

Construction law in 2021

20 May 2021

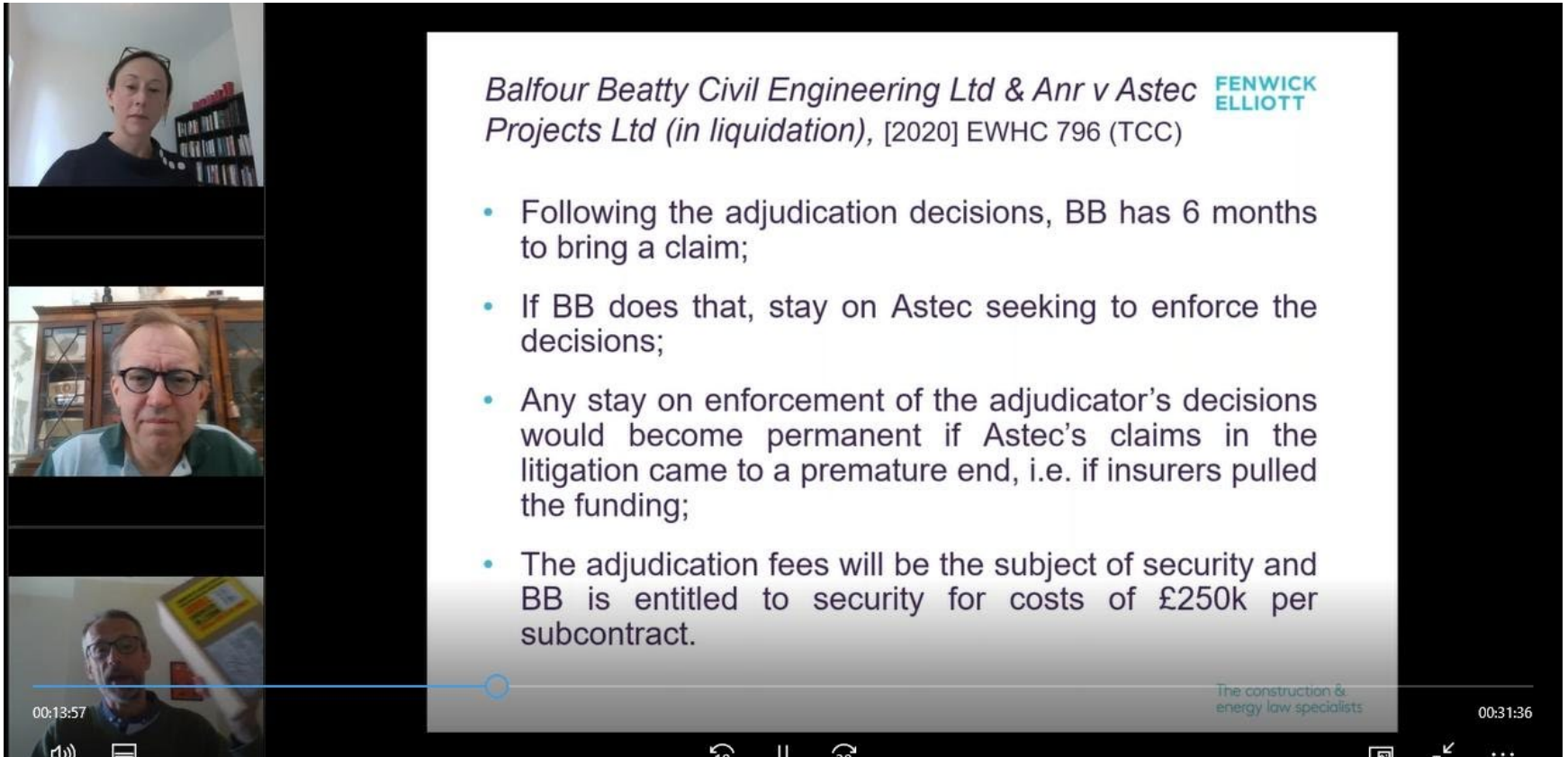
Jeremy Glover, Partner
Stacy Sinclair, Partner



Construction Law in 2021

- Changes brought about by COVID-19
- Changes to dispute resolution and avoidance
- (Alternative) Dispute Resolution
- Sustainability and Health & Safety
- Technology

One Year Ago



The screenshot shows a video conference interface. On the left, there are three video thumbnails of participants: a woman at the top, a man with glasses in the middle, and another man at the bottom. The main area is a presentation slide with a white background and a black border. The slide title is "Balfour Beatty Civil Engineering Ltd & Anr v Astec Projects Ltd (in liquidation), [2020] EWHC 796 (TCC)" with the Fenwick Elliott logo to the right. Below the title is a bulleted list of three points. At the bottom of the slide, there is a blue progress bar and the text "The construction & energy law specialists". The video player controls at the bottom show a timestamp of 00:13:57 on the left and 00:31:36 on the right.

