

**| NEW TEMPLE CHAMBERS**

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# NTC Monthly

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# JCT DB 2016 CONTRACT: ELECTRONIC VS. PAPER DISCREPANCIES

“If language is not correct, then what is said is not what is meant; If what is said is not what is meant, then what ought to be done remains undone.” - Confucius.

## Introduction

Charles Edwards, high performing Construction Barrister reviews the Technology and Construction Court case of *John Sisk and Son Ltd v Capital & Centric (Rose) Ltd* [2025] EWHC 594. The dispute between the parties involved, amongst other things, Part 8 proceedings, the interpretation of the risk allocation provisions in construction contracts based on a heavily amended JCT Design and Build Contract 2016 with bespoke provisions in which the electronic version of the contract differed to the paper version.

## Key Issues

Key issues to be considered by the Technology and Construction Court (TCC) in this dispute was the interpretation of the Contract between the Claimant and the Defendant due to the fact that the electronic version of the contract between the parties had two clarifications documents, one being a worksheet headed “contract clarifications” and the other being a worksheet headed “tender

submission clarifications”. The paper version of the contract had only one clarification document, which is a printed and initialled copy of the “contract clarifications” worksheet. The relevance of this to the dispute was whether or not the tender submission clarifications falls within the contract definition of the Clarifications. The Contractor submits that it is only the former document which contains the “contract clarifications”, whereas the Employer submits that it is both documents which do so.

The Claimant, John Sisk and Son Ltd (the “Contractor”), entered into a construction contract based on a heavily amended JCT Design and Build Contract 2016, with bespoke provisions with the Defendant, Capital & Centric (Rose) Ltd (the “Employer”), for the design and construction of residential and refurbishment works at Weir Mill, Stockport. The dispute between the Contractor and the Employer concerned who was contractually responsible for the risks associated with the existing structures on the site, including their ability to support and/or facilitate the proposed works. The relevant provisions to be construed by the TCC included the interpretation of clause 2.42 and related contract clarifications: specifically, which party bore the contractual risk for the suitability of existing structures on the site. The Contractor sought declaratory relief through Part 8 proceedings after losing a prior adjudication on the same issue. The Contractor had been the unsuccessful party in a referral to an adjudicator, who had found in the Employer’s favour on the same point. The declaration made by the

adjudicator was that:

## Adjudicator’s Decision

The Adjudicator’s Decision provided as follows (paragraphs 6 of the Judgment):

“On a proper interpretation of the Contract and in particular clause 2.42 of the Contract and items 1 and 2 of the Contracts Clarifications schedule, the responsibility for ground conditions including the identification of the basements, structures, voids, compressed structural elements and obstructions under the existing West Mill was solely Sisk’s risk”

The Adjudicator’s Decision is binding on a temporary basis until the matter is finally determined in court. The Contractor now seeks the TCC’s view on the correct interpretation of the Contract to finally determine the dispute.

## Summary of the Technology and Construction Court Judgment

The TCC decided the opposite of what the Adjudicator had decided and held that:

“... on a proper interpretation of the design and build contract and, in particular clause 2.42 and item two of the contract clarifications, the risk of the



unsuitability of the existing structures (as defined in the contract), including their ability to support and/or facilitate the proposed works, lies solely with C&C” [the Employer].

Key provisions for consideration by the Court included

Clause 2.42.1 of the Contract provided that:

“The Employer gives no warranty or representation as to the condition of the Site, any existing buildings or structures on the Site or any adjoining property or any services in or under the Site or as to the accuracy, reliability or sufficiency of any soils or survey data, asbestos reports, condition surveys or other data contained in any document made available to the Contractor by the Employer or as to any recommendations or conclusions made or reached in any such document.” [Emphasis added]

Clause 2.42.2 of the Contract provided that:

