Neutral Citation Number: [2022] EWCA Civ 823

Case No: CA-2021-000741

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS AND PROPERTY COURT
TECHNOLOGY AND CONSTRUCTION COURT(QBD)
Mr Martin Bowdery QC (Sitting as a Deputy High Court Judge)
[2021] EWHC 2110 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2022

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LORD JUSTICE STUART-SMITH

- -

Between :

Abbey Healthcare (Mill Hill) Limited	**Appellant**
- and -	
Simply Construct (UK) LLP	**Respondent**

- -
- -

Tom Owen (instructed by **Watson Farley & Williams LLP**) for the **Appellant**
Michele De Gregorio & Sahana Jayakumar (instructed by **Veale Wasbrough Vizards LLP**) for the **Respondent**

Hearing Date : 16 March 2022

- -

Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on 21 June 2022

LORD JUSTICE COULSON:

1. INTRODUCTION

1. The issue which arises on this appeal is whether or not the collateral warranty relied on by the appellant ("Abbey") was a construction contract within the meaning of s.104(1) of the Housing Grants (Construction & Regeneration) Act 1996 ("the 1996 Act"). Abbey brought adjudication proceedings against the respondent ("Simply Construct"). The adjudicator awarded them £908,495.98 inclusive of VAT. Abbey's application for summary judgment to enforce that decision was refused by Mr Martin Bowdery QC (sitting as a deputy judge of the High Court) ("the judge"). He concluded ([2021] EWHC 2110 (TCC)) that, because the collateral warranty was executed years after the construction operations had been completed, it was not a construction contract in accordance with s.104(1). I granted permission to appeal against that decision on 16 November 2021.

2. By way of a Respondent's Notice, Simply Construct seek to advance a new set of submissions – not made to the judge – to the effect that the collateral warranty, irrespective of when it was executed, was not capable of being a construction contract under the 1996 Act. On analysis, those new submissions gave rise to two separate questions: i) Can a collateral warranty ever be a construction contract? and ii) If it can, did the terms of this particular warranty (regardless of timing) make it a construction contract as defined? Logically, although these issues had not previously arisen, they should be taken first, particularly as Mr De Gregorio properly accepted that, if he was wrong on both, he could not say that the timing of the collateral warranty, although of relevance, was determinative of the question as to whether it was or was not a construction contract.

3. In one sense, it is a pity that these issues have arisen at all. I say that because this appeal is not about the merits of the underlying claim, but is instead a purely procedural debate about the applicability or otherwise of the adjudication process to this collateral warranty. However, as I pointed out when I granted permission to appeal, as long as adjudication remains a popular and cost-effective dispute resolution process for those concerned with defective or delayed buildings, parties who are at risk of having to pay money as a result of an adjudicator's decision will continue to argue, where they can, that the contract in question was not caught by the 1996 Act, and therefore did not contain the implied adjudication machinery.

2. THE FACTS

4. By a contract dated 29 June 2015, Sapphire Building Services Limited ("Sapphire") engaged Simply Construct to carry out the construction of the Aarandale Manor care home ("the care home"). The contract was in the JCT Design and Build 2011 form, with bespoke amendments ("the building contract").

5. It is unnecessary to set out very many of the terms of the building contract. However, the following should be noted:

   a) Clause 2.1 set out Simply Construct's primary obligation to "carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents…" There were a number of other

obligations as to the quality of the design work, materials, goods and workmanship.

b) Clause 2.35 obliged Simply Construct to remedy defective work.

c) Clause 9.2 contained express adjudication provisions.

d) Clause 7.1.3 provided that Sapphire might at any time novate the building contract to Toppan Holdings Limited ("Toppan"), the freeholder. There was an agreed form of novation at Appendix 2 of the contract.

6. The building contract also contained detailed provisions in respect of warranties. The definition section referred to "P & T Rights", which were the rights in favour of a Purchaser and Tenant set out in Part 1 of Schedule 5 in the form of a collateral warranty. Both 'Purchaser' and 'Tenant' were defined terms. In the event, Toppan became the Purchaser and Abbey became the Tenant. Clause 7C of the building contract was in the following terms (as amended):

> "Where Clause 7C is stated in Part 2 of the Contract Particulars it will apply to a Purchaser or Tenant, the Employer may by notice to the Contractor, identifying the Purchaser or Tenant and his interest in the Works, require that the Contractor within 14 days from receipt of that notice enter into with such Purchaser or Tenant a Collateral Warranty of the P &T Rights in the relevant form appended at Schedule 5 of this Contract executed as a deed or signed underhand to reflect the manner of execution of this Contract"

7. Other references in the building contract indicate that Toppan was expressly identified as a potential beneficiary of a collateral warranty, as was the 'Management Company', which was essentially the role to be played by Abbey, the ultimate tenant of the care home.

8. Simply Construct commenced the building works on 11 May 2015. On 15 October 2015, they executed a collateral warranty in favour of Toppan pursuant to their obligations in clause 7C. Practical completion of the care home was achieved on 10 October 2016.

9. On 13 June 2017, Sapphire and Simply Construct entered into what was called a settlement agreement which, amongst other things, required the execution of a deed of novation in an agreed form by Simply Construct, Sapphire and Toppan. By a novation agreement dated 14 June 2017, Sapphire transferred all its rights and obligations under the building contract to Toppan. In this way, Toppan became the "substitute employer", as they were referred to in the settlement agreement.

10. On 12 August 2017, Toppan granted a long lease holding of the care home to Abbey. The term was 21 years.

11. In or around August 2018, Toppan discovered fire-safety defects in the care home. It was Toppan's case that the discovery of these defects prevented a sale of the care home to another freeholder. Simply Construct were notified of the defects and requested to

rectify them. They did not do so, so Toppan engaged a third party to carry out remedial works. Those works were commenced on around 25 September 2019 and were practically complete on 14 February 2020. It appears that Abbey paid for some or all of the remedial works.

12. Simply Construct, as contractor, had never entered into the collateral warranty with Abbey, as tenant, as required by Clause 7C of the building contract (paragraph 6 above). On 8 June 2020, Toppan requested Simply Construct to execute the collateral warranty in favour of Abbey. Simply Construct did not respond. On 30 June 2020 Toppan wrote to Simply Construct's then legal advisors to request that the collateral warranty be executed, but again there was no response. Neither was there any response to the pre-action correspondence. Toppan was obliged to issue proceedings for specific performance and, after further delays, on 23 September 2020, Simply Construct executed and delivered the collateral warranty to Abbey ("the Abbey Collateral Warranty"). Toppan and Abbey executed the same document on 23 October 2020.

