in the Project Bank Account (Project Trust Account in QLD). The Court determined that given the purpose of the Act, that is, the protection of subcontractors from non-payment, the funds within the PBA could not be used to pay the administrative costs of $189,017.54.

A similar question is currently posed in Northern Ireland, where the administrators for ESS Modular, a subsidiary of ISG, are seeking to recoup GBP£154,000.00 in costs.[40] The case involves a GBP£1.3 million PBA, covering four Ministry of Justice projects.

These cases raise important questions regarding not only the administrative effectiveness of the accounts once a company fails but also the extent and nature of how PBAs interact with existing legislative and procedural systems. Specifically, the *Re PBS Building (QLD) Pty Ltd (2024)*[41] case identifies an institutional gap between the desired policy outcomes, that is, protecting subcontractor payments, and the practicalities of bankruptcy procedures, which has the potential unintended consequence of shifting risk from subcontractors to insolvency practitioners.[42]

5.5 Future directions for project bank accounts and payment security

The PBA 'experiment' has existed since at least the Latham Report of 1994. Yet three decades have followed where insolvency continues to impact the viability of the construction sectors of both the United Kingdom and Australia. There are, however, several directions for future development in their adoption in the industry.

First, the devolved governments within the United Kingdom should consider the adoption of the cascading deemed statutory trust model, which is active in almost half of all USA states. Under this model, it is statutorily enshrined that payments are to be held in trust for the beneficiary down the contractual hierarchy. Some of the American states require trust funds to be segregated from general funds of the trustee, in effect, providing the same protections as a project bank account, with the added benefit of reaching further down the supply chain.

Second, the abolition of cash retention, as recently announced by the U.K. Government, is an opportunity for further integration of PBAs as a cost effective and meaningful tool for payment security. The abolition of retention risks driving performance guarantees 'underground', where trust protection, like PBAs, could provide necessary transparency and security. The reforms to retention recognise the financial challenges facing the construction sector. In this context, PBAs, a tested and readily available tool, should also be considered as a natural progression of the sectors financial regulations.

Finally, there remains significant barriers to further adoption of PBAs, which, in part, is due to their relative obscurity as a tool for payment security. Stakeholders, from government to contractors, should continue raising awareness of the regime and broaden the community of practice through sharing case studies and guidelines. Specifically, as the sector recognises that change is not only needed, but inevitable, payment security becomes an integral part of facilitating a consorted, considerate, and secure way of promoting sustainability. This, in turn, will enable the construction sector to continue to deliver critical infrastructure and housing projects that Britons and Australians, alike, are demanding.

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PAPER 1

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PAPER 2

8. 2026] EWHC 202 (TCC).
9. The Bond here was a hybrid and not the usual JCT wording.
10. As to which see Oval (717) Ltd v Aegon Insurance Company (UK) Ltd (1997) 85 B.L.R. 97; IE Contractors Ltd v Lloyds Bank [1989] 2 Lloyd's Rep. 205 at 207 but cf Siporex Trade SA v Banque Indosuez [1986] 2 Lloyd's Rep. 146 at 159; AES-3C Maritza East 1 EOOD v Credit Agricole Corporate & Investment Bank [2011] EWHC 123 (bond does not require same level of precision as a letter of credit); or a literal approach to the demand requirements may be rejected if that approach would strip the security of effect – Seele Middle East FZE v Raiffesenlandesbank [2014] EWHC 343.
11. These elements of the case have been considered in several articles in the industry press and are not repeated here.
12. [1978] QB 146, 155G-156B; [1978] QB 159 at 171; [1984] 1 WLR 392, 393 respectively.
13. See judgment at [75].
14. Although there is a line of authority (mainly derived from the public law context) that a successful intervenor is not automatically entitled to their costs, here FEC was entitled to its costs as FEC had an interest – that under the Bond – to protect.
15. Even if they agree on the proper construction of the instrument.
16. For the balance of this article as I am dealing with the general position (which would include letters of credit) I refer to the document at issue as an instrument rather than a bond.
17. Bearing in mind those may require some form of decision as to the merits – see Yuanda (UK) Co Ltd v Multiplex Construction Europe Limited [2020] BLR 320.
18. See [9 – 10].
19. See Bolivinter supra.
20. See [11]. The Court then went on to hold that a claim against FEC would have failed in any event – see [11] and [13 ff].
21. [2011] EWHC 657 (TCC). The proposition has been explained as follows: It is clear from these authorities that an Injunction restraining a beneficiary from enforcing payment under an on demand bond will be granted only where it is shown either that the demand would be in breach of an express condition precedent to the right to demand payment or in breach of an implied obligation to similar effect providing such an implied term can be shown to the enhanced standard or it can be shown to the enhanced evidential standard that any demand is fraudulent unless (perhaps) an injunction has been sought before any question of enforcement arose. Shapoorji Pallonji & Company Private Ltd v Yumn Ltd & Anor [2021] EWHC 862 at [23].
22. There is an argument as to whether this statement is obiter, the Court having held that the application failed against Barclays and there was no application as against FEC.
23. Which would have been CR here if there had been such a stipulation which there was not.
24. If there is one – see the point about the cases on point being obiter.
25. I put on one side the point that in many of cases, the discussion over the contractual bar is obiter – see eg Simon Carves itself; Doosan Babcock Ltd v Comercializadora de Equipos y Materiales mabe Limitada [2014] BLR 33.
26. See eg Cargill International SA v Bangladesh Sugar and Food Industries Corpn [1998] 1 WLR 469.
27. The defaulting party is obliged to pay the surety all and any amounts paid under the call either by debit from the defaulting party's bank account or some other financial instrument.
28. Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689; The Brede [1973] 2 Lloyd's Rep 333; Post Office v Hampshire CC [1980] 124; Magdeev v Tsetkov [2019] EWHC 1557.
29. It has to be borne in mind, however, that it will remain very difficult for a defaulting party to show that the balance of convenience favours it – see Harbottle (Mercantile) Ltd v National Westminster Bank [1978] Q.B. 146 at 155.
30. It must be noted, however, that interim injunctions granted in Simon Carves cases often do not survive further scrutiny – see eg Sirius International Insurance Co v FAI General Insurance Ltd [2003] 1 WLR 2214.

PAPER 3

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