Balfour Beatty Civil Engineering Ltd & Anr v Astec Projects Ltd (in liquidation), [2020] EWHC 796 (TCC) FENWICK ELLIOTT

- Following the adjudication decisions, BB has 6 months to bring a claim;
- If BB does that, stay on Astec seeking to enforce the decisions;
- Any stay on enforcement of the adjudicator's decisions would become permanent if Astec's claims in the litigation came to a premature end, i.e. if insurers pulled the funding;
- The adjudication fees will be the subject of security and BB is entitled to security for costs of £250k per subcontract.

00:13:57 The construction & energy law specialists 00:31:36

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Adjudication



Adjudication in 2020-21

- Adjudication continued as usual during 2020, with the TCC as always, expecting parties to be sensible and take reasonable steps to ensure that adjudications can proceed in line with the lockdown measures that currently apply. (*MillChris*)

Bresco v Lonsdale [2020] UKSC 25

“It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator. Furthermore the availability of adjudication as of right has meant that many disputes are speedily settled between the parties without even the need to invoke the adjudication process.”

Lord Briggs

Adjudication in 2021 and beyond

- May 2016-April 2017 1533 1% increase
- May 2017-April 2018 1685 10% increase
- May 2018-April 2019 1905 13% increase
- May 2019-April 2020 1945 2% increase
- May 2021 ???
- TeCSA LVD Scheme / CIC Low Value Disputes Model Adjudication Procedure.

The effect of COVID-19 on Dispute Resolution in the courts: 2020

A Judge's view on the future of litigation

Mrs Justice Finola O'Farrell DBE, 28 May 2020:

- Success of co-operation and agility of the legal profession to adapt to new circumstances
- Need for evolution of legal processes to serve the interests of justice
- Use of technology to improve the efficiency and cost of legal proceedings without compromising justice
- Value of retaining physical hearings where appropriate

The effect of COVID-19 on Dispute Resolution in the courts: 2021

- Is the pandemic still an excuse for delay?
- Hybrid hearings;
- Difference in approach between trials and other hearings;
- May 2021, Commercial Court is moving back to live hearings 4 days a week, with Fridays remaining remote

“I would draw the attention of practitioners in the specialist courts in particular to the requirements in the rules for such documents. Statements are not supposed to be drafted by those who equate length with substance, and regardless of expertise with the copy and paste functions of word processing programmes, witness statements must be drafted in accordance with the Civil Procedure Rules. Nor should such documents include lengthy quotations from contemporary documents... There is absolutely no good reason, in any case, for the regular and continuing failure to pay attention to the rules concerning witness statements. Attention is also drawn to the likely consequences if such rules are ignored.”

Mr Justice Fraser

*Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No.2 Quantum),
[2018] EWHC 1577 (TCC)*

Witness evidence in the courts: Practice Direction 32: 6 April 2021

- A trial witness statement must:
 - Set out evidence as to matters that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial;
 - Set out only matters of fact of which the witness has personal knowledge that are relevant to the case;
 - Identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement;
 - Be signed with a new “improved” statement of truth;
 - Be endorsed with a certificate of compliance, signed by the relevant legal representative.

Witness evidence v documents

- Close examination of actual evidence of what was happening on the ground will reveal if delay in approving the sewerage design actually delayed the project.
- Court should apply common law, common sense approach to causation.
- Rejected generalized statement from site foreman.
- Judge preferred primary, contemporaneous source of evidence: site diary.

White Constructions Pty Ltd v PBS Holdings Pty Ltd

[2019] NSWSC 1166

ICC Report: *The Accuracy of Fact Witness Memory in International Arbitration*

“5.32 Basic practices such as good recordkeeping and contemporaneous notes during the course of a transaction or project (pre-dispute) serve both to provide evidence of what happened at a time when the witness’ memory was fresh and unaffected by information learned subsequently and to help the witness later to recall facts.”

The effect of COVID-19 on International Arbitration: 2021

New ICC Rules, 1 January 2021.