3. THE TERMS OF THE ABBEY COLLATERAL WARRANTY

13. The Abbey Collateral Warranty is called on its face a 'Collateral Agreement', although Clause 9 refers to it as a collateral warranty. Nothing can turn on how the document describes itself. It contained the following material provisions:

> "BACKGROUND
>
> (A) The Developer [Toppan] has the benefit of the Contract entered into with the Contractor [Simply Construct].
>
> (B) The Beneficiary [Abbey] has a leasehold interest in the Site.
>
> (C) The Contractor has agreed to enter into this agreement with the Beneficiary.
>
> OPERATIVE PROVISIONS
>
> 1 DEFINITIONS
>
> …
>
> "Contract" means the contract in the form of a JCT Design and Build Contract dated 29 June 2015 entered into by Sapphire Building Services Limited and the Contractor under which the Contractor is to carry out the Works and the design of the Works.
>
> …
>
> "Works" means the construction of the development at the Site as more particularly described in the Contract.
>
> …
>
> 4 SKILL AND CARE
>
> 4.1 The Contractor warrants that:
> (a) the Contractor has performed and will continue to perform diligently its obligations under the Contract;
> (b) in carrying out and completing the Works the Contractor has exercised and will continue to exercise all the reasonable skill care and diligence to be expected of a, properly qualified competent and experienced contractor experienced in

carrying out and completing works of a similar nature value complexity and timescale to the Works;
(c) in carrying out and completing any design for the Works the Contractor has exercised and will continue to exercise all the reasonable skill care and diligence to be expected of a prudent, experienced competent and properly qualified architect or as the case may be other appropriate competent and qualified professional designer experienced in carrying out and completing the design for works of a similar nature value complexity and timescale to the Works.
4.2 Insofar as the Contractor has performed a part of its obligations under the Contract before the date of the Contract the obligations and liabilities of the Contractor under this agreement shall take effect in all respects as if the Contract had been dated prior to the performance of that part of its obligations by the Contractor.
4.3 The Contractor shall owe no greater duties to the Beneficiary under the terms of this agreement than it would have owed to the Beneficiary had the Beneficiary been named as the employer under the Contract save that this agreement shall continue in full force and effect notwithstanding the determination of the Contract for any reason.
4.4 The obligations of the Contractor shall not be released or diminished by the appointment of any person by the Beneficiary to carry out any independent enquiry into any relevant matter.
4.5 The Contractor further warrants that unless required by the Contract or unless otherwise authorised in writing by the Developer or the Developer's representative named in or appointed pursuant to the Contract (or where such authorisation is given orally, confirmed in writing by the Contractor to the Developer and/or the Developer's
representative), it has not and will not use materials in the Works other than in accordance with the guidelines contained in the edition of the publication "Good Practice in Selection of Construction Materials" (published by the British Council for Offices) current at the date of the Building Contract."

4. THE ADJUDICATIONS

14. Both Toppan and Abbey made claims against Simply Construct arising out of the fire-safety defects and the cost of the necessary remedial works. Toppan set out their claim in correspondence on 17 August 2020 and, following execution of the Abbey Collateral Warranty, Abbey wrote a similar letter on 5 November 2020. Simply Construct refused the request that the disputes be dealt with together. Accordingly, Toppan and Abbey served separate notices of adjudication on Simply Construct on 11 December 2020. The same adjudicator, Mr Vinden, was appointed in respect of both disputes.

15. In the Toppan adjudication, Simply Construct raised the jurisdictional objection that the adjudication claim was an ambush and that the dispute was not properly defined. The adjudicator rejected those objections. In his decision dated 30 April 2021 in the Toppan adjudication, the adjudicator awarded Toppan £1,067,247.14. Simply Construct did not pay the sum due. Toppan commenced proceedings and sought summary judgment to enforce the adjudicator's decision. Simply Construct resisted enforcement and alternatively sought a stay of execution. Their objections were rejected by the judge, and Simply Construct were ordered to pay the sum found due by the adjudicator.

16. The Abbey adjudication proceeded in parallel. Simply Construct took the jurisdictional objection that the Abbey Collateral Warranty was not a construction contract. On 26 February 2021, the adjudicator gave a non-binding ruling on jurisdiction in favour of Abbey. His final decision, dated 30 April 2021 (the same day as his decision in favour of Toppan), awarded Abbey £908,495.98. Simply Construct did not pay this sum either. On enforcement they took the same point that they had taken before the adjudicator, namely that the collateral warranty was not a construction contract as defined by s.104 of the 1996 Act, and that therefore the adjudication machinery was not implied into it, meaning that the adjudicator had no jurisdiction.

5. THE JUDGE'S JUDGMENT

17. It is unnecessary to set out large parts of the judge's judgment, because much of it deals with matters which are not in issue on this appeal. On the issue as to whether the collateral warranty was a construction contract as defined, the judge referred to *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC), [2013] BLR 589 ("*Parkwood*"), in which Akenhead J found that the collateral warranty in that case was a construction contract for the purposes of the 1996 Act. At paragraph 21 of his judgment in the present case, the judge compared the wording of this warranty to the wording of the warranty in *Parkwood*. He said:

> "21. The Abbey Collateral Warranty does not include the verbs "acknowledges" or "undertakes".
>
> Simply Construct warranted that:
>
> > (1) It "*has performed and will continue to perform diligently its obligations under the Contract*", clause 4.1(a) (the "Contract" is defined in the Abbey Collateral Warranty to mean the Building Contract);
> >
> > (2) In carrying out and completing the works, it "*has exercised and will continue to exercise*" reasonable skill, care and diligence, clause 4.1(b); and
> >
> > (3) In carrying out and completing any design for the works, it "*has exercised and will continue to exercise*" reasonable skill, care and diligence, clause 4.1(c)."

The judge made no further comment about the terms, and made no findings as to the relevance – if any – of the differences between the wording of this warranty and the warranty under review in *Parkwood*.

18. The judge's conclusion that the Abbey Collateral Warranty was not a construction contract within the meaning of s.104 of the 1996 Act was set out at paragraphs 22-31. The critical passages are set out below:

> "22…I do not consider that the Abbey Collateral Warranty can be construed as a "construction contract" within the meaning of Section 104 of the Act. I reach that conclusion because whilst construing the section widely I do not consider the agreement between Abbey and Simply Construct was an agreement for "*the carrying out of construction operations*". As Mr Justice Akenhead stated in *Parkwood:*

"A pointer against may be that all the works were completed and that the contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard."…

24. Here the collateral agreement was executed:

- 4 years after practical completion;

- 3 years 4 months after the Settlement Agreement; and

- 8 months after the remedial works had been completed by another contractor.

25. The only matter left after the Settlement Agreement was any potential liability for latent defects. The only latent defects discovered after the date of the Settlement Agreement were defects which had been remedied months before the Abbey Collateral Warranty had been executed.

26. Accordingly I consider that:

- where a contractor agrees to carry out uncompleted works in the future that will be a very strong pointer that the collateral warranty is a construction contract and the parties will have a right to adjudicate.

- where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate.

27. Whilst contractors and beneficiaries should negotiate the contents of their collateral warranties with some caution if they want them not to fall within the Act, the timing as to when they are executed is also important. On the facts of this case I cannot see how applying commercial common sense a collateral warranty executed four years after practical completion and months after the disputed remedial works had been remedied by another contractor can be construed as an agreement for carrying out of construction operations…

29. The wording of the Abbey Collateral Warranty should be construed against the relevant factual background. Including the facts that:

- the works had been completed some four years previously;

- the remedial works to the disputed defects had been completed by another contractor months before the Abbey Collateral Warranty had been executed;

- when the Abbey Collateral Warranty was executed there is no evidence that Abbey or Simply Construct contemplated the possibility of any further construction operations being carried out as a result of any breach of the Building Contract and/or the Settlement Agreement…

31. Accordingly I find that the Abbey Collateral Warranty is not a construction contract for the purposes of the Act. There was no contractual right to adjudicate by section 108(5) of the Act and the implied terms of the Scheme."

19. During the hearing of the appeal, there was some debate as to the precise basis for the judge's conclusion under s.104(1). For myself, I read paragraphs 22-31 as saying that the fact that the collateral warranty was entered into so long after the construction operations had been completed meant that it was not a contract for the carrying out of construction operations, but was instead a warranty as to events that had occurred many years before. It was a decision based on the date of execution of the collateral warranty, as compared to the date when the construction operations were completed.

