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# NEWSLETTER

**Blue Sky ADR Ltd Newsletter** **September 2022**

Welcome to our September 2022 Newsletter.

There have been so many matters going on in the world in 2022 and it is clearly a time of great change, but in the Construction Industry the ever present backdrop of disputes continues to exist.

We therefore felt that it would be a good opportunity to provide a brief round-up of some of the more significant and interesting construction related cases that have gone through the courts so far this year.

We hope that your enjoy it .

## Do you have a dispute? Can we help?

If you have a construction dispute why not contact us to see if we can help? We are a modern and innovative construction contract and commercial, and dispute resolution consultancy, specialising in providing contractual and commercial support services (both non-contentious and contentious) to those operating in the Construction industry. We have extensive experience and a proven track record in the resolution of construction disputes. We give sound advice. We attempt dispute avoidance techniques initially (where appropriate to do so), and only where this fails, we give a committed service and provide hard work to attempt to obtain the best result that we can for our clients through a formal dispute resolution process. When it comes to Adjudication Blue Sky ADR regularly and very successfully represents parties, both in pursuing and in defending Adjudication actions; it has done so for many years and our staff have extensive experience and knowledge in this complex and specialist area.

We are always here to help you when you need our assistance, and even through all of the recent unprecedented and extremely trying times, it has still been business as usual for Blue Sky ADR Ltd. Our services and support to you and your team can, in the majority of instances, still be provided remotely by us, and we remain contactable by phone, email or post (key contact details are provided below). Files and papers can still be sent to us electronically. In the event that a meeting is required this can still be done by telephone or a video conference can be set up.

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If you allow us to provide our support to you we will do our absolute best for you. We hope to hear from you soon.

Best Regards
Peter Barnes and Matthew Davies

## HELPLINE – 0845 371 2575

Do you have a construction contract or commercial query, problem or dispute? Struggling to get paid? Can we help? Contact us for a free, up to 1 hour, initial consultation. Alternatively, if you would prefer to send us an email, with a brief summary of your situation, we'll get back to you as soon as possible. Our key contact emails are set out above under key contracts.

# 2022 – A REVIEW OF VARIOUS SIGNIFICANT AND INTERESTING CONSTRUCTION RELATED CASES SO FAR THIS YEAR — BY PETER BARNES

## 1 Bilton & Johnson (Building) Co Ltd v Three Rivers Property Investments Ltd [2022] EWHC 53 (TCC) (14 January 2022).

In a decision handed down on 14 January 2022 the TCC allowed a contractor's application for summary judgment to enforce an adjudicators' decision dated 2 September 2021. It rejected the defendant employer's arguments that the decision had been made in excess of jurisdiction and/or breach of natural justice and/or that the adjudicator failed to exhaust his jurisdiction.

In reaching his decision, Jason Coppel QC (sitting as a Deputy High Court Judge) reiterated that whilst when an adjudicator intends to adopt a methodology for resolving a dispute which was not proposed by either party, they should give the parties an opportunity to comment on that approach, the adjudicator need not consult the parties on every aspect of their reasoning.

In particular, in this case, it was not a breach of natural justice for the adjudicator to have derived his reasoning from the parties' cases rather than to have taken it directly from the parties' submissions and he did not need to consult the parties about it in advance of providing his decision. In any event, the breach, in this particular case, would not have been material.

The judge further held that the adjudicator had not failed to consider the Defendant's rectification defence but rather considered and rejected it. The question of whether his decision on that point was correct in law was (as is usually the case) not relevant to the question of enforcement.

In the circumstances, neither of the Defendant's grounds for resisting enforcement had a real prospect of success and the Claimant was granted summary judgment to enforce the award.

## 2. McAlpine Ltd v Richardson Roofing Co Ltd [2022] EWHC 982 (1 April 2022)

In this case, the Technology & Construction Court had to decide whether a claim had been validly served where the claimant had sent its particulars of claim to the defendant by email. The Court took a strict approach to the rules in making its decision highlighting the need to ensure that a valid method of service is used.

In this case a Notice of Change of Legal Representative (notice of acting) had been provided by the defendant on which the defendant had detailed the solicitor's email address. The question before the court was whether this was sufficient to demonstrate that the defendant had authorised acceptance of service by email.

4.1 of Practice Direction 6A of the Civil Procedure Rules ("CPR") deals with service by fax or other electronic means.

The court stated that the rules in relation to service of a claim form or other document have to be clear and certain. The claimant argued that the notice of acting was a formal document which meant that the court should consider it when deciding whether there had been a written indication of acceptance of service by email. However, whilst the court accepted that the notice of acting was a court form and that it contained an email address, it also included a fax number and telephone number for the solicitors. It was not a form concerning service like an Acknowledgment of Service and could not be compared to such but instead was a document providing details of how to contact the solicitor who was now instructed by the defendant. The court held that a willingness to accept service by electronic means should be clearly expressed in writing and therefore found that the particulars of claim had not been validly served.

**Analysis**

Whilst email is widely used method of communication, until or unless the CPR are amended, a party should only serve a claim or other litigation document by email or other electronic means if they have obtained express written agreement from the other party to accept service by that method in advance in accordance with the rules set out above.

## 3. Soteria Insurance Ltd v IBM United Kingdom Ltd [2022] EWCA Civ. 440 (4 April 2022)

In this case the Court of Appeal overturned a High Court decision by finding that the words "loss of profit, revenue, savings (including anticipated savings)" in a limitation of liability clause did not exclude a claim for wasted expenditure.

**Background**

On 16 June 2015, Cis General Insurance Limited ("CISGIL") (latterly Soteria Insurance Limited), entered into a written contract with IBM United Kingdom Limited ("IBM") for the supply, installation and management of an IT system (the "Contract") for a sum of £175.8million.

A series of delays, for which IBM was responsible, ultimately meant that the IT system was never delivered. A dispute arose following non-payment of a milestone invoice (the "Invoice"), following which, IBM terminated the Contract.

CISGIL commenced proceedings against IBM on the basis that IBM had wrongfully repudiated the Contract and sought damages for wasted expenditure flowing from the repudiation in the sum of £132 million. CISGIL also claimed for IBM's alleged breach of warranty and delay under the Contract. IBM defended the claims on the basis that non-payment of the Invoice entitled it to terminate the Contract. IBM also counterclaimed £2.9million for the sum due under the Invoice.