- Article 22(2): *"to ensure effective case management, the arbitral tribunal, after consulting the parties, shall adopt such procedural measures as it considers appropriate"*.
- Article 26, empowers tribunals to decide between conducting hearings in-person and remotely.
- Expands the scope of the Expedited Procedure provisions by raising the opt-out threshold from US\$2M.
- New Article 11(7) requires the parties to communicate promptly the identity of 3rd Party Funders.
- "encouraging" instead of "informing" the parties to consider settlement of all or part of the dispute.

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(Alternative) Dispute Resolution



JCT and Dispute Boards

- May 2021: Dispute Adjudication Board (DAB) Rules for use with the JCT Design & Build Contract and Major Project Construction Contract forms
- Article 9 of the JCT DAB Rules, the DAB can fulfil its avoidance function by providing informal advice;
- If a dispute arises then either party may give notice of its intention to refer the dispute. The referral is then served on the other party and the DAB within 7 days, and a decision is to be issued within 28 days in order to comply with the HGCR.
- Article 13 provides the DAB with the power to establish a procedure in relation to the making of a decision, to decide its own jurisdiction, call for site visits and hearings, and conduct itself as necessary in order to provide a decision.

9th CEDR Mediation Audit 2020

	2020	2018	2016
Settle on the day of mediation	72%	74%	67%
Settle shortly after mediation day	21%	15%	19%
Total settlement rate	93%	89%	86%

5 May 2021

- The impact of the COVID-19 pandemic triggered a downturn in mediation activity, and overall activity dropped by 35% over the period March to September 2020;
- BUT, the drop would have been far more severe were it not for the rapid upsurge in online mediation over this period.

“Whereas, prior to March 2020, only 26% of mediators reported any online work (within which the majority were handling less than 4 cases per annum), the first six months of the pandemic saw 71% of mediators switching their practice to online.”

(Alternative) Dispute Resolution

“I want to see ADR integrated into every stage of what we call the dispute resolution process. The focus throughout ought to be on resolution rather than dispute.”

“There is perhaps a linguistic problem: why do we keep on talking about Alternative Dispute Resolution? Dispute resolution should be an integrated whole. Mediated interventions should be part and parcel of the process of resolving disputes wherever they arise in our society – whether between businesses and consumers, amongst families or between the citizen and the state. There is nothing alternative about either mediation, early neutral evaluation, or judge led resolution.”

“In short, mediation is not an end in itself. ADR is not alternative. Dispute resolution needs to become an integrated process in which the parties feel that there is a continuing drive to help them find the best way to reach a satisfactory solution.”

Sir Geoffrey Vos, Master of the Rolls: Speech to Hull University,
26 March 2021

(Alternative) Dispute Resolution

“What I hope to achieve is take the “alternative” out of ADR, to focus on hard data and make sure that every dispute is tackled at every stage with the intention of bringing about its compromise. This can be done very effectively online and I believe that the onset of online dispute resolution in most bulk areas will allow far more cases to be resolved far earlier and far more cheaply.”

Sir Geoffrey Vos, Master of the Rolls: Speech to Hull University,
26 March 2021

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Enabling change

Dr Stacy Sinclair

Partner, Head of Technology & Innovation



(Alternative) Dispute Resolution

*“What I hope to achieve is take the “alternative” out of ADR, to focus on **hard data** and make sure that every dispute is tackled at every stage with the intention of bringing about its compromise. This can be done very effectively online and I believe that the onset of online dispute resolution in most bulk areas will allow far more cases to be resolved far earlier and far more cheaply.”*

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(Alternative) Dispute Resolution

*“Moreover, this is an opportunity for the UK to lead the world in showing how a mature first world justice system can make full and effective **use of technology** to allow legal rights to be cheaply and quickly vindicated.*

In this connection, I would also like to see a central website to which anyone can go to be directed towards the most appropriate method of dispute resolution for their problem. It could direct parties to ombuds, mediators, the courts, arbitration and many other types of resolution.”

“Data is crucial to reform.”

*Reliable Data and Reliable Technology:
the direction of travel for civil justice*

“Data is crucial to reform. A system cannot be improved unless one knows, within reasonable bounds of accuracy, how it is currently performing...”

Sir Geoffrey Vos, Master of the Rolls: Speech to Law Society,
28 January 2021

Technology & Data

Theme for 2021 and beyond...

Technology & data as an enabler for change.

Theme for 2021 and beyond...

Technology & data as an enabler for change.

- in dispute resolution;
- in sustainability & climate change;
- in Health & Safety;
- ...