6. THE LEGAL FRAMEWORK

20. Part II of the 1996 Act is concerned with construction contracts. These are defined in s.104(1) in the following terms:

> "**104 Construction contracts.**
>
> (1) In this Part a "construction contract" means an agreement with a person for any of the following—
>
> > (a) the carrying out of construction operations;
> >
> > (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
> >
> > (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
>
> (2) References in this Part to a construction contract include an agreement—
>
> > (a) to do architectural, design, or surveying work, or
> >
> > (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
>
> (3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996)…
>
> (5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.
>
> An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2)…"

21. Section 105 sets out a list of what is included within the definition of 'construction operations' and a bafflingly similar list of what is not deemed to be within that definition. Happily, because it is common ground in the present case that the work carried out by Simply Construct comprised construction operations, we do not need to consider s.105 further.

22. Section 108 of the 1996 Act gives "a party to a construction contract…the right to refer a dispute arising under the contract to adjudication". Section 108(5) provides that, if the contract does not contain adjudication provisions in accordance with the requirements of subsections (1) to (4), the adjudication provisions within the Scheme of Construction Contracts (England and Wales) Regulations 1998, as amended ("the Scheme") will apply. The Abbey Collateral Warranty contained no adjudication provisions. If it was a construction contract as defined in s.104(1), the Scheme was therefore implied into it. That was the basis on which the adjudicator conducted the

Abbey adjudication. It is unnecessary to set out the detail of the Scheme for the purposes of this appeal.

23. The definition in s.104(1) has been construed broadly, so as to include a contract with a contract administrator (*Gillies Ramsay Diamond v PJW Enterprise limited* [2002] CILL 1901/1903, a decision of the Outer House of the Court of Session), but not so broadly as to include a claim for fees for work done in an arbitration by a construction claims company (*Fencegate Ltd v James R Knowles Ltd* [2001] CILL 1757-1759).

24. The only case in which the court has considered whether or not a collateral warranty was a construction contract for the purposes of s.104(1) is *Parkwood,* referred to above. Akenhead J concluded that it was. The relevant parts of his judgment were as follows:

> "23. In that context therefore, one can draw the following conclusions:
>
> (a) The fact that the construction contract (if it is one) is retrospective in effect is not a bar to it being a construction contract. It is common for contracts to be finalised after the works have started and to be retrospective in effect back to the date of or even before commencement. If that is what the effect of the parties' agreement is, then that cannot prevent it from being a construction contract for the carrying out of construction operations. Put another way, a construction contract does not have to be wholly or even partly prospective.
>
> (b) One must be careful about adopting a peculiarly syntactical analysis of what words mean in this statute when it is clear that Parliament intended a wide definition. An agreement "for . . .the carrying out of construction operations" is a broad expression and one should be able, almost invariably at least, to determine from the contract in question whether it fits within those words, without what could be a straight-jacketed judicial interpretation.
>
> (c) Usually and possibly invariably, where one party to a contract agrees to carry out and complete construction operations, it will be an agreement "for the carrying out of construction operations."
>
> …
>
> 27. One therefore moves on to the actual wording used by the parties here. I have no doubt that this particular collateral warranty was and is to be treated as a construction contract "for . . . the carrying out of construction operations". My reasons are as follows:
>
> (a) There has been no suggestion that the form of collateral warranty used was in a particular standard form. Indeed, there are only a few standard forms for collateral warranties.
>
> (b) The Recital itself sets out that the underlying construction contract (the "contract") was "for the design, carrying out and completion of the construction of a pool development". There can be little or no dispute that the contract was a construction contract for the purposes of the HGCRA.

(c) That wording is replicated in clause 1 of the collateral warranty which relates expressly to carrying out and completing the works.

(d) Clause 1 contains express wording whereby LORWW "warrants, acknowledges and undertakes". One should assume that the parties understood that these three verbs, whilst intended to be mutually complementary, have different meanings. A warranty often relates to a state of affairs (past or future); a warranty relating to a motor car will often be to the effect that it is fit for purpose. An acknowledgement usually seeks to confirm something. An undertaking often involves an obligation to do something. It is difficult to say that the parties simply meant that these three words were absolutely synonymous.

(e) This is reflected in the following subparagraphs which relate to the past as well as to the future. This recognised the fact that the works under the contract remained to be completed. The acknowledgement by LORWW most obviously relates to the fact that the contractor had already carried out a significant part of the Works and the design. The undertaking primarily goes to the execution and completion of the remaining works. The warranty goes to the work and design both already carried out or provided and yet to be carried out and provided.

(f) LORWW is clearly in clause 1 (and in particular sub-clause 1) undertaking that it will carry out and complete the works in accordance with the contract between Orion and LORWW. That undertaking however is being given by LORWW to Parkwood. Thus, LORWW is undertaking to Parkwood that, in the execution and completion of the works, it will comply with that contract. Most obviously, that relates to the quality and completeness of the Works. The contract specifications and drawings will need to be complied with as will the Statutory Requirements (such as Building Regulations – see clause 6.1 of the contract conditions) and the standards and scope described in the employer's requirements and contractor's proposals (see, for instance, clause 8 of the contract conditions).

(g) The collateral warranty, being contractual in effect, will give rise to the ordinary contractual remedies. Thus, if LORWW completes the works but not in compliance with, say, the employer's requirements or the standards therein specified, there will be an entitlement for Parkwood to claim for damages because there will be a breach of contract. Similarly, there could be remedies if LORWW had repudiated the contract because it will then have failed to complete the works at all. It is at least possible that, in those circumstances, Parkwood would have had locus to seek injunctive relief in terms of a mandatory injunction or specific performance, albeit that it is often difficult to secure such injunctions or orders in practice when they relate to the execution of detailed and extensive construction work.

(h) Although clause 10 expressly excludes liability for delay in progress and completion, it does not exclude liability otherwise for noncompletion. That is recognised in clause 12 where a remedy is given for repairs, renewals and reinstatement and also for "further or other losses or damages or costs incurred

> as a result of breach". This is not a contract which is simply limited to the quality of work, design and materials.
>
> (i) Clause 1(1) is not merely warranting or guaranteeing a past state of affairs. It is providing an undertaking that LORWW will actually carry out and complete the works. Completion of the works is not only important so far as time is concerned; it is also important because LORWW is undertaking that the works will be completed to a standard, quality and state of completeness called for by the contract.
>
> (j) Thus, this collateral warranty is clearly one "for the carrying out of construction operations by others", namely by LORWW.
>
> (k) The remainder of clause 1 is consistent with and complementary of this view. Sub-clause 3 contains an important prospective element, (LORWW "will continue to exercise" care and skill). Similarly sub-clauses 4, 5, 6 and 7 have such an element.
>
> (l) The fact that proviso to clause 1 makes it clear that Parkwood is not a joint employer under the contract is not to the point because the purpose of the proviso is to provide LORWW with all the defences which would be available to LORWW under the contract. That simply relates to the "deal" which was done. It is in any event partly balanced by clause 3.
>
> 28 . It does not follow from the above that all collateral warranties given in connection with all construction developments will be construction contracts under the Act. One needs primarily to determine in the light of the wording and of the relevant factual background each such warranty to see whether, properly construed, it is such a construction contract for the carrying out of construction operations. A very strong pointer to that end will be whether or not the relevant contractor is undertaking to the beneficiary of the warranty to carry out such operations. A pointer against may be that all the works are completed and that the contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard."