**High Court**

At first instance, the High Court found that:

(a) IBM had wrongfully repudiated the Contract;
(b) CISGIL had in principle established a claim valued at £122million for wasted expenditure following IBM's repudiation;
(c) CISGIL's claim for wasted expenditure was nevertheless excluded by an exclusion clause in the Contract (the "Exclusion Clause");
(d) CISGIL was entitled recover £15,887,990 in damages for additional costs and losses following IBM's other breaches;
(e) IBM was entitled to set-off against the value of the Invoice (£2.9million); and
(f) CISGIL was entitled to recover damages in the net sum of £12,998,390 together with interest.

**The Court of Appeal**

CISGIL's appealed against limb (c) of the High Court's decision (the "Appeal") concerning the proper construction of the Exclusion Clause.

IBM cross-appealed against the finding that it had wrongfully repudiated the Contract and contended that CISGIL's wasted expenditure was attributable to a change in its strategic direction rather than termination of the Contract (the "Cross-Appeal").

The Appeal was allowed and the Cross-Appeal was dismissed by the Court of Appeal.

**Construction of the Exclusion Clause**

The Court of Appeal found that the judge was wrong to construe the Exclusion Clause as precluding CISGIL from recovering wasted expenditure following IBM's repudiation of the Contract, albeit the existence of a contractual cap meant that recovery was limited to c.£80.5million in this regard. Citing several well-known authorities, the Court explained that in determining what losses were excluded from recovery under the Contract, the starting point was to give the words making up the Exclusion Clause their natural and ordinary meaning. The first instance judge had failed to engage with this exercise.

The Contract defined "losses" widely and carved out specific types of loss that would be excluded which included "loss of profit, revenue [or] savings". The term "wasted expenditure", however, was not referred to in the Contract. On this analysis, the Exclusion Clause, as understood by a reasonable person in the position of the parties did not exclude a claim for wasted expenditure and the words "loss of profit, revenue [or] savings" were incapable of encapsulating the same.

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The Court of Appeal also reasoned that the more valuable the right which one party seeks to exclude, the clearer the language of any exclusion clause will need to be. With this in mind, the Exclusion Clause did not contain the necessary clear wording to exclude liability for costs incurred (and subsequently wasted) following IBM's repudiation of the Contract. Wasted expenditure was an obvious and common type of loss and the parties could not be taken to have excluded this in the absence of any express reference to the same.

The Court of Appeal also found that it made commercial sense for consequential losses (such as loss of profits, revenue and savings), which are notoriously open-ended and difficult to ascertain to be excluded but for a different type and more easily ascertainable type of loss (such as wasted expenditure) not to be.

**Repudiation**

In respect of repudiation, the Court of Appeal found that the judge had been entitled to find that CISGIL had validly disputed the Invoice in good faith and that IBM was therefore not entitled to rely on the non-payment of the Invoice to justify termination of the Contract.

**Analysis**

This case highlights the importance of accurate and unambiguous drafting where one party seeks to exclude or cap liability for a specific head of loss, which in this case related to wasted expenditure. This case also suggests that the courts will be more stringent in their interpretation of exclusion clauses where parties have been more specific about the types of loss they intend to exclude.

## 4. Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 936 (TCC) (19 April 2022)

BHL applied for summary enforcement of a "smash and grab" adjudication decision for just over £700k in relation to Interim Payment Application 23. ESG sought to rely on an earlier "true valuation" adjudication in relation to Application 22.

Mrs Justice O'Farrell said that, if ESG wanted to do this, it could and should have raised this in a Pay Less Notice. Having failed to do so, the sum claimed in Interim Application 23 became the "notified sum" due for the purposes of section 111 of the HGCRA, and BHL was entitled to enforce the decision through summary judgment. ESG's submission that the court should order a stay of execution pending determination of the "true value" of Interim Application 23, by adjudication or litigation, was contrary to the general rule that adjudicators' decisions are intended to be enforced summarily and the successful party should not, as a rule, be kept out of its money.

ESG resisted enforcement on two other grounds:

a) ESG had a contractual entitlement to set off or make deductions against the adjudicator's award; and
b) BHL had deprived ESG of its contractual right to elect to have the true value of the application payment in dispute determined at the same time by the same adjudicator as the notified sum dispute.

Under the Contract, clause 30 provided that:

> *"30.2 The Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator's award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor under the Sub-Subcontract or otherwise.*
>
> *30.3 If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another."*

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The problem for ESG was that these sub-clauses were contrary to the provisions of the HGCRA and the Scheme. They were seen as attempts to get round the key principles underlying the adjudication process.

The Scheme includes the following provisions:

> *"21 In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.*
>
> *…*
>
> *23(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."*

In *Ferson Contractors Ltd v Levolux AT Ltd* [2003] EWCA Civ 11, the CA considered whether, pending final resolution by arbitration or litigation, an adjudicator's decision should be enforced in derogation of contractual rights with which it may conflict. Mantell LJ said that:

> *"The intended purpose of s.108 is plain … The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down."*

The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.

ESG also said that the adjudicator was wrong to refuse to allow joinder of the "true value" of Interim Application 23 with the "notified sum" issue in the second adjudication, in accordance with clause 30.3 of the Contract. Again, the Judge disagreed. Here, the clause, which gave ESG an unilateral right to refer more than one dispute to the adjudicator, was inconsistent with paragraphs 8 and 20 of the Scheme, which require the consent of all parties to a multiple dispute adjudication.

The court decided that both clauses were contrary to the principles underlying statutory adjudication. The decision was accordingly enforced.

## 5. Liverpool City Council -v- Vital Infrastructure Asset Management (VIAM) Ltd (In Administration) [2022] EWHC 1235 (TCC) (24 May 2022)

In this case, the Technology and Construction Court provided declaratory relief rendering an adjudicator's decision unenforceable because it found these rules of 'natural justice' had been breached.

### The Proceedings

Liverpool City Council ("**LCC**") was the respondent to an adjudication brought by Vital Infrastructure Asset Management (VIAM) Ltd (in Administration) ("**Vital**"). In the adjudication Vital sought additional payment pursuant to the terms of a contract. The appointed adjudicator (the **"Adjudicator"),** despite LCC's jurisdictional objections, issued a decision in Vital's favour. In the event, Vital had entered administration the previous day. LCC did not make payment and brought Part 8 proceedings seeking declaratory relief, asserting the Adjudicator had no jurisdiction.