“The Contractor shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied himself before the date of the Contract as to the nature of the ground, the sub-surface conditions and sub-soil (any information in connection therewith which may have been provided by or on behalf of the Employer being provided by way of information only without any warranty or representation as to its accuracy, reliability or completeness) the form and nature of the Site, existing buildings, services, utilities or structures on, in and under the Site, the extent, nature and difficulty of the work and materials necessary for the completion of the Works, the means of communication with and the restrictions of access to the Site, the accommodation he may

require, and in general to have obtained for himself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the Works or the occupation and intended use of the Site. The Contractor shall not be entitled to any extension of time or to any additional payment on the grounds of any misunderstanding or any such matter nor shall the Contractor be released from any of the risks accepted or obligations undertaken by him under this Contract on the ground that he did not or could not have foreseen any matter which might affect or have affected the carrying out and completion of the Works.” [Emphasis added]

Clause 2.42.3 of the Contract provided that:

“The Contractor has had the opportunity of inspecting the physical conditions and other conditions of the Site and structures upon it and acknowledges that it shall be solely responsible for ensuring that the ground, the Site and any existing structures to be retained under or upon or adjacent to the Site are (or will upon completion of the Works) be suitable for the development and intended occupation and use of the Site to which the Works relate and the Contractor shall be responsible for dealing with any other matters required to be dealt with in order to complete the Works. Nothing referred to in this clause 2.42.3 shall give rise to an increase in or addition to the Contract Sum, nor to an extension of time, nor give rise to any right on the part of the Contractor to determine its employment on the grounds of any misunderstanding or any such matter nor shall the Contractor be released from any of the risks accepted or obligations undertaken by him under the Contract on the ground that he did not or could not have foreseen any

matter which might affect or have affected the execution of the Works.” [Emphasis added]

Clause 2.42.4 of the Contract provided that:

“This clause 2.42 shall be subject to item 2 of the Clarifications”. [Emphasis added]

Clarifications included:

- Item 2, the Contractor’s Clarification stated:

“Existing Structures Risk including ability to support/facilitate proposed works”

- Item 2, the Employer’s comments stated:

“The Employer is to insure the Existing buildings/ works. Employer also to obtain warranty from Arup with regard to the suitability of the proposed works. Employer Risk”

The Contractor argued, amongst other things, that the “contract clarifications” document governed risk allocation between the parties and the existing structures risk was an “Employer Risk”. This meant that the Employer bore the risk if the existing structures proved unsuitable. Further, the electronic “tender submission clarifications” were not contractually binding and merely reflected earlier stages of negotiation.

The Employer argued, amongst other things that, firstly, the tender submission clarifications were part of the contract documents; secondly, the entries showed that the Contractor’s attempts to shift the existing structures risk had been expressly rejected by the Employer; thirdly, there was no agreement that changed this position and; fourthly, this is consistent with the terms of clause 2.42 of the Contract as amended.

In light of the above, the TCC had to determine how clause 2.42 should be constructed with the clarifications in the Contract, the admissibility of pre-contractual negotiations and whether pre-contractual discussions could be considered in interpreting the final agreement and the status

of the tender submission clarifications and whether it formed part of the Contract and whether it should influence the Court's interpretation of the Contract. In reaching a view, the TCC considered the principles of contract interpretation, including reference to *The Interpretation of Contracts* by Sir Kim Lewison (8th edition) (Lewison), section 9 and made it clear that it is important, that in this case any admissible evidence is directed either to a particular known fact or to the general object of the contract:

“Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties; ... to determine which party put forward a particular term; and to elucidate the general object of the contract. Evidence that parties negotiated on the basis of an agreed meaning is only admissible in support of a claim of estoppel or rectification.”

The TCC stated, there was no proper basis in this case for the court to have regard to the pre-contractual negotiations as admissible. That would be to depart from

the clear guidance in the textbooks and the authorities referred to the court. The TCC further stated at paragraph 69 that:

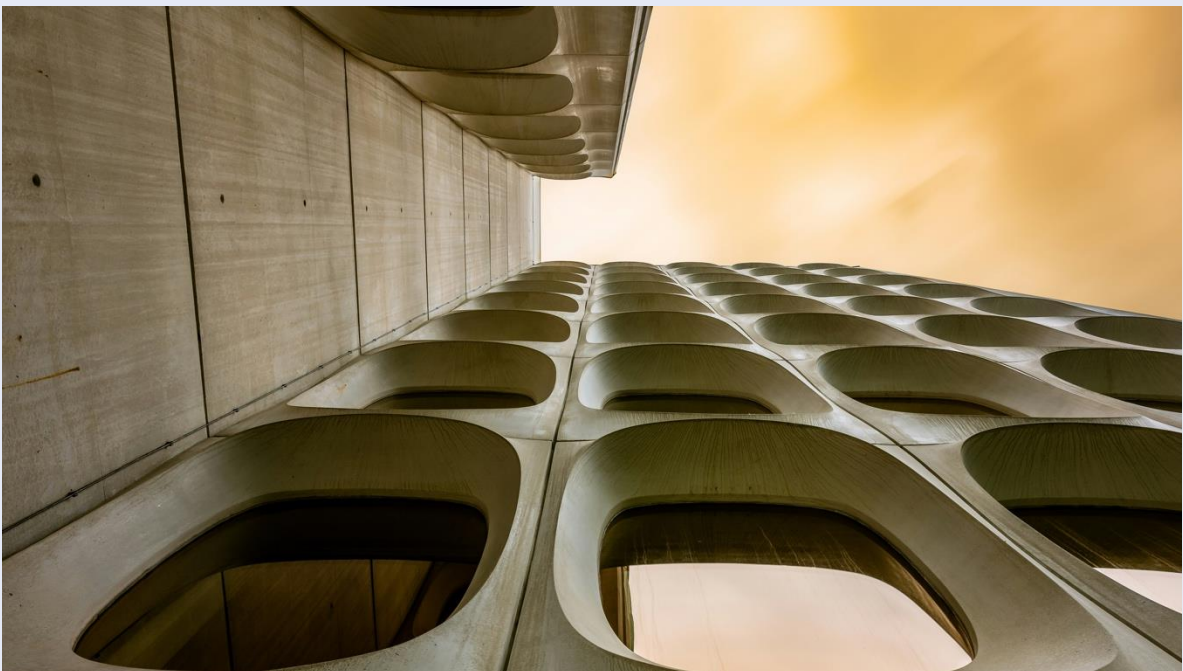
“... What C&C [the Employer] cannot do, in my judgment, is to seek to buttress that argument by referring, additionally, to the pre-contractual negotiations to show that: (i) the parties had agreed that the agreement recorded in the tender submission clarifications meant what C&C says it was intended to mean; (ii) there was no explicit change of position thereafter under which the parties expressly agreed a change to this agreed intended meaning; and, thus, that (iii) the agreement recorded in the contract clarifications should also be construed as meaning what the agreement recorded in the tender submission clarifications was agreed as being intended to mean. Such an argument plainly offends against the restriction of admission of pre-contractual negotiations.”

#### **Conclusion**

1. In conclusion, the Court granted the declaratory relief sought by the Contractor, confirming that the Employer bore the risk for the suitability of existing structures.
2. This case reinforces the primacy of express contract terms and limiting the role of extrinsic evidence in the interpretation of contracts. Even

when tender documents or pre-contract negotiations suggest otherwise, the executed and incorporated contract terms govern risk allocation and it is important for the parties to a construction contract to be clear what terms are incorporated or not incorporated into their contract. In this instance, despite the prior adjudication finding in favour of the Employer, the Court found in favour of the Contractor.

3. Special care should be taken by those drafting and compiling construction contracts to ensure consistency between electronic versions and the paper versions to prevent inconsistencies and arguments as to what terms are incorporated or not into a construction contract.
4. This case also shows how organisations in the construction industry need to be very careful in the drafting and compilation of contract documents and how this can affect the allocation of risk between the parties compared to what was perceived by each party in respect of risk when the construction contract was executed.





## THE SUPREME COURT'S LANDMARK RULING: BUILDING SAFETY ACT 2022

### Introduction

Charles Edwards, high performing Construction Barrister reviews the Supreme Court appeal in the case of *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21. This appeal concerns the liability of URS under the Building Safety Act 2022. Some of the key provisions of the Building Safety Act 2022 ("BSA") include retrospectivity with regard to limitation periods.

The dispute between the parties involved two developments, Capital East, on the Isle of Dogs in London, and Freemans Meadow, in Leicester. BDW are developers, which include brand-name developers such as Barratt Homes and David Wilson Homes. URS provided consulting engineering services to BDW on the two developments which are subject to the appeal in the Supreme Court.