25. Since here the judge placed considerable emphasis on the date of execution of the collateral warranty, it is important to have regard to when in law a cause of action accrues under such a warranty. In *Swansea Stadium Management Limited v City & County of Swansea and Another* [2018] EWHC 2192 (TCC), [2018] BLR 652, O'Farrell J found that the collateral warranty in question was intended to have retrospective effect. She went on:

> "56. In conclusion on this issue, the clear intention of the parties was that the Collateral Warranty should have retrospective effect. The Second Defendant's liability to the Claimant was deemed to be coterminous with its liability to the First Defendant under the Building Contract. Any breach of contract created by the Collateral Warranty would be regarded as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty."

7. THE ISSUES ON THE APPEAL

26. Towards the end of his helpful oral submissions, Mr De Gregorio said that there were three issues to be decided:

a) Issue 1: Can a collateral warranty ever be a construction contract as defined by s.104(1)?

b) Issue 2: If the answer to Issue 1 was Yes, did the terms of the Abbey Collateral Warranty make it a construction contract as defined by s.104(1)?

c) Issue 3: If the answer to Issue 2 was otherwise Yes, did the date on which the Abbey Collateral Warranty was executed make any difference?

27. I agree that those are the three issues which arise on this appeal and that that is the appropriate order in which to address them. Of course, because the first two issues have arisen for the first time in this court, we cannot derive any assistance on them from the judge's judgment. Moreover, in relation to Issue 1, it is an integral part of Mr De Gregorio's submissions that Akenhead J was wrong in *Parkwood*, and that this court should conclude that *Parkwood* was wrongly decided.

8. ISSUE 1: CAN A COLLATERAL WARRANTY EVER BE A CONSTRUCTION CONTRACT AS DEFINED BY S.104(1)?

8.1 Summary

28. In my view, the answer to Issue 1 is Yes. There are two routes to that conclusion: one short; one much longer.

29. The short answer is that it will always depend on the wording of the warranty in question. To determine the nature of any contract, the express words and the substantive rights conferred must be construed in their proper context: *Street v Mountford* [1985] A.C. 809.

30. So a warranty which provided a simple fixed promise or guarantee in respect of a past state of affairs may not be a contract for the carrying out of construction operations pursuant to s.104(1). Something that said "We completed these works two years ago and we warrant that they were completed in all respects in accordance with the Building Regulations", is a promise about the quality of something which has been completed. It does not recognise or regulate the ongoing carrying out of any future work. It may therefore not be a contract for the carrying out of construction operations. It is more akin to a product guarantee.

31. On the other hand, a warranty that the contractor was carrying out and would continue to carry out construction operations (to a specified standard) may well be "a contract for the carrying out of construction operations" in accordance with s.104(1). That is because, unlike a product guarantee, it is a promise which regulates (at least in part) the ongoing carrying out of construction operations.

32. That is the short answer to Issue 1. However, there is a much longer answer, which endeavours to interpret s.104(1) in its context, analyses the judgment in *Parkwood*, and addresses the various reasons put forward by Mr De Gregorio in support of his

submission that a collateral warranty could never be a construction contract. Despite the existence of the short answer, the longer answer is not a redundant exercise for the purposes of this appeal, because much of the reasoning is directly relevant to Issues 2 and 3, and the question as to whether the Abbey Collateral Warranty was or was not a construction contract for the purposes of s.104(1).

8.2 "Paradigm" Building Contracts and "Genuine" Collateral Warranties

33. Underlying the submissions of Mr De Gregorio was a simple proposition: if it looks and sounds like a building contract, then it probably is, and if it looks and sounds like a collateral warranty, then again it probably is, and one cannot sensibly be the other. That explained why, in his oral submissions, Mr De Gregorio talked about "paradigm" building contracts and contrasted them with "genuine" collateral warranties. I understand that basic point, but for the reasons noted below, I do not find it of any great assistance.

34. The classic definition of a building contract is that given by Lord Diplock in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 at 717B and 722G: "an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the good are delivered and the work is done." That is to be contrasted with the purpose of a collateral warranty, described by Lord Drummond Young in *Scottish Widows Services Limited v Harmon/CRM Facades Limited* [2011] PNLR 8 (CS)(OH) at [18], as being:

> "…to provide a right of action to a person who is liable to suffer loss as a result of defective performance of a building contract or a contract for professional services in connection with a building project."

35. On this basis, the different features of a building contract, on the one hand, and a collateral warranty, on the other, are plain. But I do not find these descriptions particularly helpful for the purposes of this appeal. Unlike Akenhead J in *Parkwood*, neither Lord Diplock nor Lord Drummond Young were endeavouring to interpret what "a contract for the carrying out of construction operations" might mean in the context of s.104(1). So, whilst the collateral warranty here is a pretty conventional collateral warranty, and is a long way from being a conventional building contract, let alone one in a JCT standard form, I am not sure that that ultimately adds very much to the analysis.

36. There is, however, an important point to be made about the significance of collateral warranties in the construction industry generally, and for the ultimate owners/occupiers of new buildings in particular. The result in *Murphy v Brentwood DC* [1991] 1 AC 398 meant that, in general terms, the ultimate owner/occupier of a defective building had no claim against the building contractor responsible, unless there was some sort of contractual nexus between them. Collateral warranties became the principal way of providing the necessary contractual mechanism for a claim to be made. They were of particular importance to those, like Abbey, who would occupy and be liable to maintain the building (and therefore be liable for remedying defects) but who had not been involved when the original building contract had been agreed. Thus, the provisions of the building contract requiring Simply Construct to provide a collateral warranty to the ultimate tenant are both important and commonplace.

8.3 "An agreement…for the carrying out of…construction operations"

37. Much may turn on the meaning of the word "for" in s.104(1). Dictionary definitions refer to it as a function word to indicate purpose, or to indicate the object of an activity. That purpose or object of the agreement is the carrying out of construction operations, as defined in s.105. In my view, there is no room for any further gloss.

38. Mr De Gregorio's construction of this provision rather shied away from the word "for". He said that s.104 should be construed as referring to a contract "under which" construction operations were carried out (and, he added, "usually paid for"). The difficulty with that, in my view, is that it not only seeks to rewrite the statutory provision by introducing different words, but it seems to indicate that, for any given set of construction operations, there could only be one construction contract (or only one primary construction contract), a view with which I expressly disagree below. Nor does the section refer to a contract "*to* carry out" construction operations, another of Mr De Gregorio's synonyms.

39. As a matter of language, therefore, it seems to me that "an agreement for the carrying out of construction operations" is broader than the interpretation ascribed to it by Mr De Gregorio. It is not to be confined to a traditional building contract. Giving the words a broad meaning is how it has been approached by courts in the past (see paragraphs 23-24 above).

40. Moreover, I consider that support for the broader construction of s.104(1) can be derived from two other sources. First, the provision at s.104(5), which is concerned with hybrid contracts (namely, contracts for the carrying out of construction operations and for the carrying out of other operations too), refers to an agreement "related to" construction operations. That is very wide. It does not, as it could have done, repeat the formulation "an agreement for the carrying out of construction operations". That demonstrates that s.104 was intended to cast the net of the 1996 Act as widely as possible, even where there were hybrid contracts: see *Spencer Limited v MW Hitech Projects UK Limited* [2020] EWCA Civ 331,[2020] 1 WLR 3426.

