**Laying a firm foundation: using legal theory to improve construction practice**

A common criticism of commercial contract law is that it is not adequately accommodative of commercial practices, causing the parties to be sceptical of lawyers and academics. This is perhaps most evident within the construction industry, where the complexities of a long-term, multi-party transaction towards a common goal strains contract theory and doctrine. Indeed, Lord Dyson picked up that it was traditionally the case that construction law was ‘all about the facts, not about the law’.[[1]](#footnote-2)

That being said, commercial arrangements cannot exist independently of the legal framework. It is the law which provides the justification for, and imposes limits upon, the parties’ private ordering of their transactions – a necessary function without which uncertainty would prevail. Instead, the real concern is whether the law understands and persuasively *explains* the commercial arrangements of the parties. For example, if one is concerned with understanding the parties’ intention, it is imperative to understand the meaning of the contractual terms within context of the construction project. Although there are sound arguments for following a more formalistic approach in contract interpretation, as espoused by Sir Rupert Jackson for example, it is perhaps entirely too optimistic to hold that the written word encapsulates the parties’ intention, especially in light of the increasing use of standard form contracts. Thus, the law must answer the question, as posed by Catherine Mitchell – ‘what degree of formalism?’[[2]](#footnote-3) And even beyond the debates surrounding contract interpretation, there are many spheres where contract doctrine must be made to engage with the modern construction practice, including accounting for technological changes such as smart contracts.

There is a role for academics here. Lord Burrows JSC has recently discussed the ways in which academic lawyers can influence the development of the law in practice – or at least the development of the common law - through appellate decisions. He has highlighted, in particular, the importance of ‘practical legal scholarship’ in that endeavour on the road to ‘unattainable perfection’ in the law. He draws on that idea – which focusses on what academics refer to as doctrinal legal research – away from some of the wider, more theoretical ideas of legal research (while acknowledging that that too does have some role to play).

These observations apply in practice too by providing a broader understanding and assessment of actions which helps decisions makers, other than the appeals court judge, of which there are plenty in the construction industry. For example, as stakeholders engage with devising new drafting strategies to further the industry practice, then apart from practitioners, academics – with their lecturing and teaching hats (mortarboards) on – are necessary.

Thus, there is clear scope for increasing the role of academic lawyers within construction law. This would have three key aims:

1. the use of academic study to help develop construction law – in particular through engaging with doctrinal development and practical legal scholarship;
2. the use of construction law situations to develop law and practice more generally; and,
3. in due course, as a case study for the interaction of academic and practice-focussed legal development.

Examples of where this can help are:

*“Relational contract” and collaboration:* The idea of the relational contract could perhaps be an example: starting in academia in the 1960s, this idea lies closely beside the idea of increased flexibility and collaboration in construction contracts. Relational ideas abound within the UK Government’s construction playbook and are emerging in case law. Practical responses to the concept are still being developed. Deeper engagement with the underlying ideas can only help this process.

*Network contracts:* A contract related to a construction project is quite a distance from the classical conception of a one-shot transaction. The construction project comprises several separate, bilateral contracts that are nonetheless inter-related and inter-dependent, working towards the common purpose of a complete project. They comprise a ‘network’ of contracts. Academic theory on this, building upon the work of scholars such as Teubner, has been invaluable in demonstrating the tensions created between the self-interested postures of parties in their individual contracts and their reliance upon the cooperative framework of the network. Engagement with this scholarship may hold several intriguing lessons for the construction industry, while a detailed case study of the industry might illuminate the scholarship and bolster the need for a separate category of network contracts.

There are other examples for discussion that are set out on our webpage.

We propose to form a network to identify those areas where practitioners, lawyers and academics can work together to improve construction practice.

We are keen to hear from those who might be interested and are using this note to reach out to those who could form the core group. The initial stage will be to identify the agenda for action and then develop a forum for the exchange of ideas.

If you’re interested please contact [ ].

1. That is changing as can be seen from the prominence in the judiciary of Dyson himself, Sir Rupert Jackson and Sir Peter Coulson. [↑](#footnote-ref-2)
2. Catherine Mitchell. *Interpretation of Contracts*. New York: Routledge. 2019, p. 123. [↑](#footnote-ref-3)