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NetZero

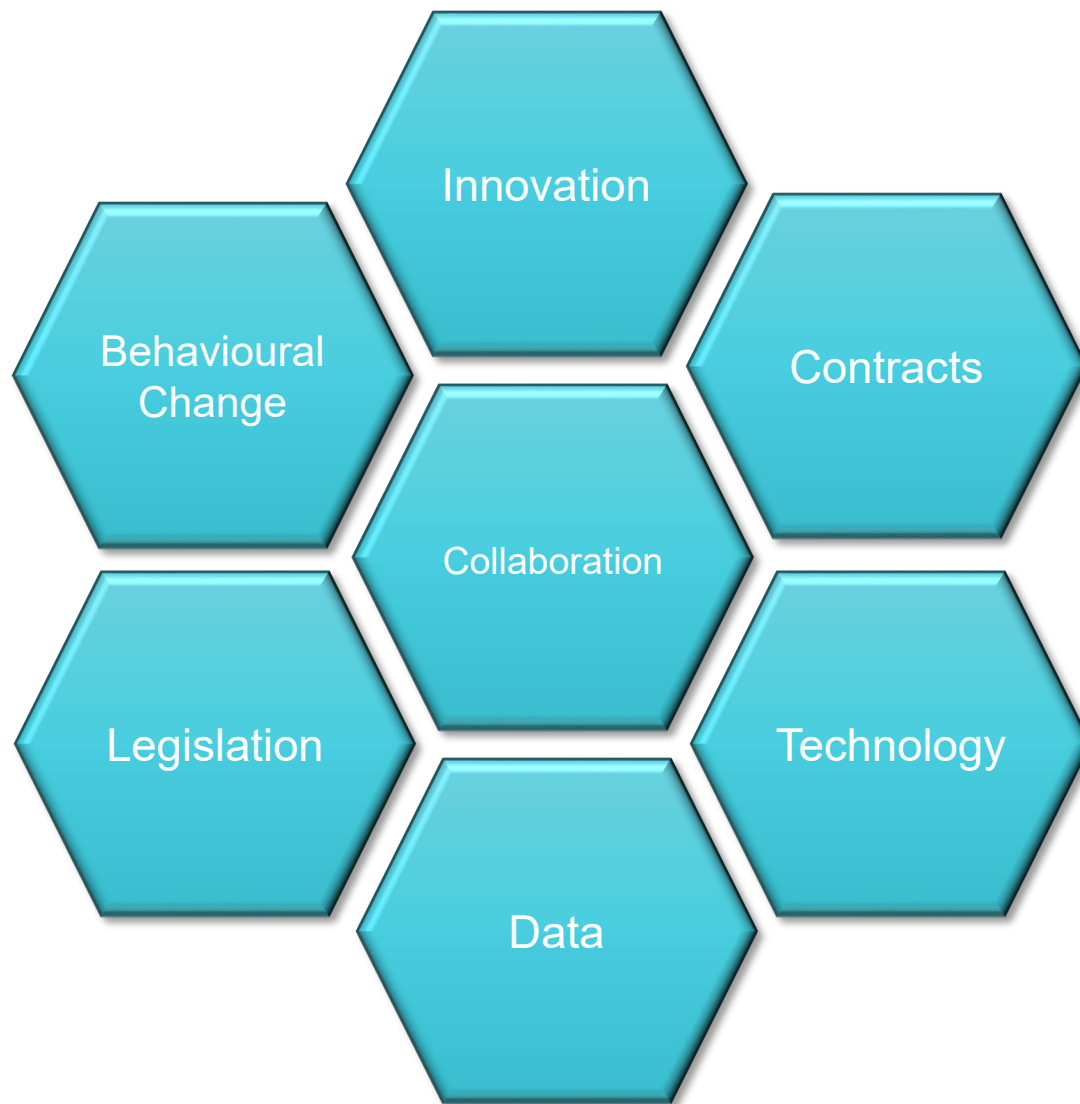


- Goal: NetZero by 2050
 - December 2020: cut carbon emissions by 68% by 2030
 - April 2021: cut emissions by at least 78% by 2035
- Construction industry accounts for 40% of carbon emissions through the construction, operation and maintenance of our built environment.