Section 135 of the BSA provides as follows:

#### "135 Limitation periods

(1) After section 4A of the Limitation Act 1980 insert—

#### "4B Special time limit for certain actions in respect of damage or defects in relation to buildings

(1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.

(2) An action referred to in subsection (1) is one to which—

- (a) sections 1, 28, 32, 35, 37 and 38 apply;
  - (b) the other provisions of this Act do not apply.
- (3) In this section "relevant provision" means—
- (a) section 1 or 2A of the Defective Premises Act 1972;
  - (b) section 38 of the Building Act 1984.

(4) Where by virtue of section 1 of the Defective Premises Act

1972 a person became entitled, before the commencement date, to bring an action against any other person, **this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.**

(5) In subsection (4) "**the commencement date**" means **the day on which section 135 of the Building Safety Act 2022 came into force.**"

(2) In section 1(5) of the Defective Premises Act 1972, for "the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963" substitute "the Limitation Act 1980".

(3) The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.

(4) In a case where—

- (a) **by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the day on**

which this section came into force, to bring an action against any other person, and (b) the period of 30 years from the date on which the right of action accrued expires in the initial period, section 4B of the Limitation Act 1980 (inserted by subsection (1)) has effect as if it provided that the action may not be brought after the end of the initial period..."

Section 135 of the BSA (which inserted section 4B into the Limitation Act 1980) came into force on 28 June 2022 and retrospectively extended the limitation period for accrued claims under section 1 of the DPA from six years to 30 years.

### Technology and Construction Court

In *BDW Trading Ltd v URS Corporation Ltd & Anor* [2021] EWHC 2796 (TCC), Fraser J (as he then was) decided some preliminary issues based on assumed facts. The nature of the claim brought in those proceedings concerned a claim in tort in relation to structural defects in a number of high-rise buildings. The Technology and Construction Court ("TCC") emphasised some unusual aspects to the case:

*"The first is that BDW is said to have had no legal obligation to make payment of the very sizeable losses which are said to have been incurred or arisen as a result of the dangerous structural state of the buildings to which the claims relate. This is because it is said by the Defendants that BDW would, if so minded, have been entitled to defend any claims brought against it by relying upon the benefit of a range of defences, including limitation. Given some of these buildings were constructed in 2005, and the problems were discovered in 2019, limitation is doubtless a central feature in the litigation as a whole."* (paragraph 2).

The preliminary issues decided by the Court on the basis of the assumed facts in the TCC together with the TCC's judgment on those issues can be summarised as follows (paragraph 132 of the judgment):

"...  
(a) Did the scope of URS' duties extend to the alleged losses?"

Answer: Yes, with the exception of the losses specifically pleaded as Reputational Damage at paragraph 48.7 (and the two other paragraphs consequential upon that one, 48.13 and 48.18).

(b) Are BDW's alleged losses recoverable in principle as a matter of law in tort?"

Answer: Yes, again with the exception of the losses specifically pleaded at paragraphs 48.7, 48.13 and 48.18.

(c) In particular as to (b), is it nonetheless, and on the basis of those Assumed Facts, a defence to URS in law that: (i) the losses were not in the contemplation of the parties at the time of entering into the appointments; (ii) the losses are too remote; (iii) BDW has caused its own losses; (iv) BDW's actions broke the chain of causation; and (v) BDW has failed to mitigate its loss?"

Answer: for the paragraph 48.1 to 48.6 losses (i) No (ii) No. Sub-issues (iii) to (v) are all highly fact dependent and can only be finally determined at trial. For the paragraph 48.7 losses the answers are (i) Yes (ii) Yes."

Further, hearings in the TCC in relation to this matter involved proposed amendments which were objected to by URS for a variety of reasons. In two short judgments dated 8 November and 14 December 2022, Adrian Williamson KC (sitting as a Deputy Judge of the High Court) gave permission to BDW to make the amendments.