### Grounds for Declaratory Relief

LCC contended that the adjudicator's decision was unenforceable as:

- The dispute arose under two separate contracts (the "**Two Contracts Issue**");
- The Adjudicator was not validly appointed (the "**Service Issue**");
- The Decision was a nullity; and/or
- There had been a breach of natural justice

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The Court found that the Adjudicator's Decision was not unenforceable because of the "Two Contracts Issue" and/or because of the "Service Issue" and/or because the Decision was a nullity. However, the Court found that the Adjudicator had breached the rules of natural justice and therefore the Adjudicator's Decision was not enforced by the Court.

**Breach of Natural Justice**

LCC contended the Adjudicator had breached natural justice by finding that LCC had agreed that there was an error (in the FA rates) which should be amended in circumstances where, on LCC's case, not only was this not true, but something which Vital had not contended was an issue for the Adjudicator's determination.

The relevant principles are well established, "*The common law rules of natural justice or procedural fairness are twofold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal"* (*AMEC v Whitefriars* [2004]).

For there to be a breach of the rules of natural justice, the breach must be more than peripheral, it must be material. It will be material if the adjudicator failed to bring to the parties' attention a point/issue that they ought to have been given an opportunity to comment on, provided the omission is either decisive or of considerable importance to the outcome of the dispute, and is not irrelevant (*Cantillon Ltd v Urvasco Ltd* [2008]).

In this case, the Schedule of Rates ("**SoR**") in the FA included 4 rates. The first three were stated to be £X per metre per day; whereas the fourth was simply £2 per metre. In the Court's view, the fourth rate – which would have meant a contractor would receive the same for maintaining the same length of fence for a year as for a day – was an obvious mistake, but the Adjudicator had not decided it on this basis, neither had he engaged with the points raised by LCC in its Response. LCC had not admitted that there was an error in the SoR. Neither had Vital advanced this case.

The Adjudicator had sought to overcome this problem by determining LCC had, in the compensation event, made an implicit, if not an explicit, concession that the rate in the SoR, expressed as a rate per metre rather than a rate per metre per day, was a mistake. Again, this was not advanced by Vital and the Adjudicator did not give notice to LCC that he was considering it or allow LCC to make submissions on the point before making his decision. He did not engage with LCC's Response, where it addressed in detail the analysis of Vital's case.

The Court held these were fundamental departures from the obligation to follow a fair procedure. Although LCC failed on the first three grounds of resisting enforcement, as noted above, it was therefore entitled to a declaration that the Decision was unenforceable as a matter of law, as the same had been reached in a procedurally unjust manner.

This case serves as an important reminder of an adjudicator's obligation to follow fair procedure and the importance of their allowing the parties the opportunity to make submissions on points material to their decision.

## 6. Advance JV & Ors -v- Enisca Ltd [2022] EWHC 1152 (8 June 2022)

In this case, the Technology and Construction Court considered the validity and interpretation of a pay less notice which failed to refer to a particular payment application.

**Background**

A Joint Venture between Balfour Beatty Group Ltd and MWH Treatment Ltd ("**Advance**") was to design and construct a new water treatment works and hydro-electric power generation facility in Cumbria (the "**Project**"). By a sub-contract dated 21 October 2019 and based on the NEC3 Engineering and Construction Subcontract April 2013 using Option A, with bespoke amendments (the "**Sub-Contract**"), Advance engaged Enisca Ltd ("**Enisca**") to design, supply and install the LV electrical installation for the Project.

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**The Dispute**

Pursuant to the terms of the Sub-Contract:

- Enisca was entitled to make a payment application on or before each assessment date;
- Advance was to assess the amount due for payment at each assessment date (the payment due date);
- Advance was to certify a payment by issuing a payment certificate within 3 weeks of an assessment date;
- The final date for payment was 21 days after the assessment date; and
- A party intending to pay less than the notified sum was to notify the other party not later than 7 before the final date for payment.

Enisca's interim application 24 ("**App 24**") sought payment of a net sum of c£2.7m. Advance did not issue any payment certificate or any other response in respect of App 24. In response to Enisca's subsequent interim application 25 ("**App 25**"), Advance issued a payment certificate which enclosed a pay less notice, both of which specifically referred to App 25. Despite this, Advance argued that the pay less notice was a valid response to both App 24 and App 25, having been served timeously in each case and that, properly construed, the pay less notice would have indicated to a reasonable recipient that Advance did not intend to make any further payment in respect of either application.

Enisca argued that Advance's pay less notice responded only to App 25 and that no valid payment certificate or pay less notice had been issued for App 24.

By a decision dated 8 February 2022, an adjudicator agreed that Advance had failed to issue a valid pay less notice against App 24 and, consequently, Advance was to pay to Enisca the sum applied for of c £2.7m (the "**Decision**"). Before the Decision was issued, however, Advance had commenced Part 8 proceedings in the Technology and Construction Court (TCC) seeking declaratory relief in respect of the validity of the pay less notice.

**The Statutory Provisions**

The interim payment provisions of the Sub-Contract reflected the requirements of sections 110 – 111 of the Housing Grants, Construction and Regeneration Act 1996, as amended (the "**Construction Act**").
It is well established that these provisions require the paying party to pay the *"notified sum"* by the final date for payment, irrespective of whether that sum represents the true value of the work in question. The TCC noted the provisions have *"severe, if not draconian, consequences for a party who fails to serve a pay less notice."*

**The Parties' Positions**

Enisca submitted that it was a *"backbone"* of the statutory provisions that payment cycles exist which create due dates and final payment dates, and that payment notices and pay less notices must be referable to the particular notice and/or application identifying the notified sum.

For its part, Advance contended there was no requirement in the Construction Act or elsewhere for pay less notices to be referable to a particular payment cycle. Rather, the Construction Act was only concerned with time limits for pay less notices. In addition, Advance argued that there was nothing in the Construction Act or the Sub-Contract which precluded a pay less notice from responding to two separate payment applications.