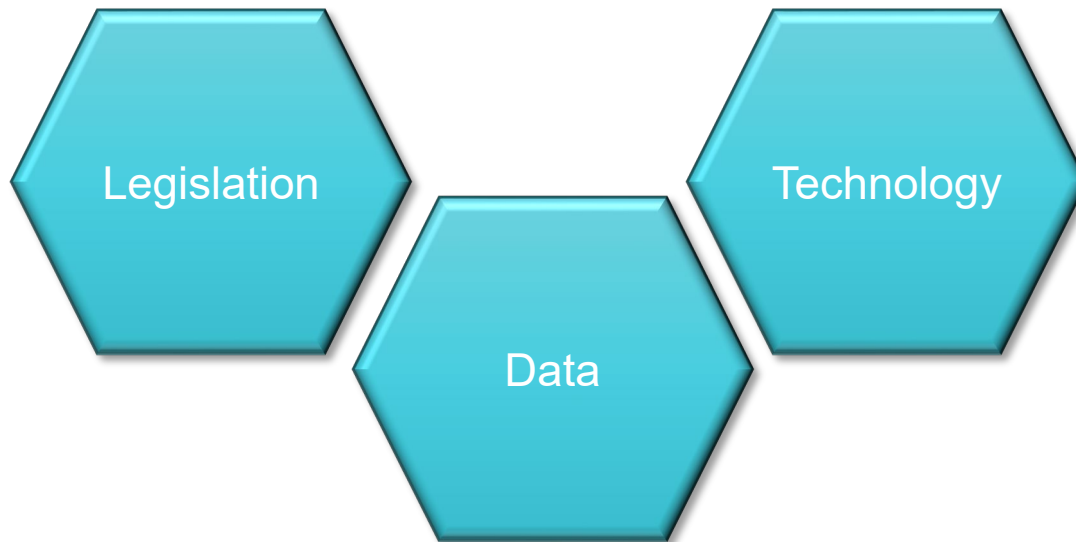
NetZero is driving an unprecedented, transformational change in the construction and energy sectors.

Achieving NetZero



Achieving NetZero

- Driver of change: NetZero
- Enabler of change: Legislation & Technology
- Underpinning foundation (golden thread): Data



- Climate Change Act 2008 (as amended in 2019): legally binding target to reduce the UK's greenhouse gas emissions by 100% by 2050
- Very little law at the moment
- Expect an increase in primary and secondary legislation

- *“The United Kingdom is committed to achieving net zero greenhouse gas emissions by 2050 and will continue to lead the way internationally by hosting the COP26 Summit in Glasgow. Legislation will set binding environmental targets [Environment Bill]...”*

Queen’s Speech, 11 May 2021

- Environmental Bill – to be introduced later this year

- Planning Legislation: London Plan
 - Offset payments for carbon emissions
 - Planning Bill in the autumn (Queen's Speech)
- Building Regulations
 - Consultation on proposed changes to Part L
 - Future Building Standards
 - Interim Part L, Part F and Overheating Regulations in 2021?

Contractual emission targets: We should expect to see low carbon emissions targets, working towards a net zero obligation, in contracts. Crucial that this is focused on design obligations as well as the construction and operational phases.

- Measure, Manage, Monitor
- Report



Digital Twins

NetZero: Contractual Obligations

- **Chancery Lane Project: Climate Contract Playbook**
A series of clauses that could be used in a variety of commercial situations, not just construction.