### The Court of Appeal

The Court of Appeal considered the two appeals from the judgments in the TCC in relation to this matter, prior to the further appeal in the Supreme Court. The Court of Appeal hearings had over 11 files of authorities and as described by Coulson LJ, had all the hall marks of three-day examination in construction law. The Court of Appeal stated in relation to the issues to be considered:

*"perhaps the most important concerned the date of the accrual of a cause of action in tort against designers of a defective building, in circumstances where the defect caused no immediate physical damage. Did the cause of action accrue when the building was completed to the defective design, or when the developers discovered that the buildings were structurally defective?"*

1. Ground of Appeal 1: Did the scope of URS' duties extend to the alleged losses?"

The Court of Appeal dismissed Ground 1 of the appeal.

2. Ground of Appeal 2: The accrual of the cause of action in tort

The Court of Appeal dismissed Ground 2 of the appeal and accepted BDW's primary case as to the accrual of its action in tort. The Court of Appeal added that: "The judge [in the TCC] was right to find that the cause of action accrued, at the latest, on practical completion. That was at a time when the developments were owned by BDW, and so there is no reason in law not to conclude that they had a completed cause of action in tort against URS at that stage." [Emphasis added]

3. Ground of Appeal 3: Amendments

Ground 3 of the substantive appeal only arises if URS had been successful on Grounds 1 and 2 and therefore, it is unnecessary to consider further the possibility of striking out of BDW's claim.

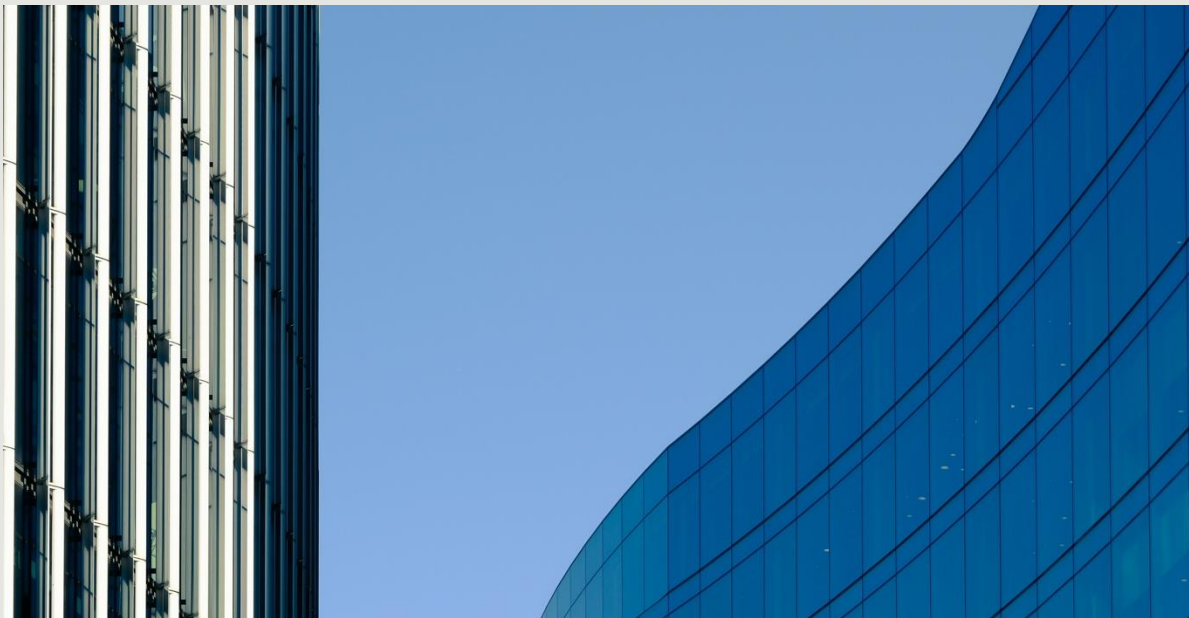
### The Supreme Court

The Supreme Court granted permission to appeal from the Court of Appeal's judgment on four grounds, which gave rise to the following issues as stated by the Supreme Court:

**Ground 1:** In relation to BDW's claim in the tort of negligence against URS, has BDW suffered actionable and recoverable damage or is the damage outside the scope of the duty of care and/or too remote because it was voluntarily incurred (disregarding the possible impact of section 135 of the BSA)? If the answer to that question is that the damage is outside the scope of the duty of care or is too remote, did BDW in any event already have an accrued cause of action in the tort of negligence at the time it sold the Developments?