**The Law – Interpretation of Notices**

As to the construction of payment notices, the TCC noted:

- the question must be viewed objectively – *"the issue is how a reasonable recipient would have understood the notices"*;
- the purpose of a notice is relevant to its construction and validity;
- Courts will take a common sense, practical view of the contents of a notice and will not adopt an unnecessarily restrictive interpretation;
- To be valid, any payment notice must comply with statutory requirements in substance and form;

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- Was the document intended as a notice and is it *"free from ambiguity"*; and
- payment notices must make plain what they are.

**The TCC's Decision**

The TCC agreed with Enisca that it was plain from the Construction Act that payment notices must be referable to individual payment cycles, and rejected Advance's contention that the Construction Act is concerned only with time limits in respect of pay less notices. The reference to "notified sum" in s111(3) of the Construction Act roots *"the giving of a pay less notice firmly in the payment cycle represented by the payment notice which will identify the notified sum."* Any pay less notice must therefore be referable to the payment notice in which the notified sum is identified.

The TCC also rejected Advance's argument that there was nothing in the Construction Act or the Sub-Contract which precluded a pay less notice from responding to two payment applications. The TCC described this as a *"novel proposition for which no support can be found"* in the Construction Act and the Sub-Contract.

Whilst the pay less notice was likely a valid pay less notice in respect of App 25, the TCC rejected Advance's position that it was also referable, in form and intent, to App 24. Viewed objectively:

- the express reference to App 25 pointed clearly to an intention that the pay less notice related to App 25;
- there was nothing expressly on the face of the pay less notice, nor the payment certificate to which it was attached, which pointed to it being a response to App 24;
- a reasonable recipient in Enisca's shoes would not understand the pay less notice to be intended as a response to App 24;
- even if the pay less notice had been intended to respond to App 24, it was neither clear nor unambiguous in that Intention; and
- there was no justification in this case for viewing the pay less notice *"on a broader level"* (e.g. by reference to the *"overall message and purpose"* of the pay less notice) as the pay less notice clearly did not relate to App 24.

In the circumstances, the TCC dismissed Advance's Part 8 claim.

**Analysis**

This case makes clear that pay less notices must be referable to a particular payment notice and/or payment application and must relate to a particular payment cycle. A lack of specificity risks profound consequences.

## 7. Essential Living (Greenwich) Ltd v Elements (Europe) Ltd [2022] EWHC 1400 (TCC) (8 June 2022)

This case was a Part 8 claim for declarations relating to the effect of a previous adjudication decision on the parties' ongoing final account dispute. This is an important case which provides helpful clarification on the binding effect of adjudication decisions on interim accounts for the purpose of subsequent final account assessments.

The dispute arose from a mixed-use development in Southwest London known as Greenwich Creekside, and Essential Living engaged the Defendant (Elements) in December 2016 to carry out the design and construction of the modular units for the project under an amended JCT Construction Management Trade Contract 2011.

Prior to practical completion in May 2019, the parties went through a lengthy adjudication on the last interim valuation account. In his Decision, the Adjudicator determined (among other things) Elements' variation and extension of time claims and also awarded liquidated damages for delay.

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In the final accounting process conducted by the Construction Manager, Elements sought to reopen and reargue the various variations and delay matters which were determined by the Adjudication Decision. In anticipation of a potential further adjudication on such matters, Essential Living sought Part 8 declarations from the Court to the effect that Elements remained bound by the prior Adjudication Decision.

O'Farrell J held, in summary, that:

> Where the Adjudication Decision determined discrete issues of entitlement or valuation (such as on variations), those determinations are binding on Elements for the purpose of ascertaining the Final Trade Contract Sum ('FTCS'), unless and until those matters are finally resolved by litigation or settlement, or unless Elements advances claims on a fresh basis such that they amount to new causes of action. It is not right for Elements to say that those determinations are irrelevant simply because they were made in the context of an interim valuation.
>
> However, the Construction Manager (and any subsequent adjudicator) is entitled to review previous decisions / assessments on extensions of time post-completion and reach a different assessment, by virtue of the express power of review in clause 2.27.5 of the JCT Contract. The decision in *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd* [2017] Bus LR 2103 is therefore distinguishable.

In summary, the TCC found that: (1) the parties were bound by the Adjudicator's Decision until final determination. They could not seek a further decision on a dispute/difference already subject to the Adjudicator's Decision; (2) The Adjudicator's Decision was not binding for the purpose of the CM's final contractual determination of the Completion Period and associated matters; and (3) The Adjudicator's Decision was not binding for the purposes of determining the FTCS but was binding in respect of variations assessed by the adjudicator (unless and until the Decision was overturned, modified or altered or a fresh basis of claim permits the variation claim to be opened up and reviewed under the Contract). Finally, (4) it was a matter of fact and degree as to whether the Decision was binding on other discrete issues and as to whether matters EEL might seek to refer to subsequent adjudication were indeed the same, or substantially the same as those previously decided.

**Analysis**
The precise scope and extent to which an earlier adjudicator's decision will be binding upon ongoing contractual processes will invariably be a matter of fact and degree, and will entail close consideration of the contractual terms applicable to each procedure. One cannot assume that a successful interim adjudication decision will translate readily to the final accounting process under the contract.

## 8. FTH Limited v Varis Developments Limited [2022] EWHC 1385 (TCC) (8 June 2022)

The ability of a party in a company voluntary arrangement ("CVA") to enforce an adjudicator's decision is a question to be determined on a case-by-case basis. This case provides a useful reminder of the court's approach to deciding such issues.

**Background**

In August 2018, the Claimant ("FTH") entered into a design and build contract (the "Contract") with the Defendant ("Varis").

On 22 October 2019, Varis issued a pay less notice in respect of FTH's relevant application for payment. This disclosed that the sum of £317k was otherwise due for payment but had been withheld because of FTH's alleged failure to provide collateral warranties.

On 25 October 2019, Varis purported to terminate the Contract; and on 29 November 2019, it issued a further pay less notice showing a sum otherwise due of £90k, but subject to numerous alleged withholding items.

**First Adjudication**

On 20 January 2020, the first adjudicator upheld the validity of the pay less notice of 22 October 2019.

**Second Adjudication**

On 14 February 2020, the second adjudicator concluded that Varis' purported termination was invalid and that they had repudiated the Contract.

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**CVA and Third Adjudication**

On 13 May 2020, FTH entered a CVA. The Company's liabilities reported in the statement of affairs did not include any provision for a cross-claim from Varis.