<https://chancerylaneproject.org/>

Construction

[Mary's Clause] Build Contract Energy Efficiency Clauses

[Luna's Clause] Green Construction Modifications

[Estelle's Clause] Net Zero Construction Standards

[Edgar's Clause] Climate Resilient landscape design contracts *NEW*

[Tristan's Clause] Construction Materials: Procurement *NEW*

[Francis' Clause] Climate Aligned Construction Waste Management *NEW*

Planning

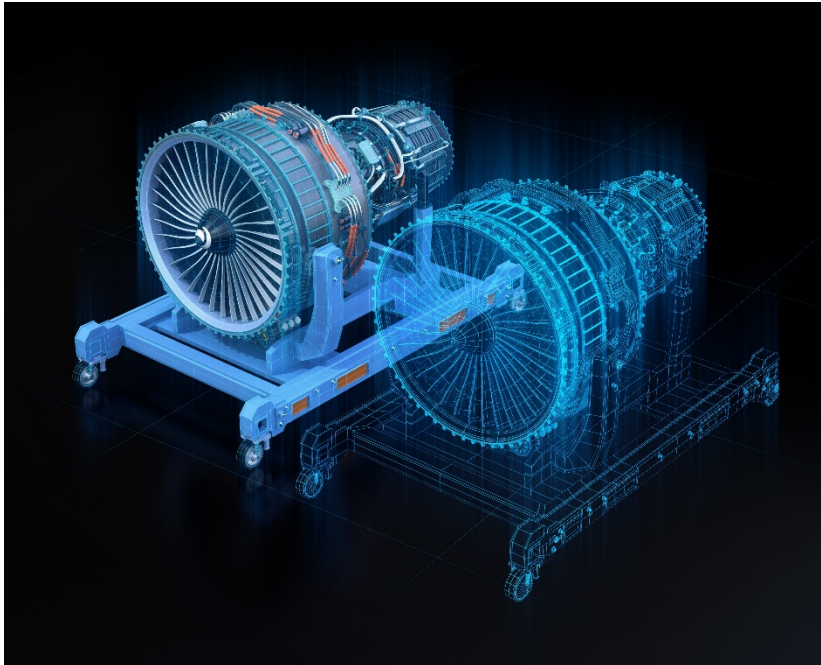
[Rory's Clause] Net Zero Land Promotion

[Evelyn & Ezra's Clause] Securing Net Zero in development through planning *NEW*

NetZero: Contractual Obligations

- Businesses required to identify their carbon footprint. Implications for the supply chain.
- Requirement / pre-requisite to tendering?
- Benchmarking?
- Termination?
- Reference to Greenhouse Gas Protocol Corporate Accounting and Reporting Standards (Ed 2015)?
- Protocols for green arbitrations

- Digital Twins bring to the forefront the significance and importance of data and data management.
- It is no longer about static, siloed 2D drawings/documents, transferred intermittently and manually, but rather:



real-time connection of models, data and databases, to the physical asset, with the use of sensors and other tech, to monitor, control & predict

What is a Digital Twin?

- A digital replica of a physical asset, process or system in the built or natural environment.
- A virtual representation of a physical building as it is constructed.
- A digital representation designed to provide a simulated (and safe) environment to test and monitor a building/asset as it is constructed.
- Uses real-time data (e.g. from sensors placed on the physical twin) and applies analytics, machine-learning and AI to environment to record and test a project as it is constructed.
- The Government is promoting the development of a National Digital Twin (NDT) of the UK built environment.

<https://www.cdbb.cam.ac.uk/what-we-do/national-digital-twin-programme>

Connected Technologies: Already a reality

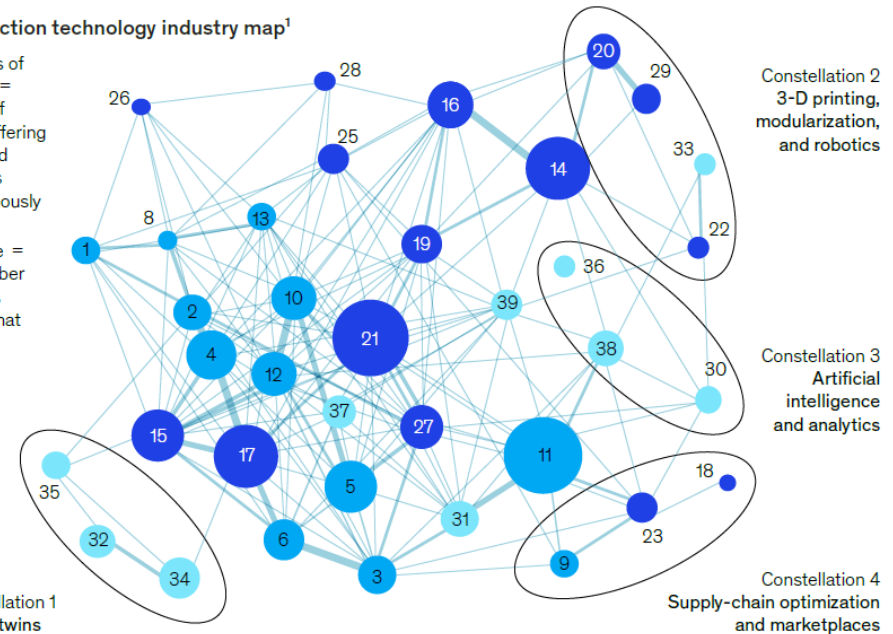
- Connected technologies and connected data
- Requirements for real-time flow of data
- What are the issues?

The largest construction industry clusters of use cases include 3-D printing, modularization, and robotics.