41. Secondly, the 1996 Act was intended both to improve the payment regime in the construction industry, and to improve the dispute resolution mechanisms available to those involved in construction disputes. One way in which it achieved that latter purpose was ensuring the availability of a swift and inexpensive adjudication procedure. If there are disputes between parties to two different construction contracts (for example, an employer and a main contractor, and the main contractor and the relevant sub-contractor), but the underlying factual issues are the same or very similar, the same adjudicator will usually be appointed to decide those disputes, thereby ensuring consistency of approach and outcome, and a reduction in duplicated costs. The idea that a dispute between a contractor and an employer arising out of allegedly defective work is heard by an adjudicator, whilst the same dispute between the employer and the warrantor has to be litigated, may be said to be contrary to the intended purpose of the 1996 Act. Instead, what happened in the present case was what the 1996 Act envisaged: the same underlying dispute, about the same defective work, arising under two different contracts but decided in parallel by the same adjudicator. In my judgment, that statutory purpose is a relevant factor in construing s.104(1).

8.4 *Parkwood*

42. Although Akenhead J in *Parkwood* was anxious to point out that his decision did not mean that any collateral warranty would be a construction contract for the purposes of s.104(1), it is right to say that, in general terms, that is how *Parkwood* has been treated.[1] The wording of the warranty in *Parkwood* was in relatively conventional form, using standard clauses and phrases. Leaving aside questions of timing, it seems to me that there are two passages in Akenhead J's judgment in *Parkwood* that are of particular relevance to the present case.

43. First, at [23(b)], Akenhead J concluded that the words "an agreement…for…the carrying out of construction operations" were intended by Parliament to be construed broadly, and that strait-jacketed judicial interpretation should be avoided. That is in accordance with the views I have expressed above.

44. Secondly, [27] contains the reasons why Akenhead J concluded that the collateral warranty in that case was a construction contract as defined in s.104. On behalf of Abbey, Mr Owen submitted that each of the sub-paragraphs at [27(a)-(l)] is of equal applicability to the Abbey Collateral Warranty. Mr De Gregorio did not dispute that, which is why he had to say instead that *Parkwood* was wrong. It is therefore worth looking at some of these points in a little more detail.

45. At [27(b)] Akenhead J noted that the Recital to the warranty in that case identified what was, without question, a construction contract for the purposes of the 1996 Act. He went on to say at [27(c)] that that wording was replicated in clause 1 of the warranty which related expressly to carrying out and completing the works. The same is true of clause 4 in the present warranty, and of collateral warranties generally.

46. At [27(e) - (f)] Akenhead J made the point that the warranty in *Parkwood* related to the past as well as to the future. That is again true of clause 4 here ("has performed and will continue to perform"). In my view, Akenhead J was right to identify such a provision as a potentially important indication that the collateral warranty was a construction contract for the purposes of s.104(1). It is not a warranty as to a past state of affairs: it assumes that the works will continue in the future to be carried out. He repeats that conclusion at [27(i)], noting that the clause provides an undertaking that the contractor "will actually carry out and complete the works".

47. The other significant conclusion was at [27(g)], to the effect that the warranty would give rise to ordinary contractual remedies. Akenhead J said that this was not limited to damages and that, if the contractor failed to perform, *Parkwood* would have had locus to seek specific performance or injunctive relief. This point is not further elaborated upon in *Parkwood*. However it seems to me to be an important point. If the beneficiary of a warranty such as this might be able to require the contractor to perform the construction operations in question, that would be a strong indicator that the warranty

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[1] Although we were not taken to them during the hearing, I am aware that, shortly after *Parkwood* was decided, there were one or two articles in the Construction Law Journal expressing some surprise at the outcome. The principal points made in those articles are all considered in this judgment. However, *Parkwood* was decided almost a decade ago, and there has been no subsequent decision in which it has been doubted or criticised in any way. The construction industry, known for picking up on any TCC decision that it regards as anomalous, can therefore be taken to have broadly accepted the result. That may also help to explain why these arguments were not raised before the judge.

was a construction contract for the purposes of s.104(1). I therefore turn to consider that issue in a little more detail.

8.5 Specific Performance and Collateral Warranties

48. The ability of a beneficiary under a collateral warranty of this kind to claim for a remedy other than damages for breach of warranty is not free from doubt. Specific performance is an equitable and a discretionary remedy. As Lord Wilberforce stated in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723: "it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment." This leads Dr Spry in *Equitable Remedies* (9th Edition) to conclude that courts will order specific performance where justice so requires.

49. The court will not generally grant specific performance where the common law remedy of damages will adequately compensate the claimant, nor where the court cannot properly supervise performance. For these reasons, courts rarely compel performance of building contracts: as was famously said in *Wilkinson v Clements* (1872) L R 8 Ch 96 at 112, "the court will not compel the building of houses". Despite this, courts will sometimes compel performance of repair and/or building obligations: see, for example, *Jeune v Queen's Cross Properties Ltd* [1972] Ch 97 and *Price v Strange* [1978] Ch 337. In this way, the beneficiary of a collateral warranty such as this would not necessarily be prevented by law from seeking specific performance of a primary building contract. The difficulty a beneficiary may face in satisfying the test for specific performance is not the same as concluding that the beneficiary could not bring such a claim in the first place.

50. Mr De Gregorio relied on *Hurley Palmer Flatt Ltd v Barclays Bank PLC* [2014] EWHC 3042 (TCC), to suggest that it would not be granted because Abbey were effectively a third party. However, that was a very different case. There, Ramsey J ruled that, because Barclays was not a party to the relevant appointment of the engineers, and because procedural rights had not been expressly passed on to them, Barclays were in the position of a third party and had no right under the Contracts (Rights of Third Parties) Act 1999 to commence adjudication proceedings against those engineers. In the present case, Abbey were emphatically not in that position: they were identified as the Tenant and the Management Company in the building contract between Toppan and Simply Construct, and they were a party to and beneficiary of the Abbey Collateral Warranty.

51. So pausing there, I consider that Akenhead J's reasoning at [27] of *Parkwood* was correct, and that collateral warranties can, depending on their precise wording, be construed as construction contracts within the meaning of s.104(1). With those points in mind, I now turn to some of Mr De Gregorio's other submissions to contrary effect.

8.6 Payment Provisions

52. Mr De Gregorio's skeleton argument set out an extensive case as to how, in order to be a construction contract under s.104, a contract had to contain detailed payment provisions, and that what was required were contractual obligations on the part of the beneficiary to pay the contractor for the construction operations being carried out. At the hearing he rather backtracked from that proposition, saying that this would "usually" be required, but accepting that it may not be "essential", and that there could be cases where the absence of a typical set of payment obligations would not mean that

the contract in question was not a construction contract. I think that this concession was rightly made.

53. There is nothing in s.104(1) which suggests that a construction contract can only be defined as such if it contains detailed remuneration obligations on the part of the beneficiary. That would limit the scope of contracts which could qualify under s.104(1) to those between a contractor and a traditional employer who was paying for the construction operations. But what if the work was being funded by a third party under a separate agreement with the contractor (a not uncommon situation)? Or if the work was being done for a charity for a nominal consideration? Does that mean that, because the employer was not paying for the work in the traditional way, its contract with the contractor (which might be in every other respect a conventional construction contract) was not a construction contract for the purposes of s.104(1)? The answer must be No: complexities abound if requirements such as these are grafted on to s.104(1).

54. It is certainly right that s.109(1) of the 1996 Act contains basic payment provisions that must be included in a construction contract and, if they are not expressly agreed, s.109(3) applies the payment provisions in the Scheme instead. But s.109(2) qualifies this by providing that "the parties are free to agree the amounts of the payments, and the intervals at which, or circumstances in which they become due". Collateral warranties usually contain an agreement to pay a single amount (often a nominal sum): that was the case here. I understood Mr De Gregorio to accept that this agreement as to payment meant that the Abbey Collateral Warranty complied with s.109; in my view, regardless of any concession, the point is self-evidently correct. It appears that the same nominal payment provision formed part of the warranty in *Parkwood*, and it was not suggested there that it did not comply with s.109.