**Ground 2:** Does section 135 of the BSA apply in the present circumstances and, if so, what is its effect?

**Ground 3:** Did URS owe a duty to BDW under section 1(1)(a) of the DPA and, if so, are BDW's alleged losses of a type which are recoverable for breach of that duty?



**Ground 4:** Is BDW entitled to bring a claim against URS pursuant to section 1 of the Contribution Act notwithstanding that there has been no judgment or settlement between BDW and any third party and no third party has ever asserted any claim against BDW?

These were also answered in summary as follows:

**Conclusion to Ground 1:** The appeal on Ground 1 fails. There is no rule of law which meant that the carrying out of the repairs by BDW rendered the repair costs outside the scope of the duty of care owed or too remote.

**Conclusion to Ground 2:** For all these reasons, URS's appeal on Ground 2 is dismissed. When the meaning of the words used in section 135(3) is considered in the light of their context and the purpose of the statutory provision, they should be interpreted as applying in the circumstances of this case. Section 135 applies where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation

period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW's actions in carrying out the remedial works as a matter of legal causation or mitigation.

**Conclusion to Ground 3:** The duty under section 1(1)(a) of the DPA is owed to any person, including a developer, to whose "order" a dwelling is being built. That person will ordinarily be its first owner. In this case, relevant work was carried out by URS "to the order of" BDW and URS therefore owed a section 1 DPA duty to BDW.

**Conclusion to Ground 4:** BDW is not prevented from bringing a claim for contribution against URS by the fact that there has been no judgment against BDW or settlement between BDW and any third party and no third party has ever asserted any claim against BDW. It is sufficient that BDW has made a payment in kind (by performing remedial works) in compensation for the damage suffered by the homeowners.

This judgment has significant implications for developers. It confirms that developers can recover the costs of remediating building defects after many years as the limitation period has been increased to 30

years. The judgment affirms the retrospective effect of the Building Safety Act 2022, particularly section 135 which revives time barred claims under the Defective Premises Act 1972, thereby widening the scope of liability in relation to historic defects.



# ENFORCEABILITY OF ADJUDICATOR'S DECISION IN POST INSOLVENCY CLAIM & SECURITY FOR COSTS

## Introduction

Charles Edwards, high performing Construction Barrister reviews the Technology and Construction Court case of *Midas Construction Ltd v Harmsworth Pension Funds Trustees Ltd [2025] EWHC 1122 (TCC)*. The Claimant, Midas Construction Limited (in Administration) (the "Contractor"), entered into a construction contract based on a JCT Design and Build Sub-Contract 2011 (as amended), with the Defendant, Harmsworth Pension Funds Trustees Limited (the "Employer"), for "the design and construction of the Shell and Core, Fit Out and External Works of a new build student residential, private residential and affordable housing development" ("the Works"). The contract sum for the Works was £24,087,347.50 plus VAT.

## The Dispute

The dispute between the parties followed the termination of the Contractor's employment by the Employer pursuant to a JCT Design and Build Sub-Contract 2011 (as amended) and an adjudicator's decision in favour of the Contractor in the sum of £1,551,528.00 excluding VAT. The Employer refused to comply with the Adjudicator's decision. The Contractor commenced adjudication proceedings with a Notice of Adjudication seeking amongst other things, payment of £1,551,528 exclusive of VAT and interest from the Employer.

The Employer issued a Clause 8.7.4 statement to the Contractor. As a result of the statement, the Employer was asserting that there were no further sums due to the Contractor and that the Contractor had been paid the full amount it was owed by the Employer.

The Contractor challenged the amount set out by the Employer in its Clause 8.7.4 statement pursuant issued to a JCT Design and Build Sub-Contract 2011 (as amended) which stated as follows:

a. Clause 8.7.4.1	£226,280.00
b. Clause 8.7.4.2	£24,598,740.50
c. Clause 8.7.4.3	£24,825,020.50

The Contractor disputed the amount set out in particular at Clause 8.7.4.2 of the statement and asserted that only

£22,820,932.50 had been paid by the Employer and as such, a balance of £1,551,528 exclusive of VAT was owed by the Employer to the Contractor.