Construction technology industry map¹

Thickness of the lines = number of players offering connected use cases simultaneously

Circle size = total number of players offering that use case



Constellation 1
Digital twins

Constellation 2
3-D printing,
modularization,
and robotics

Constellation 3
Artificial
intelligence
and analytics

Constellation 4
Supply-chain optimization
and marketplaces

● Digital collaboration

- 1 Capital financing
- 2 Customer relationship management
- 3 Equipment management
- 4 Estimating
- 5 Manpower optimization
- 6 Materials management
- 7 Planning
- 8 Portfolio planning and management
- 9 Predictive assessment performance
- 10 Project scheduling
- 11 Real-time monitoring and control
- 12 Resource planning
- 13 Risk management

● Back office

- 14 3-D modeling
- 15 Bidding process
- 16 Building-information modeling
- 17 Contract management
- 18 Deep learning
- 19 Design management
- 20 Design simulation
- 21 Document management
- 22 Laser scanning
- 23 Machine learning
- 24 Management
- 25 Process simulation
- 26 Productivity management
- 27 Progress tracking and performance dashboards
- 28 Value engineering
- 29 Virtual learning

● On-site execution

- 30 3-D printing
- 31 Compliance
- 32 Construction materials marketplace
- 33 Drone-enabled yard inspection
- 34 Equipment marketplace
- 35 Labor and professional marketplace
- 36 Off-site fabrication
- 37 Quality control
- 38 Robotics/automation
- 39 Testing and training
- 40 Yard inspection

The legal issues...

- Access & right to use the data
- Data usage and expectations
- Licensing
- Liability (errors and incorrect data / etc)
- Security

The technical issues...

- Security & storage
- Information Management
- Data compatibility
- Data & System Integration (from different sources)

The importance of data

- ***Software Solutions Ltd v 365 Health and Wellbeing Ltd*** (2021)
 - Issues of copyright and database rights
 - Important to understand what rights and licenses, both express and implied, are in place prior to embarking on the development of new innovations and advancements in technology.
- ***Premier Engineering (Lincoln) Limited v MW High Tech Projects UK Limited*** (2020)
 - What data will be used for? Unexpected outcomes?
 - Important to agree at the outset

The devil is in the detail...

- NetZero is an unprecedented, transformational game-changer, driving the change;
- Legislation & Technology are the enablers of this change;
- Digital Twins are essential to meet upcoming legislation and contractual obligations;

measure, manage, monitor, benchmark, report, automate

necessary in the design, construction and operation of built assets

- Need to be alive to the issues surrounding data, which is essential and integral to the success of Digital Twins.

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Building Safety

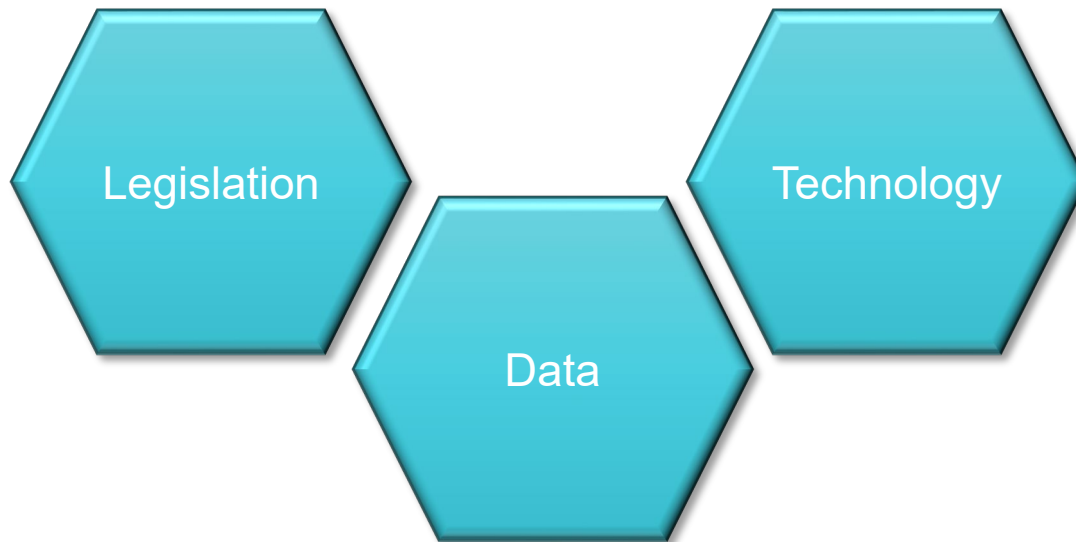


- July 2020 | Draft Building Safety Bill released
 - drive to improve fire and structural safety across the whole of the build environment;
 - new requirements for high rise buildings & new requirements for all buildings;
 - duty holders (which mirror the CDM Regulations) will have new responsibilities;
 - Queen's Speech 2021 – expect Bill to be introduced this year.