Following the third adjudication on 11 September 2020, in which the adjudicator awarded FTH £670k plus VAT, Varis intimated a cross-claim against FTH (initially valued at £1.3million and later rising to £1.7m) in respect of its losses arising from its alleged entitlement to terminate.

**Court case**
The case subsequently brought before the court concerned FTH's attempt to enforce the second and third adjudication awards by way of summary judgment. Varis did not dispute that the Awards were valid, but sought to resist the grant of summary judgment, alternatively sought a stay of execution on the basis of FTH's financial position and its own alleged cross-claims, which remained subject to final determination.

**Held**
The Court refused summary judgment in favour of FTH on the basis that there was a "real risk" that summary enforcement would deprive Varis of security for its cross-claims, alternatively that there was, on this same basis, a "compelling reason" not to give summary judgment. The Court also found that had it been necessary for it to do so, it would in any event have granted a stay of execution in favour of Varis.

**Application for Summary Judgment**
Where a company in insolvent liquidation has obtained an adjudication decision in its favour, that decision will not generally be enforced by way of summary judgment (Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000]).

In contrast, different considerations may apply where a company subject to a CVA has obtained such a decision. In the context of a CVA, a court "should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties" (Bresco v Lonsdale [108] (Coulson LJ)).

Exercising its discretion under CPR part 24, the Court nevertheless declined to grant summary enforcement in this instance and drew on the following factors in support of its decision:-

- The CVA, in contrast to that in Bresco, was not designed to allow FTH "to trade its way out of trouble".
- No evidence was adduced to suggest FTH was trading profitably.
- Varis's cross-claim had not been considered by the CVA Supervisors.
- The CVA was for 12 months only and had not been validly extended.

**Application for a Stay**
Refusing summary judgment meant there was no need for the Court to consider the Wimbledon v Vago principles for granting a stay. Despite this, it briefly considered the same, finding that it would in any event have exercised its discretion under CPR 83.7(4) in favour of Varis. Reasons for this included FTH's financial position, which had deteriorated to such an extent that it was probable it would be unable to pay the judgment sum; and the Court's finding that this likely inability was not caused by Varis's failure to honour the third adjudicator's decision.

**Analysis**
This case provides a useful reminder of the several matters a court may take into account should a company in CVA seek summary judgment to enforce an adjudication decision in its favour. While there is no outright bar to enforcement, such cases will turn on their own facts, and will inevitably involve close scrutiny of the nature and purpose of the CVA, the financial standing of the company, and the legitimate interests of the Respondent party.

## 9. Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP [2022] EWCA Civ. 823 (21 June 2022)

The Court of Appeal in *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2022] has clarified that subject to their wording, collateral warranties may constitute construction contracts within the meaning of s104(1) of the Housing Grants, Construction and Regeneration Act 1996 (the "**Act**") and so permit adjudication. This may be so even where the warranty has been provided retrospectively.

**Background to the Appeal**

In June 2015, Sapphire Building Services Limited ("**Sapphire**") engaged Simply Construct (UK) LLP ("**Simply Construct**") pursuant to an amended JCT Design and Build 2011 contract (the "**Contract**") to construct a care home (the "**Property**").

Practical completion was achieved in October 2016. A long lease was granted to Abbey Healthcare (Mill Hill) Ltd ("**Abbey**") in August 2017. Fire-safety defects (the "**Defects**") were then discovered at the Property by Toppan Holdings Limited ("**Toppan**") who by that time was the freeholder and "substitute employer" under the Contract following a novation from Sapphire in June 2017.

Simply Construct was notified of the Defects but failed to rectify them. A third party was therefore engaged to carry out the remedial works, which were eventually completed in February 2020.

While the Contract contained provisions requiring Simply Construct to provide a collateral warranty in favour of Abbey, this was not done until 23 October 2020 (the "**Warranty**"), by which time the works, including the third party remedial works, had long since been completed.

Toppan and Abbey each made claims against Simply Construct for the cost of rectifying the Defects. Their respective claims were rejected and each commenced (separate) adjudication proceedings against Simply Construct in December 2020. Both adjudications were successful but Simply Construct failed to comply with either decision.

On enforcement of the Abbey decision (the "**Decision**"), the court held that the Warranty was not a 'construction contract' for the purposes of the Act, meaning there was no contractual right to adjudicate by s108(5) of the Act and the implied terms of the Scheme. The adjudicator thus lacked jurisdiction in the Abbey adjudication and the Decision was unenforceable.

This case concerns Abbey's appeal against the judgment handed down at first instance.

**Held**

The Appeal was allowed by the Court of Appeal. The Warranty, whilst retrospective in effect, was a construction contract under the Act. The Court confirmed that depending on its precise wording, a warranty is capable of being a construction contract under the Act.

Applying *Parkwood Leisure v Laing O'Rourke* [2013] B.L.R. 589 (a case where it was decided that a warranty relating to past and future construction activities was a construction contract), the Court explained that consideration must be given to whether a warranty regulates a past and/or future state of affairs. A warranty which provides a simple fixed promise or guarantee relating to a past state of affairs may not be a contract for the "carrying out of construction operations". Rather, it will be more akin to a product guarantee (which had indeed been the line of argument adopted by the court at first instance). A warranty that regulates ongoing construction operations, however, is more likely to fall within the meaning of the Act.

The Court found s104(1) of the Act did not contain any provisions to suggest a 'construction contract' must contain detailed remuneration obligations on the part of the beneficiary. Rather, a nominal payment provision in a warranty would satisfy s109 of the Act. This further supported the Court's broad construction.

**Analysis**

This important case adopts a more generous interpretation of the Act than previously canvassed and clarifies that depending on their terms, collateral warranties may qualify as construction contracts notwithstanding they might only have been provided after completion of the works in question. This will be welcome news for beneficiaries, who may find themselves able to use adjudication under the Act as a quicker means of resolving disputes. Not so much for contractors, consultants and their insurers, who will need to be astute if they are to limit their potential exposure.

## 10. Martlet Homes Ltd. v Mulalley & Co Ltd. [2022] EWHC 1813 (TCC) (14 July 2022)

In the case of *Martlet Homes Limited v Mulalley & Co Limited**[1]***, the Court awarded a housing association substantial damages in a claim relating to defective cladding.