55. For these reasons, it seems to me that, provided the collateral warranty in question complied with s.109, the absence of more detailed payment provisions or remuneration obligations on the part of the beneficiary did not mean that the collateral warranty could not be a construction contract as defined in s.104(1).

8.7 A Single, or Primary, Construction Contract

56. It was also Mr De Gregorio's submission that, in respect of one set of construction operations, there could only be one construction contract (or possibly two, the main contract and the sub-contract). This arose out of his submission that in any given situation, there was one overarching or dominant construction contract, and that any other subsidiary agreements relating to those operations, particularly collateral warranties or parent company guarantees, were not intended to be caught by s.104(1).

57. The principal difficulty with that argument is that s.104(1) simply does not say that. There is nothing in s.104(1) which suggests that there can only be one construction contract for any given set of construction operations. Likewise, there is nothing to say that only the primary construction contract was intended to be caught by s.104(1), and not any other related contracts or warranties. Indeed, I consider that that would be contrary to one of the purposes of the Act in creating a cost-effective method of dispute resolution where the same underlying dispute can be dealt with by the same adjudicator.

8.8 Conclusions on Issue 1

58. Drawing those various threads together, I conclude that:

(a) The words in s.104(1) ("an agreement…for…the carrying out of construction operations") is a broad expression and has regularly been construed as such: see in particular *Parkwood*.

(b) Traditional views about what comprises a building contract or a collateral warranty are of limited value. However, the importance of collateral warranties to the ultimate owners/occupiers who were not involved when the building contract was originally agreed is a relevant background factor.

(c) The broad approach to s.104(1) is supported by s.104(5) and by one of the purposes of the 1996 Act, namely to provide an effective dispute resolution system. It is in accordance with that purpose that the same factual disputes about the carrying out of the same construction operations can be dealt with by the same adjudicator, even where there are two different contracts.

(d) There is no reason to limit the words of s.104(1) to refer only to the primary building contract in any situation. Neither is it necessary to construe the expression by reference to whether or not the contract contains detailed obligations on the part of the beneficiary to make payments direct to the contractor. Provided the contract or warranty in question complies with s.109, it can be a construction contract for the purposes of s.104(1).

(e) A collateral warranty may, therefore, be capable of being a construction contract for the purposes of s.104(1). What may be critical is whether the warranty is in respect of the ongoing carrying out of construction operations, on the one hand, or is in respect of a past and static state of affairs, on the other.

(f) Akenhead J's reasoning at [27] of *Parkwood* was and remains good law.

59. These conclusions mean that, unless the wording of the Abbey Collateral Warranty is outside the broad interpretation of s.104(1), and/or is materially different to the collateral warranty in *Parkwood*, the Abbey Collateral Warranty will be a construction contract in accordance with s.104(1).

9 ISSUE 2: DID THE TERMS OF THE ABBEY COLLATERAL WARRANTY MAKE IT A CONSTRUCTION CONTRACT AS DEFINED BY S.104(1)?

9.1 "Has Performed and Will Continue to Perform"

60. In the Abbey Collateral Warranty at clause 4.1(a), Simply Construct warranted that it "has performed and will continue to perform diligently its obligations under the contract." In my view, that warranty covered two separate things.

61. It plainly set out the standard to which the construction operations would be carried out. That was by reference to the detailed terms of the building contract. That point is emphasised in clauses 4.1(b) and (c). To that extent, the building contract is the marker or standard denoting the level of quality that Simply Construct were required to achieve.

62. However, I consider that there is also a warranty of both past and future performance of the construction operations. Simply Construct were warranting that, not only have

they carried out the construction operations in accordance with the building contract, but they will continue so to carry out the construction operations in the future. That is an ongoing promise for the future, of the kind to which I have already referred. As a matter of common sense, therefore, it seems to me that that is "an agreement for the carrying out of construction operations". It is not a warranty limited to the standard to be achieved; neither is it a warranty limited to a past or fixed situation. It is a warranty as to future performance. It is that that differentiates the Abbey Collateral Warranty from a product guarantee.

63. That can be tested in this way. If Simply Construct had failed to complete the construction operations, would they have been in breach of the Abbey Collateral Warranty? The answer must be Yes. They had agreed to carry out the construction operations to the standard set out in the building contract and they had stopped before they had been completed. That would have been in breach of both the building contract and the Abbey Collateral Warranty, because they could not perform their obligations under the Abbey Collateral Warranty unless they also performed their obligations under the building contract. The obligations arising under the Abbey Collateral Warranty were thus inextricably linked to the carrying out of the relevant construction operations. I have dealt above with Abbey's ability to seek specific performance.

64. The real issue here may be whether the provisions in clause 4 of the Abbey Collateral Warranty simply recognise the existence of Simply Construct's obligation to perform the construction operations under the building contract with Toppan without more, or whether they comprise separately actionable obligations on the part of Simply Construct. For the reasons that I have given, I consider that they are separately actionable obligations. The fact that they do not bring with them all the myriad other rights and duties which an employer may have under a traditional building contract is irrelevant for the purposes of s.104(1).

65. Mr De Gregorio's further argument on this point was that it was artificial to differentiate between the past and the future in circumstances where, as here, the warranty was signed long after the works had actually been completed. I address that issue in detail under Issue 3, in Section 10 below. But I should say that, for the reasons given there, I do not accept the proposition that, if the Abbey Collateral Warranty was a construction contract by reason of its terms, it fell outside that categorisation merely because of the date on which it was executed.

9.2 'Acknowledges' and 'Undertakes'

66. As the judge noted, the warranty in the present case does not include the verbs 'acknowledges' or 'undertakes' which were present in the warranty in *Parkwood*. The judge did not decide that those differences were relevant to the issue.

67. I agree. The word 'acknowledges' adds nothing, and Mr De Gregorio did not suggest otherwise. 'Undertakes' may add something: as Akenhead J said at [27(d)] of his judgment in *Parkwood*, an undertaking often involves an obligation 'to do something'. So it does. But in my view the obligation here, whereby Simply Construct warranted that it "will continue to perform diligently its obligations under the contract", was also a promise and an obligation 'to do something'. I therefore do not consider that the absence of the word "undertakes" in the present case makes any material difference:

indeed, I regard any difference between "warrant" and "undertakes", in the present context, as hair-splitting.

9.4 Conclusion on Issue 2

68. I therefore conclude, by the same process of reasoning as Akenhead J adopted in *Parkwood*, that the terms of the Abbey Collateral Warranty made it a construction contract as defined in s.104(1).

10. ISSUE 3: DID THE DATE ON WHICH THE ABBEY COLLATERAL WARRANTY WAS EXECUTED MAKE ANY DIFFERENCE?

10.1 The Judgment

69. This, of course, was the point that the judge decided against Abbey. He found that, because there were no future works to be carried out at the time the Abbey Collateral Warranty was signed, this was a warranty of a state of affairs akin to a manufacturer's product warranty. It was not a construction contract.

70. For the two reasons set out below, I respectfully disagree. I have already noted that, if he was wrong on Issues 1 and 2, Mr De Gregorio did not seek to uphold the judge's conclusion to that effect. Whilst he submitted that timing may be a relevant factor, he expressly accepted that it could never be determinative.

