

## ADJUDICATION BENEFITS EXTENDED BY COURT OF APPEAL IN IMPORTANT DECISION

21 JUNE 2022 • ARTICLE



**In an important decision, the UK Court of Appeal has today overturned a High Court judgment that restricted the use of a quicker and cheaper means of resolving construction disputes.**

The decision in *Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP*, in which Barry Hembling and Simon Jennings plus Sam Goodwill all from WFW's construction team, acted for the successful appellant, will have significant implications for the construction and real estate industries as it confirms the benefits of adjudication as being widely available. It is also the first time that the Court of Appeal has considered the statutory meaning of a "construction contract" for adjudication purposes. Although the case concerned a collateral warranty, the principles could apply to other agreements such as third party rights schedules and forward funding agreements.

### BACKGROUND

Adjudication is a fast track and less expensive procedure for resolving construction disputes than litigation and was introduced in the UK by the Housing Grants, Construction and Regeneration Act 1996 (the "Act"). In an adjudication, after submissions are made by the parties an appointed adjudicator makes a decision on the issue in dispute. Although that decision is only temporarily binding until, and if, the dispute is finally determined by court proceedings, arbitration, or settlement, in most cases the parties accept the adjudicator's decision without further proceedings being necessary.

"While there have been many court cases about adjudication ... surprisingly very few of those cases have addressed the issue of what is a "construction contract" and how Section 104(1) of the Act ought to be interpreted. "

Under Section 104(1) of the Act, the benefits of adjudication extend to certain types of agreements (defined as "construction contracts" in the Act) covering a defined list of construction related works and services (defined in Section 105 of the Act as "construction operations").

While there have been many court cases about adjudication since the right to adjudicate was first introduced in the UK on 1 May 1998, surprisingly, very few of those cases have addressed the issue of what is a "construction contract" and how Section 104(1) of the Act ought to be interpreted. This has resulted in uncertainty about which contracts actually benefit from an entitlement to adjudicate. The Court of Appeal has now issued its first judgment on this issue.

### THE FACTS

The successful appeal arose out of a tenant's claim to recover losses from fire safety related defects at a care home. The tenant (Abbey Healthcare (Mill Hill) Limited) brought an adjudication claim against the contractor (Simply Construct (UK) LLP) under a type of contract known as a collateral warranty. This is a contract where a party providing construction works or services gives to a beneficiary certain warranties in connection with a primary contract. This may include (as in this case) a warranty to a tenant beneficiary by a contractor that they have complied with and will continue to comply with the primary contract.

Although the tenant obtained a successful adjudication award against the contractor through its claim via the collateral warranty, the award was not enforced by the High Court on grounds of jurisdiction, including because the collateral warranty was signed after the construction works had finished. The Court of Appeal has now found by majority that was the wrong decision.

## THE COURT OF APPEAL DECISION

In an 45-page decision comprising three judgments, including a dissenting judgment, the Court of Appeal overturned the earlier High Court ruling and held that:

1. Section 104(1) of the Act confirms a "construction contract" as including contracts "arranging for the carrying out of construction operations by others". This has a broader meaning than solely an agreement under which the original construction works and services were paid for and performed. By implication this means there can be more than one contract for the same set of construction operations.
2. Although construction contracts must satisfy the payment provisions under Section 109 of the Act, this requirement can be met even by the inclusion of nominal payment arrangements (such as drafting providing for the payment of a £1 consideration). The absence of more detailed payment provisions or remuneration obligations does not mean that the collateral warranty could not be a construction contract as defined in Section 104(1).
3. While it may make commercial common sense for any parasitic warranties to be treated in the same way from an adjudication perspective as the underlying contracts to which they are collateral, whether or not a collateral warranty will be a construction contract for purposes of the Act will depend on its interpretation, not by importing rights from the primary contract.
4. Following on from the above, the date of execution of a collateral warranty is also immaterial. Interpretation, rather than the date of execution, is paramount.
5. Where a contractor or consultant warrants in a collateral warranty that it was carrying out and will continue to carry out construction operations, this includes a promise regulating the ongoing carrying out of construction operations and is therefore more likely to be a construction contract for purposes of the Act. That position is to be distinguished from a product guarantee, which only warrants a past state of affairs.

Applying the law to the facts in the case, the collateral warranty between the tenant and the contractor was a construction contract for purposes of the Act. This meant the tenant did have the right to adjudicate and so the adjudicator's decision would be enforced.

## COMMENTARY

**"This decision creates a level playing field by ensuring that end-users with vested interests in a finished building are treated equally from a dispute resolution perspective to those involved with the original construction works and services."**

This is an important decision that will have wide implications for the construction and real estate industries. While collateral warranties could be regarded as construction contracts since the Technology and Construction Court's decision in *Parkwood*<sup>1</sup> in 2013, there has been uncertainty about the extent to which this was applicable. Not only does the Court of Appeal's decision remove any uncertainty but the principles adopted by the Court of Appeal could now be applied so that other types of contract could also be construction contracts for the purposes of the Act. For example, statutory adjudication rights could in principle now apply to third party rights schedules or to agreements where the works are being funded by a third party under a separate agreement with the contractor (a not uncommon situation). It all depends on the interpretation of their terms, taking account of the principles summarised above.

This case is a significant extension of liability for contractors and consultants who perform construction works and services. The Court of Appeal's decision clarifies that statutory adjudication rights can apply not only to the contracts under which the original works and services are performed, but also to other agreements in the construction pack. Parties and their insurers will need to carefully consider the implications of this liability extension.

The decision will be particularly welcomed by tenants, landlords and funders. They are usually connected with the original construction team through ancillary documents such as collateral warranties, third party rights schedules and/or forward funding agreements. This decision creates a level playing field by ensuring that end-users with vested interests in a finished building are treated equally from a dispute resolution perspective to those involved with the original construction works and services.

The decision is also timely as it comes while the construction and real estate industries continue to grapple with the ongoing building safety crisis, with many buildings still requiring repairs for defects, over five years since the Grenfell Tower tragedy. The decision is important for access to justice as it provides an alternative remedy to those who may not have the time or financial resources to pursue construction claims through the courts where obtaining judgment can take years and significant expense. This decision should therefore be welcomed by those who can't afford the time and costs of expensive litigation by providing another potential route to recovery, giving hope that those responsible for shoddy construction work may now be held to account.

**"This decision should be welcomed by those who can't afford the time and costs of expensive litigation by providing another potential route to recovery, giving hope that those responsible for shoddy construction work may now be held to account."**

[1] *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC)

## KEY CONTACTS



**BARRY HEMBLING**  
PARTNER • LONDON

[bhembling@wfw.com](mailto:bhembling@wfw.com)



**SIMON JENNINGS**  
ASSOCIATE • LONDON

T: +44 20 3314 6475

[sjennings@wfw.com](mailto:sjennings@wfw.com)



**SAM GOODWILL**  
ASSOCIATE • LONDON

T: +44 20 7814 8437

[sgoodwill@wfw.com](mailto:sgoodwill@wfw.com)

### DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.