The case will be of interest to housing associations, local authorities and other landlords who are still assessing their potential claims in a post-Grenfell landscape and gives useful guidance to the approach the Court will take. In particular, the Court looked at the thorny question as to whether a claimant can recover for full replacement, or a more limited repair scheme.

**Background**

Martlet Homes Limited (Martlet) owns five tower blocks in Gosport which were refurbished by Mulalley & Co Limited (Mulalley) in the mid-2000s. That work included the installation of external wall insulation rendered cladding.

Post-Grenfell, Martlet discovered fire safety defects in all five blocks, including:

- inadequately installed fire barriers at each floor (particularly poor/inadequate fixing and gapping)
- inadequately fixed insulation boards, and
- A combustible external wall insulation (EWI) rendered cladding system.

After extensive investigations and expert advice, Martlet eventually decided to remove the entire EWI cladding system and replace it with a new non-combustible cladding system using stone wall insulation panels instead of EPS insulation panels.

Martlet looked to recover the costs of this replacement scheme from Mulalley. The claim was close to £8m and included:

- the costs of investigating and remedying (by removal and replacement), combustible external wall installation rendered cladding (originally installed by Mulalley between 2005 and 2008), and
- providing a waking watch as a fire safety precaution until the EWI cladding had been removed.

Mulalley argued that Martlet should only be able to recover the cost of repairing the installation issues, which did not include replacing the EWI cladding system.

**The Decision**

Martlet succeeded in recovering the full replacement costs and costs of the waking watch, but in order to allow it to do so, the judge had to take what he called a more ‘nuanced approach’. How the judge reached his conclusions will be instructive to all those involved in these type of fire safety cases.

Martlet’s original claim was based on an allegation that the fire barriers and EPS insulation were not properly installed (i.e. they were not fixed, there were gaps and the wrong type of dowels had been used). This was what it called its ‘primary case’. The court found that installation was defective, in breach of the Building Regulations, the guidance in ADB 2002 and the guidance in BRE135 (2003). However, if Mulalley’s only breaches were in respect of installation, then it would be limited in what it could recover, because installation issues could be remedied by more limited repair work (installing adequate fire barriers and fixing them properly), and so its recovery would be limited to these repair work costs (even when it had actually implemented the full replacement scheme).

Therefore, Martlet relied on what it called a 'secondary' or 'fall-back' claim, which is that Mulalley had breached the contractual specification in its choice of EWI for the external wall system. Although this may seem the more obvious case to make, the EWI rendered cladding had been installed in the mid-2000’s, well before the Grenfell Tower fire; it was therefore far from clear whether, at the time of construction, such systems were actually prohibited (or even advised against). For example, the applicable version of Approved Document B was the 2002 version; it was only the 2006 version of ADB that advised that it was no longer possible to use combustible insulation panels, unless the EWI system of which they form part had passed a BS8414-1 full scale fire test at the time.

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Notwithstanding this, the judge noted that under the building contract, Mulalley agreed to "*conform with the requirements, directions, recommendations and advice contained in the latest addition of the following publications..(f) Building Research Establishment reports, papers, defects action sheets and the like*".

The relevant BRE report was BRE135 (1988), which was then replaced by BRE135 (2003) at the time the contract was entered into. BRE135 (2003) provides that the performance standard contained in it "*could be adopted where the implications of rapid fire spread by way of the external cladding system are considered to be unacceptable, such as tall buildings (above 18m)".* The performance standards are set out in Annex A of BRE135 (2003) and were to be assessed through tests to be undertaken in accordance with BS8414-1.

Accordingly, BRE135 (2003) contained a recommendation and/or advice that the default position for an EWI should be that it should **not** be specified for use in these buildings, unless it could be shown to meet the Annex A performance standard in accordance with the test method set by BS8414-1.
Although the wording of BRE 135 (2003) is advisory and not mandatory, the judge noted that the advice contained a "*clear recommendation*" and a "*strong exhortation*" and that any reasonable contractor would comply with that advice. The Court concluded not only that Mulalley had failed to follow the advice, but that failure to comply with BRE 135 recommendations/advice also amounted to a failure to comply with functional requirement B4(1) of Schedule 1 of the Building Regulations. This meant that Mulalley was also in breach of its contractual requirement to comply with statutory requirements.

The judge was clearly eager to find that the full replacement costs of the EWI rendered cladding system was recoverable by Martlet, as is evidenced by the emphasis he put on the fact that the recommendations and advice contained in BRE 135 (2003) amounted to a strong exhortation.

There are also the following important points to note from the judgment:

- Mulalley tried to argue that similar systems had passed BS8414-1 tests, but the judge was not impressed with this argument, and essentially said that only a test of that particular system would 'be sufficient'
- The fact that the EWI system had a BBA[2] Certificate did not mean that the system is compliant with Building Regulations
- Mulalley's experts argued that the BRE 135 (2003) did not require a B8414-1 test as long as the system that contained the EPS had BRE 135 complaint fire-barriers. The judge said that this was wrong and '*too simplistic'*.

**Remediation/Repair or Replacement**

As is common in these types of cases, Mulalley also tried to argue that the decision to replace the EWI rendered cladding system (rather than repair the defects) was due to the '*changed fire-safety landscape'* post-Grenfell, and not Mulalley's specific breaches. Mulalley also made some allegations that Martlet effectively 'retro-engineered' the need to replace the cladding rather than carrying out the limited repair works.

Mulalley's argument in this respect failed. The judge emphasised that, as long as the defendant's breaches are an *effective cause* of the loss, then that is sufficient; they do not have to be the only cause, and it does not matter that there might be other 'effective causes' (for example, the financial and political pressures following Grenfell).

The judge also made the following comments in relation to recovery for remedial works:

- The Court will be slow to criticise a claimant who has undertaken remedial works due to the fact that another party is in breach. This is particularly so when the claimant has to make an urgent decision, or make a decision with incomplete information, as was the case here.

- However, a claimant's decision to undertake the remedial work must be reasonable. The burden is on the claimant to show that the remedial works it embarks upon are reasonable.

- 'Reasonable' does not necessarily mean 'cheapest'. A key pointer to reasonableness is whether the claimant followed expert advice in deciding upon a particular remedial solution - although this is not conclusive and will not apply if the advice is negligent.