The Employer refused to comply with the Adjudicator's Decision for a number of reasons including, the Contractor being insolvent.

## Adjudicator's Decision

The Adjudicator decided that the Contractor was in fact owed £1,551,528 exclusive of VAT. The Employer refused to comply with the Adjudicator's decision on a number of grounds, including the fact that the Contractor was insolvent. The Employer also raised various counter claims.

## Key Issues for consideration in the enforcement proceedings

Key issues to be considered by the Technology and Construction Court (TCC) in the enforcement proceedings to this dispute, included the following:

1. The enforcement of an Adjudicator's Decision by an insolvent party.
2. The Contractor was a company in administration seeking enforcement of an Adjudicator's Decision in the sum of £1,551,528 exclusive of VAT and interest, subject to a stay with proposed conditions.

The Contractor submits that it is entitled to recover the cancellation costs of 30% pursuant to Clause 19.6(c) from the Employer. The Employer submits that such costs were unreasonably incurred by the

3. The Employer opposed the enforcement and raised two points:

“(1) there was inadequate security for the costs of any final proceedings that the Employer may bring to challenge the adjudication decisions between the parties.

(2) the enforcement claim is champertous because it is in breach of the Damages Based Agreement Regulations 2013 and is therefore an abuse of process.”

### **Summary of the Technology and Construction Court Judgment**

The TCC dismissed the champerty allegation as the funding agreement was in compliance with the Damages Based Agreements Regulations 2013. In relation to the issue of inadequate security of costs since the Contractor was insolvent, the TCC focused on balancing the rights of protection required by the solvent Employer and the insolvent Contractor. The TCC reviewed the relevant key authorities which included: *Styles & Wood Limited (in administration) v GE CIF Trustees Limited* [2020] EWHC 2694 (TCC); *Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651.

The TCC stated that amongst other things:

“27. *The court in assessing the amount of security must look carefully at the actual issues to be determined in final proceedings and reject a generic estimate of likely costs divorced from the actual issues. The court will also give credit for work already done in the adjudication and elsewhere and how this means less costs are required than when a matter is considered, and pleaded afresh with witness and expert evidence being gathered for the first time* (see *Styles v Wood* at paragraphs 16 to 18 and again *Styles v Wood* at paragraph 28). The Court will allow security for the likely recoverable costs rather than likely incurred costs. This is how the sum for security for costs is set generally even outside the context of security as a condition for enforcement of the adjudicator's decision. It is also submitted by the Claimant that the courts will be receptive to an incremental approach to adjust or increase security as

required (see *Styles v Wood* at paragraphs 30 to 31.” [Emphasis added]

The TCC considered the relevant authorities and stated amongst other things that:

“30. Mr Justice Constable in *Meadowside Building Developments Ltd (in Liquidation) and 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC) observed that:

84. *As near as possible, the safeguards must seek to place the responding party in a similar position to if the company was solvent. I recognise that it is unlikely that this would be wholly achieved. First, it is likely that should a responding party want to pursue its cross-claim in further litigation, it would likely be solely for the purposes of seeking repayment of any sum awarded, and it would be unlikely to benefit from a finding that it was the true creditor in the insolvency (other than to the extent of recovery of sums paid pursuant to the adjudication). Second, there would be an element of irrecoverable costs. Whilst this is the ordinary exigency of any litigation, this downside is more acute in litigation where the upside of success is limited by reason of the opposing parties' insolvency. Third, the requirement imposing a time limit in which the responding party must take steps to overturn the adjudication may involve a party bringing a claim earlier than the Limitation Act 1980 might otherwise have required it.*

85. *However, against this I bear in mind that a liquidator has a statutory obligation to collect the companies' debts. Ordinarily, a party to a construction contract has the right to adjudicate and retain sums, following a successful adjudication, pending any action by the other side to recover the sums. For the reasons set out above, this has some real practical utility that goes beyond cashflow. It might also be thought that (if the third party funding business model is successful) in the small number of cases identified for pursuit in this manner in which the funder is putting up security and accepting liability for an adverse costs order in any subsequent litigation, there is a reasonable chance that the company in liquidation's entitlement to payment is in, fact, a good one which, despite its merits, would otherwise be impossible or difficult for the liquidator to realise. It is commercially unrealistic to suggest that if the liquidator or its funder has faith in the claim, they should simply fund the case to litigation or arbitration rather than adjudication. Irrespective of liquidation,*