10.2 Retrospective Effect

71. The fact that the Abbey Collateral Warranty was executed at a time when the works were complete is of little relevance to its categorisation under s.104(1). That is because it was retrospective in effect. The wording of the Abbey Collateral Warranty and the surrounding evidence points inexorably to that conclusion, and Mr De Gregorio agreed that it was retrospective. The Abbey Collateral Warranty and the surrounding factual circumstances are, to that extent at least, indistinguishable from the position in *Swansea Stadium* (paragraph 25 above). There, O'Farrell J explained that a cause of action in respect of defective work accrued on practical completion. That would be true of a claim under the underlying building contract and also true of a claim under a collateral warranty. As to the latter, she expressly found that the cause of action accrued at practical completion even if, at that date, the collateral warranty had not been executed. This provides certainty to both contractor and warranty holder: see *Northern & Shell PLC v John Laing Construction Ltd* [2003] EWCA Civ 1035 at [50].

72. In *Swansea Stadium*, therefore, the date of execution was irrelevant because of the retrospective nature of the warranty. It is the same here. Although the Abbey Collateral Warranty was executed after the works had been completed, it was retrospective. It made a promise both as to the standard of past work and to the future carrying out of work to the same standard. It was therefore an agreement for the carrying out of construction operations which had retrospective effect. Once that is accepted, the delay between the completion of the works and the execution of the warranty does not matter. Otherwise arbitrary lines would start to be drawn. For example, in this case, it was inferred by the judge that 4 years was too long. But what about 2 years? A year?

73. In my view, because the Abbey Collateral Warranty contained future-facing obligations and was retrospective in effect, the date of execution was ultimately irrelevant. I note that, although the retrospectivity point had been raised before the judge in argument, he did not address it in his judgment.

10.3 Statutory construction

74. There is a second reason why the date of execution of the Abbey Collateral Warranty should not matter. Any other result would be counter-intuitive as a matter of statutory construction. It would make for considerable uncertainty: on this premise, a warranty may not be a construction contract in respect of construction operation X because that was completed on 1 January, but it may be a construction contract for the purposes of construction operation Y, because that was completed a month later, by which time the warranty had been signed. That cannot have been what the parties intended under clause 7C. It would be wholly unsatisfactory. It would also encourage contractors not to sign collateral warranties until after they had finished as many of the construction operations as they could, on the basis that, in such circumstances, whatever the wording of the collateral warranty, they could avoid the implication of the Scheme and therefore avoid being the subject of a claim in adjudication.

75. Take the present case. If Toppan had not become the substitute employer, then their claim against Simply Construct would have been brought pursuant to the collateral warranty that was in the same terms as the Abbey Collateral Warranty, but agreed during the course of the works. The timing point would not then be open to Simply Construct, and, on the face of it, the Toppan Collateral Warranty would be a construction contract within the meaning of s.104(1). In those circumstances, it would be wrong in principle to suggest that, whilst the Toppan Collateral Warranty was a construction contract, the Abbey Collateral Warranty, in exactly the same terms, was not, simply because it was entered into later. That would make for commercial absurdity.

76. I should add, for completeness, that there is no authority for the proposition on which the judge based his decision, namely that what matters above all else is the date on which the contract – in this case, the warranty - was executed. That is not what Akenhead J found in *Parkwood*.

10.4 Conclusion on Issue 3

77. I therefore respectfully conclude that the judge was wrong to find that the date of execution of the collateral warranty was determinative. For the reasons that I have given, it was not.

11. DISPOSAL

78. For these reasons, I would allow the appeal on the narrow ground, on the basis that the judge was wrong to find that the timing of the execution of the Abbey Collateral Warranty was the determinative factor. As I have said, that was not itself contested by Mr De Gregorio at the hearing. The points raised in the Respondent's Notice have required rather more analysis. However, I have concluded that they are incorrect. If my Lords agree, I would therefore allow the appeal and dismiss the Respondent's Notice.

LORD JUSTICE STUART-SMITH:

Introduction

79. Coulson LJ has set out the issue to be decided and the relevant facts at [1]-[12] of his judgment. I gratefully adopt his summary and the definitions he has used. As will become clear, although I agree with much of his judgment, I have come to the opposite conclusion on the determination of the issue that arises in this appeal. In my judgment, the judge was correct to hold that the provisions of the Abbey Collateral Warranty did not amount to or constitute a "construction contract" within the meaning of s. 104(1) of the 1996 Act (a "Construction Contract") for the reasons I set out below. However, I am in a minority and what follows is a dissenting judgment.

80. The outcome of the appeal depends upon:

    i) The proper construction of the Abbey Collateral Warranty; and

    ii) Whether the Abbey Collateral Warranty, so construed, is a Construction Contract, which in turn depends upon the meaning of s. 104(1).

    Before tackling these two critical questions, it may help to establish areas of agreement and other areas where there may be a difference of emphasis or substance.

Preliminary matters

81. Labels are not determinative, unless they are made so by contract or statute. This simple proposition is important in a case where the agreement at the heart of the dispute, which has been labelled "the Abbey Collateral Warranty", is referred to in Clause 7C of what has been labelled the building contract as "a Collateral Warranty", on its cover sheet as "Contractor's Collateral Agreement in favour of a beneficiary" and in its own Clause 9 once more as a "collateral warranty". The importance of looking at the substance of the clause or agreement in question is highlighted by the fact that the words "Collateral Warranty" are given capital letters in Clause 7C, which raises at least the suspicion that "Collateral Warranty" will be a term that is defined in the building contract: but it is not, and the building contract itself ascribes no particular meaning to the words "collateral warranty" as used in Clause 7C of the building contract or elsewhere. Furthermore, and for reasons I will explain, Clause 4 of the Abbey Collateral Warranty is not the only clause to which regard should be had when considering what meaning is to be attributed to that particular clause.

82. In the same vein, I would be cautious of an approach which assumed (or a result that concluded) that "collateral warranties" generally either did or did not amount or give rise to a Construction Contract. When interpreting the Abbey Collateral Warranty, as with any commercial agreement, the starting point will be the ordinary meaning of the words used. As it happens, the words "warrant" and "warranty" have a well-established "normal" usage and meaning which provides the start (though not necessarily the end point) of the iterative interpretative process: see [106]ff below. But the mere fact that a clause or agreement contains the word "warrant" or "warranty" does not necessarily determine the meaning of the clause or the agreement as a whole. The meaning ascribed to different wordings in different contexts may be informative; but what matters will be the specific words or agreement under immediate consideration.

83. I agree with Coulson LJ that it is conceptually possible for a clause or agreement that includes the words "warrant" and/or "warranty" to give rise to obligations that bring the clause or agreement within the ambit of s. 104(1): it all depends on the interpretation of the clause or agreement as a whole. I also agree that there may be more than one Construction Contract relating to the same set of works. The most obvious example is where there is a main contract and a sub-contract for the carrying out of the same works. The co-existence of more than one Construction Contract relating to the same set of works may give rise to practical difficulties, to which I will return later: but those difficulties do not bar the possible co-existence of two Construction Contracts that touch upon the same works. Set against the possible difficulties is the possible procedural advantage, which I also acknowledge, of being able to refer to adjudication multiple disputes that arise out of different Construction Contracts but raise the same or similar issues. That possible procedural advantage cannot and does not affect the meaning of s. 104(1) of the Act; nor would it justify an otherwise strained interpretation of a clause or agreement so as to conclude that it is a Construction Contract.