- 10 February 2021 | The government announced:
 - a further £3.5 billion investment for the remediation of unsafe cladding on high-rise residential buildings (in addition to the £1.6 billion announced last year);
 - targeted, state-backed indemnity scheme for qualified professionals unable to obtain professional indemnity insurance for the completion of EWS1 forms.

Achieving Building Safety

- Driver of change: Building Safety
- Enabler of change: Legislation & Technology
- Underpinning foundation (golden thread): Data



Building Safety – the Golden Thread

- The Golden Thread of Information
 - proposed in the draft Building Safety bill;
 - a live digital document [platform] with accurate and up-to-date information of the building data, aiming to promote transparency;
 - the document [platform] allows you to access details on how the building was designed, built and is being operated at any point of time during the lifecycle of the building.



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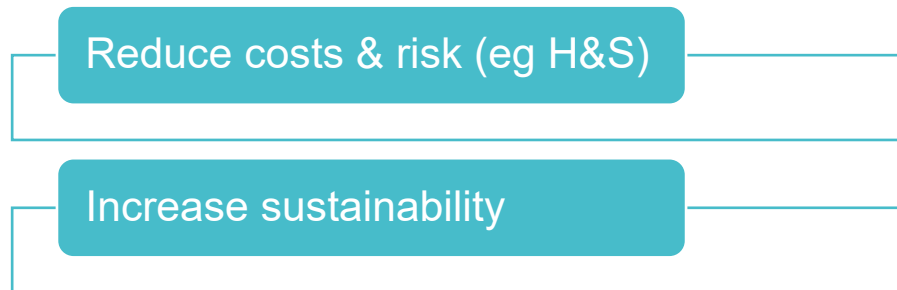
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Technology



Construction Tech & Legal Tech = Tech

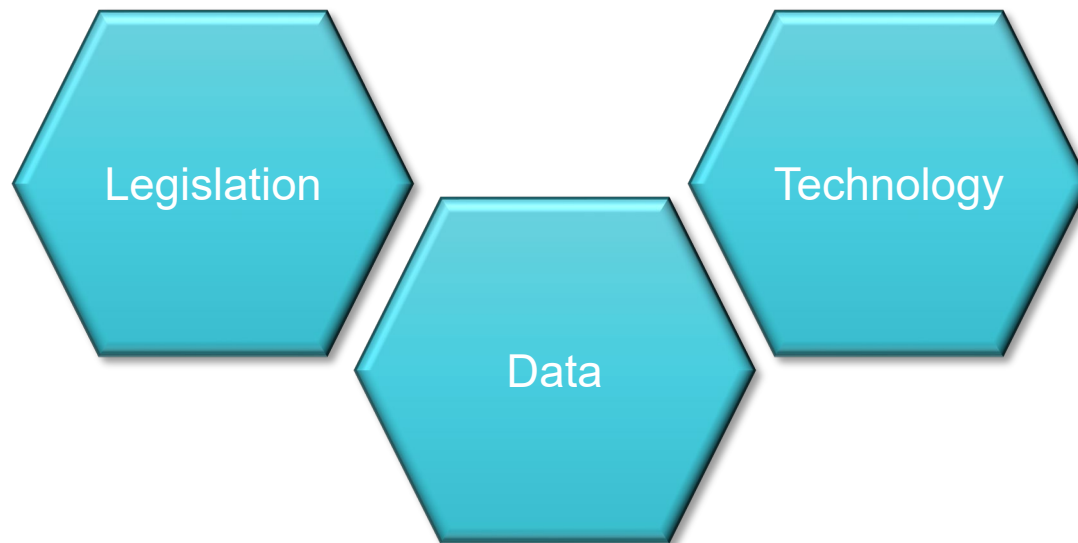
- Data-led decision making, to increase efficiencies and productivity:



- Landscape of technology:
 - spans all stages of design, procurement, commissioning, operation (asset management), disputes; and
 - rise of automation, machine learning and AI, including smart contracts and blockchain.
- Need to be alert to issues surrounding data & new technologies.

Enabling change in 2021 & beyond...

- Enabler of change: **Legislation & Technology**
- Underpinning foundation (golden thread): **Data**



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Thank you!
Questions?

Jeremy Glover, jglover@fenwickelliott.com

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Webinar

Watch | Listen | Discuss

Next webinar:

The Role of the Engineer in FIDIC Contracts

Thursday, 3 June 2021

12pm (40mins + 10mins Q&A)



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Register at www.fenwickelliott.com/events