*parties use their contractual and statutory rights to adjudicate as a means of enforcing their contractual rights when they would not contemplate the risk and expense of litigation. Providing adequate safeguard to balance the interests of the parties are put in place because of insolvency, there would seem to be little justification in removing the tool of adjudication, which has generally proved very effective in allowing parties to resolve their disputes without the need to burden the Courts, from liquidators. It may also be that the existence of funding itself is dependent upon the ability to adjudicate: for example, the provision of ATE insurance is likely to be easier and cheaper following a successful adjudication (where a provisional view on the merits has already been given by a third party), than where no such assessment has been undertaken.*

86. *There is an obvious injustice if the company in liquidation is, in reality, the net debtor between the parties and enforces an adjudication award to the contrary with the practical effect of finality, and the loss of the responding party's security against its cross-claim. Yet, there is also injustice if the responding party is, in reality, the net debtor and by reason of the absence of funds available to a liquidator to pursue debtors, is able to evade its contractual liabilities to assess the sum due and pay it. It receives an undeserved windfall. In the modern world, it is common place for liquidators to approach third party funders. This is considered further below in relation to the question of champerty. Setting that question aside for present purposes, the general position is that the Courts ought, for public policy reasons, to support liquidators and their agents in collecting sums due to companies in liquidation. As Mr Justice Smith remarked, in *Absolute Living* it is in the public interest that liquidators proceed in a manner that is generally uninhibited in deciding how to frame and fund actions to collect sums thought to be due and owing. It is clear that *Bresco* places important limits on the use of adjudication in the ordinary case to safeguard the rights of the debtor/(creditor); but where the central rationale for incompatibility is dealt with satisfactorily by the provision of security for the awarded sum and costs, the balance in my view should shift to one which permits a party to utilise the statutory and contractual entitlements at its disposal to pursue its right to payment. The fact that the onus then shifts to the responding party to bring its proceedings within a reasonable*

*period of time if it wishes to overturn the adjudicator's decision is of itself unremarkable and a consequence of the intention to strike a balance between the rights of the two parties."*

The Contractor and the Employer provided the Court with detailed costs estimates in respect of future hearings. The Employer's estimated costs exceeding £568,616 for the Sanctus dispute and £767,105 for the Print Hall claim, whilst the Contractor estimated much lower amounts, arguing that many of the issues had already been aired in adjudication and could be resolved in streamlined CPR Part 8 proceedings (Para

36 of the Judgment). Whereas the Contractor estimated cost of £55,000 as an appropriate figure for security for the Sanctus claim and a figure for £258,000 for the Print Hall claim. The Court rejected both extremes, stating the Contractor's figures were too low and the Employer's too high.

#### **Conclusion**

1. The TCC in enforcing the Adjudicator's decision for 1,551,528 exclusive of VAT ordered that the Contractor should provide by way of security for costs, the following

sums:

£150,000 as security for the Sanctus claim.

£400,000 as security for the Print Hall claim.

2. This case reinforces the TCC's position on enforcing adjudicator's decisions where the enforcing party is insolvent and the balancing act of the rights of protection required by the solvent party.



## UPCOMING EVENTS: Commercial Management Conference

The **Chartered Institution of Civil Engineering Surveyors (CICES) Commercial Management Conference** is on 25 June 2025.

This is a key event for all professionals in civil engineering, infrastructure and commercial management, offering thought leadership, insights into industry trends and best practices. Whether you are a director, commercial manager, quantity surveyor, contractor, subcontractor or legal adviser, this conference offers a unique opportunity to:

- ✔ Stay informed on evolving best practices
- ✔ Gain insights into current legal and contractual trends
- ✔ Network with top-tier professionals and thought leaders
- ✔ Engage in discussions shaping the future of commercial management in civil engineering, infrastructure and commercial management.

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