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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

> "s. 104 was intended to cast the net of the 1996 Act as widely as possible, even where there were hybrid contracts."
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> Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP

Adjudication

The Court of Appeal has held that a collateral warranty issued after practical completion of the project was a "*construction contract*" for the purposes of section 104 of the Housing Grants (Construction & Regeneration) Act 1996. The majority decision, which overturned the first instance decision, meant that Abbey Healthcare, as beneficiary of the collateral warranty, was able to use the adjudication machinery in the 1996 Act to recover the cost of remedial works arising from defective work. The court held that "*construction contract*" was construed widely and was part of a regime that ensured the availability of swift and inexpensive adjudication to all those involved in construction disputes. Although it was important to qualify as a construction contract that a warranty should be in respect of the ongoing carrying out of construction operations, rather than in respect of a past and static state of affairs, the fact that the warranty was executed at a time when the works were complete was of little relevance to its categorisation under section 104. The wording of the warranty here was clearly retrospective in effect. The principles in this case could equally be applied to extend the statutory right of adjudication to third party rights schedules and funding agreements.

Watson Farley & Williams acted for the successful appellant Abbey Healthcare. To read our full article on the decision, please click on the link below.

Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP [2022] EWCA Civ 823, 21 June 2022

Maritime – Reasonable Security

The Court of Appeal has concluded that where parties following a collision had agreed to "*provide security in respect of the other's claim in a form reasonably satisfactory to the other*", if reasonable security was offered, the receiving party had to accept it. The agreement in the ASG2 standard collision jurisdiction agreement was part of a scheme aimed at avoiding arrest, so the receiving party was not free to seek alternative or better security where reasonable security was provided. The court confirmed that the same result was reached as a matter of construction of the clause or by implying a term.

M/V Pacific Pearl Co Limited v Osios David Shipping Inc [2022] EWCA Civ 798, 14 June 2022

Enforcement – Finality of Judgments

The Supreme Court has emphasised the importance of finality of judgments when considering whether to reopen an order that had been delivered in open court but not yet been sealed. AIC was given permission to enforce an arbitration award because F had not provided security as ordered. However, F then provided a guarantee for the required security before the order was sealed. AIC called on the guarantee and received payment. The Supreme Court allowed F's appeal and the enforcement order was set aside, but AIC was not required to repay the guarantee proceeds. In exercising its discretion, the finality of the order was a weighty matter in the relevant balancing act for the court.

AIC Ltd v Federal Airports Authority of Nigeria [2022] UKSC 16, 15 June 2022

Construction

An assignee of a collateral performance warranty has been held to be entitled to recover damages that were not suffered by the assignor. The warranty was given by Balfour to the funder of the development project and then assigned to Orchard who had carried out remedial work on the property following failures in the construction. The contract expressly envisaged the possibility of assignment of the warranty, with no restriction on the identity of assignees. Balfour therefore knew that losses might be claimed for by an assignee who was not a substitute funder. It was foreseeable that the funder might take possession of the property and sell to another landlord who might have to carry out remedial works. The serious possibility of an assignee incurring the cost of repairs from Balfour's breaches was therefore within Balfour's reasonable contemplation.

Orchard Plaza Management Co Ltd v Balfour Beatty Regional Construction Ltd [2022] EWHC 1490 (TCC), 16 June 2022

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

Robert Fidoe	Rebecca Williams
Ryland Ash	Charles Buss
Nikki Chu	Dev Desai
Sarah Ellington	Andrew Hutcheon
Alexis Martinez	Theresa Mohammed
Tim Murray	Mike Phillips

KEY CONTACTS

JOANNE CHAMPKINS
KNOWLEDGE COUNSEL • LONDON

T: +44 203 036 9859

jchampkins@wfw.com

REBECCA WILLIAMS
PARTNER • LONDON

T: +44 203 036 9805

rwilliams@wfw.com

ANDREW WARD
PARTNER • LONDON
T: +44 20 7863 8950
award@wfw.com