- In this case the court had regard to the fact that Martlet was doing "*the right thing as regards residents' safety*" and "*that it was obvious from an early stage that the safest thing would be to remove the defective fire barriers and to remove the combustible EPS insulation from the towers*".

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- The claimant should consider any remedial proposals put forward by the defendant but is not bound to accept them, particularly if they do not fully address all the defects. In this case, Mulalley proposed an injection of adhesive into the firebreak cavities. Martlet considered this but rejected it on the basis that it was not sufficient, and the court agreed with this.

- A claimant should make sure that it keeps a proper paper trail of its decision-making processes, particularly in relation to remedial solutions- this will help evidence the 'reasonableness' of its decision making. It is important to ensure, however, that there is no suggestion of 'retro-engineering' a decision.

- If Mulalley had produced a BS 8414-1 test that showed that the system was compliant, then Martlet would have had to take this into account when making its decision whether to replace, and if it had carried on with replacement regardless, then it would probably not be able to recover the replacement costs.

- Equally, if Mulalley had suggested a BS 8414-1 before Martlet had made its decision, then Martlet would be expected to defer its decision until the outcome of the test was known.

**Conclusion**

There has been a prevailing concern as to the extent to which what is now widely accepted as a loosening of the requirements around Building Regulations in a pre-Grenfell era may have on claims for cladding and for other fire defects.

The case is helpful in showing that the Courts can find a creative way through this by emphasising the need for compliance with issued guidance.

The decision is helpful to other parties seeking to recover damages for remedying such defects, particularly the emphasis that a reasonable solution does not have to be the cheapest. There will be a number of factors for parties carrying out such remedial works to take into account. Reasonable steps taken to mitigate risks, such as waking watches, will also in principle be recoverable.

## 11. Buckingham Group Contracting Ltd -v- Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC) (15 July 2022)

In this case, the TCC looked at the construction of liquidated damages provisions through the lenses of contractual uncertainty and limitation of liability.

**Background**
Buckingham Group Contracting Ltd ("BGC") was engaged by Peel to design and construct a production building and certain external works at a new plant for manufacturing corrugated cardboard, pursuant to a JCT Design and Build Contract 2016 with bespoke amendments (the "Contract"). The Works were significantly delayed and, on 14 November 2018, Peel issued a pay less notice notifying its intention to deduct from sums otherwise due to BGC an amount of c£1.9m by way of capped liquidated damages pursuant to clause 2.29A.1.2 of the Contract.

Clause 2.29A was a bespoke clause concerning liquidated damages for failure to achieve "Milestone Dates" and Schedule 10, on which the proceedings turned, provided that "if there is any conflict or inconsistency between the wording of [Schedule 10] and clause 2.29 the wording of [Schedule 10] shall take precedence.".

BGC contended that the liquidated damages provisions were void and unenforceable and that any remedy in respect of general damages was capped at c£1.9m. BGC sought declarations to this effect in these Part 8 proceedings.

**Void for Uncertainty and/or Unenforceable?**
The TCC reiterated the reluctance of the courts to hold provisions void for uncertainty and emphasised that judges can "find" interpretations giving effect to party intention. A provision will nevertheless be void for uncertainty if a court cannot conclude as to what is in the parties' minds or where it is "not safe" to prefer one possible meaning to other equally possible meanings.

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BGC contended that the liquidated damages provisions in this case were so defectively drafted and/or incomplete that they were void for uncertainty and/or unenforceable. This was due to alleged errors regarding completion dates, the rates of liquidated damages, the Contract Sum, and partial possession.

**Alleged Error 1: Completion**
The completion date in Schedule 10 contradicted a different date stated in the Contract Particulars. BGC contended that a liquidated damages clause cannot be considered clear and certain when the Contract contains two competing dates for completion, with no other terms to assist in resolving the question of which date applied. Whilst there was an inconsistency, the TCC accepted it was possible to find an interpretation which gave clear effect to party intention. The different dates for completion served different functions and, whilst BGC was obligated to complete works by the earlier completion date, no liquidated damages attached to such breach i.e. the date from which liquidated damages ran for non-completion was the later completion date identified in Schedule 10 and, from the TCC's perspective, the parties clearly intended for this bespoke regime to apply.

**Alleged Error 2: Two Rates of Liquidated Damages**
BGC submitted that Schedule 10 contained two different sets of rates for liquidated damages and, as such, it was impossible to discern which the parties intended should apply. As Schedule 10 also referred in multiple places to a "LADs Proposal", that was indicative that the parties had failed to reach agreement on any rates in Schedule 10. For its part, Peel submitted that it was possible to identify the parties' actual agreement in the right-hand set of columns in a proposal document. The TCC accepted Peel's submission, holding that it would be wrong to interpret "Proposal" literally and it was preferable to consider the wider context i.e. the parties had acted informally by (likely) copying a table entitled "Proposal" and proceeded to execute the agreement as a deed, thereby incorporating that schedule into the Contract. It was also acceptable to assume that the right-hand set of columns came later in time than the left-hand set of columns, and that these later rates applied.

**Alleged Error 3: Contract Sum**
The Contract Sum was c.£26m whilst the Contract Sum Analysis in Schedule 10 was c.£25m. BGC submitted that it was unclear whether liquidated damages would be based on the percentage rates in the daily column applied to the Contract Sum or based on lump sums contained in the weekly rate column, calculated upon a different Contract Sum Analysis. The TCC accepted Peel's submission that there was no error to correct and that the parties had simply agreed the weekly lump sums contained in the table of Schedule 10. If the parties had intended to change lump sums to reflect a new Contract Sum Analysis, they would have done so. In addition, if their intention was to set liquidated damages at a daily rate, there would have been no need to calculate a weekly rate. It was clear that a weekly rate would apply, not a daily one.

**Alleged Error 4: Partial Possession**
BGC submitted that Schedule 10 failed to provide a workable scheme in respect of partial possession. It submitted that the parties had intended to allow for partial possession per clauses 2.30 to 2.34 and the "Sectional Milestones" in Schedule 10 were intended to equate to "Sections". However, contrary to clause 2.34, the parties failed to provide any means of calculating the value that a Relevant Part bore to the relevant Section Sum in the Contract Particulars. However, the TCC accepted Peel's submission that clauses 2.30 to 2.34 did not refer to Milestone Dates; the Contract did not provide for completion by Sections and this was stated at various points in the Contract; and no Sections were identified in the Fifth Recital which was key for the application of "Sections". The reference to "Sectional Milestones" in Schedule 10 did not equate to completion by Sections; conventionally, the achievement of a "Milestone" was a "step along the way which involves no transfer of possession of the works comprised within that Milestone in the way that completion of a defined Section would do."

**Conclusion on Uncertainty**
None of the arguments advanced by BGC in respect of liquidated damages succeeded. The court decided that the provisions were certain and enforceable.

**Cap on General Damages?**
BGC submitted that any remedy in respect of general damages for delay was capped in the amount of c.£1.9m, in reliance on Eco World-Ballymore Embassy Gardens Company Ltd -v- Dobler UK Ltd [2021] EWHC 2207 (TCC) which concerned whether a liquidated damages provision, if not void or penal, would operate as a general limitation of liability clause. Peel argued that it was impossible to separate the cap provision from the liquidated damages regime; the cap was on "Maximum LADs" and this was its literal and only meaning. Both liquidated damages and the cap were calculations based upon a percentage

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of the Contract Sum; in contrast, general damages would never be calculated on this basis. The TCC accepted that the liability cap applied to liquidated damages, and not anything else. There was nothing in Clause 2.29A to suggest that liability for general damages would be capped, and the rates and cap clearly formed part of a single scheme. Whilst Eco World shows that it is possible, in principle, for a clause to operate as a general limitation of liability even though it is literally expressed as applicable only to liquidated damages, the fundamental question is whether the language of the provision is broad enough to encompass any alternative liability that could arise in respect of general damages. For those reasons, the TCC in this case held that there was no cap on liability for general damages for delay.

**Analysis**
This case demonstrates the judiciary's reluctance to interfere with parties' intentions and to hold that contractual clauses are void for uncertainty and unenforceable. In addition, the case acts as a reminder for parties to draft very clear liquidated damages provisions to avoid any potential pitfalls regarding uncertainty and/or potential caps on alternative areas of liability.

## 12. Barkby Real Estate Developments Limited v Cornerstone Telecommunications Infrastructure Limited [2022] [EWHC] 1892 (TCC) (21 July 2022)

In this case, the Technology and Construction Court (TCC) held a contractor liable to its employer for failing to complete its works within a "reasonable time" pursuant to section 14 of the Supply of Goods and Services Act 1982.

**Background**

The Claimant ("BREDL") engaged the Defendant ("Cornerstone") to assist with the removal, replacement and relocation of a mobile telephone mast at a development at Bexhill Road, Hastings (the "Development"). No formal written contract was entered into between the parties.
Cornerstone finalised its original foundation design for the mast relocation at end of March 2019 but in the event a redesign was required as a result of inadequate ground conditions discovered only after works had commenced on site. The ground conditions issue resulted in a delay to completion of Cornerstone's Works of some five months. Cornerstone eventually completed its works on 7 August 2020 and practical completion of the Development took place on the same date.
Crucially, BREDL claimed that but for Cornerstone's delay in completing its Works, the completed Development would have been handed over to its purchaser, Hastings Borough Council, not later than 30 June 2020. BREDL sought recovery of finance costs and other losses said to have resulted from the delay in handover of the Development.

**Held**
Cornerstone was responsible for the five-month delay to completion of its Works and this in turn had impacted critically upon the date for handover of the Development. BREDL was awarded most of its additional project finance costs and all of its additional management costs, which were not too remote.

**What were the terms of Cornerstone's contract with BREDL?**

Although there was no formal written contract between the parties, the Court nevertheless found that a binding agreement existed and had been formed on 5 September 2019 when Cornerstone acknowledged receipt of BREDL's payment following its acceptance of a quote.
In the absence of any express terms as to the time for performance, the Court also found that there was to be implied into the contract, by operation of section 14 of the Supply of Goods and Services Act 1982, a term that the "*supplier will carry out the service within a reasonable time*".

**What was a "reasonable time" for completion of Cornerstone's works?**
The Court analysed events that occurred during the build phase of the works and concluded that but for the five-month delay which was attributable to unsatisfactory ground conditions, Cornerstone would have completed its work by the end of March 2020 as initially envisaged, rather than on 7 August 2020.

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As to responsibility for the ground conditions issue, the Court held that Cornerstone's original design of the foundations was inadequate. Having heard expert opinion evidence, it agreed with BREDL that a competent designer would have arranged for a geotechnical survey to be carried out *before* finalising its design. Cornerstone did not do this and, as a result, it had to re-design the foundations which delayed the works.
In short, the Court was satisfied Cornerstone had failed to complete its Works within a reasonable time.

**Was BREDL entitled to damages, and, if so, in what amount and are these too remove?**

The TCC was also satisfied that Cornerstone's delay in completing its Works meant that the sale of the Development was in turn delayed. Cornerstone had been made aware by BREDL that completion of its works was needed to enable BREDL to achieve its objectives and that the "build contract" (i.e. the main Development) programme was only scheduled to last 8 months. The Court also wasted little time dismissing Cornerstone's contention that the main works to the Development had themselves been incomplete such that any delay attributable to Cornerstone's Works had not in fact occasioned BREDL any loss.

BREDL claimed the delayed sale of the Development meant it was unable to redeem a loan within the timeframe envisaged which had resulted in it incurring additional fees and interest. BREDL also claimed to have incurred additional project management costs.

The Court found that BREDL was entitled to recover most of its additional financing costs and all of its additional management costs. These losses would not have been incurred had Cornerstone completed its works on time. The Court rejected Cornerstone's submission that these losses were too remote, holding that knowledge on the part of Cornerstone of the precise details of BREDL's financial arrangements was not necessary. It was enough that there was a serious possibility that BREDL's ability to pay off its financing was tied to practical completion and sale of the project.

**Analysis**

This case serves as a reminder to contractors that in the absence of a formal contract, they are still likely to be under an implied obligation to complete their works within a reasonable time. The case also illustrates the importance of progressing works expeditiously, so as to meet the employer's stated objectives. In this case the Court was unable to reconcile the contractor's expected total time on site of 11 working days with the five-month delay to completion of its Works. Even once the problem with inadequate ground conditions had been identified, Cornerstone had not acted with reasonable expedition to resolve the issue, which delay ultimately proved to be its undoing.

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**Best Regards**
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