84. A contract (including a building contract) can be, and frequently is, entered into after the works that are the subject of the contract have commenced or even finished. The building contract in the present case is an example of this practice. The works commenced on 11 May 2015 at the latest (there being a dispute about the actual date of commencement that is immaterial for present purposes) and the building contract was executed on 29 June 2015. Where a document such as the building contract is executed after the commencement of the works, it comes as no surprise if it provides all of the contractual obligations arising between the Employer and the Contractor, including those that will apply to works carried out before the execution of the contract. But ultimately, and in case of dispute, it is the terms of the contract itself, and not any preconceived expectation, that will determine whether or not it does. Where it does, it means that the parties have agreed that the contract is to be treated as effective from a date that precedes its coming into existence. In that sense, it may be said that the contract has retrospective effect.

85. In general, a cause of action for breach of a contract cannot arise before the contract is in existence. There are typically two related but distinct questions to be asked when an issue of "retrospectivity" arises, each of which may be applicable in the same case. The first is whether the terms of the contract make clear that they establish and govern the obligations of the parties in relation to conduct occurring before the execution of the contract. The second is whether the contract is to be treated as effective from a date before its execution. *Northern & Shell plc v John Laing Construction Ltd* [2003] EWCA Civ 1035 was a case where the contract fell to be treated as effective from a date before its execution. The issue was whether the cause of action for breach of warranty accrued on the date when the warranty was signed, namely 16 January 1990, or some other date: see [5]. The answer was provided by Clause 5, which stated that the warranty deed "shall come into effect on the day following the date of issue of the certificate of Practical Completion under the Building contract …", which was 26 August 1989: see [58]. It was in that sense "retrospective". The cause of action for breach of the deed of warranty's promise that the contractor had complied with and would at all times comply with the terms of its building contract accrued on the effective date of the warranty deed i.e. 26 August 1989. Since proceedings were issued on 14 January 2002, they were statute barred. It is important to note that the cause of action under the warranty was held to accrue on 26 August 1989 (the date on which the

warranty deed became effective) and not on 25 August 1989 (the date of practical completion on which date the employer's cause of action against the contractor for breach of the terms of the building contract accrued). Had the Claimant's contentions succeeded, the cause of action under the warranty deed would have accrued on 16 January 1990 (the date when, in the absence of Clause 5, the warranty deed would have been effective) and the claim would not have been statute barred.

86. In *Swansea Stadium Management Company Ltd v City and County of Swansea and another* [2018] BLR 652, the works reached practical completion on 31 March 2005. After practical completion, on or about 22 April 2005, the defendants and the claimant entered into what was described as a collateral warranty by deed. It was undated. As O'Farrell J noted at [45]:

> "The collateral warranty does not contain an express commencement or expiry date. It does not contain an express term as to the date on which any cause of action for breach is deemed to have occurred. It does not identify an express limitation period in respect of claims made by the claimant against the second defendant [i.e. the contractor under the main building contract]."

87. At [48]-[52] the Judge identified four reasons to support her conclusion that the parties intended the warranty to have "retrospective effect". They included (at [51]) that the clear intention of the warranty was to cover the full scope of the contractual works under the building contract regardless of the date on which the warranty was executed. At [56] the Judge concluded that:

> "… the clear intention of the parties was that the Collateral Warranty should have retrospective effect. The Second Defendant's liability to the Claimant was deemed to be coterminous with its liability to the First Defendant under the Building Contract. Any breach of contract created by the Collateral Warranty would be regarded as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty."

88. I understand the Judge's reference to "the effective date of the Collateral Warranty" to be a reference to the date upon which it was executed. The Judge's reasoning led to the conclusion that it was to have effect before that date and was, in that sense retrospective. If I am right in this understanding, the case is on all fours with *Northern & Shell*, from which the Judge cited extensively and upon which she evidently relied. I understand Coulson LJ to be in agreement with this interpretation: see [71] of his judgment. If, however, my understanding is incorrect, and although it does not in my view affect the outcome of the issue for determination on this appeal, I do not accept that a cause of action under a collateral warranty (or any other contract) can come into existence before the agreement is effective. As is clear from *Northern & Shell* a contract is not necessarily effective on or from the date upon which it is concluded. Once again, the proper meaning of the agreement in question will depend upon its terms. For the avoidance of any doubt, if the Abbey Collateral Warranty gave rise to or constituted a Construction Contract, I consider it to be clear beyond argument that it was expressed

in terms that covered works carried out both before and after the date of its execution. I also agree that the date of execution of the Abbey Collateral Warranty at a time when the works were complete is not of itself determinative of the question whether it falls within the ambit of s. 104(1), for reasons that I will explain.

89. With these preliminary observations in mind, I turn to the interpretation of s. 104(1) of the Act and then to the Abbey Collateral Warranty.

Section 104(1) of the 1996 Act

90. Coulson LJ has set out the relevant parts of s. 104(1) at [20] of his judgment. At [37] he says that much may turn on the meaning of the word "for", the defining feature of a "construction contract" in Part II of the 1996 Act being that that it is an agreement "for" any of (a) the carrying out of construction operations, (b) arranging for the carrying out of construction operations by others, whether under sub-contract or otherwise, or (c) providing his own labour, or the labour of others for the carrying out of construction operations. I agree, it being common ground that the works under the building contract to which the Abbey Collateral Warranty referred were construction operations within the meaning of s. 105 of the 1996 Act.

91. I agree with Coulson LJ that the word "for" in such contexts has a clear and well understood "normal" meaning, which is to denote the purpose or object (or, I would add, intended outcome) of the agreement. Typically an agreement "for" something means that someone agrees to achieve that thing or bring it to fruition. Although "normal" meaning is not beholden to dictionaries, the relevant entry in the New Shorter Oxford English Dictionary adds a little extra colour: "Of purpose, result, or destination. … With the object or purpose of, with a view to; as preparatory to, in anticipation of; conducive to; leading to, giving rise to, with the result or effect of." I take this as supporting an understanding of the word "for" in the context of s. 104(1) as being a word indicating and followed by the purpose of the agreement. It carries with it the implication that a party to a contract "for" the carrying out of construction operations (typically the contractor) undertakes a direct contractual obligation to the other party (typically the employer) to carry out the construction operations.

92. This usage is reflected in Lord Diplock's classic definition of a building contract, cited by Coulson LJ at [34] as being "an entire contract *for* the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done." This indicates that the purpose and intent is that the contractor undertakes a primary obligation to sell and provide the necessary goods, work and labour for the carrying out of the work. So, although no further gloss is required to indicate in general terms the normal meaning of the word "for" in such contexts, it typically functions to identify the primary obligations being undertaken by the parties that mark the purpose of the agreement.

93. This understanding and use of the word "for" is reinforced in s. 104(1) by the various activities that are listed at (a) to (c), each of which involves either the carrying out of the construction operations or arranging for them to be carried out by others. There is a consistent thread that Construction Contracts (i.e. those within the ambit and meaning of s. 104(1)) involve a party incurring a direct obligation to carry out the construction operations themselves or arranging for others to carry them out. Section 104(2) is consistent with this approach to the primary purpose of the contract, requiring a direct

involvement in bringing the construction operations to fruition. Adopting the approach outlined by Coulson LJ at [37], a Construction Contract is an agreement, the purpose or object of which is the carrying out of construction operations (or arranging for them to be carried out by others) or providing labour for carrying them out.

94. There is a danger in attempting any further description or paraphrase of what s. 104(1) says or means. In my judgment it is clear on its face both as to what it says and as to what it means. Equally, I find it unhelpful to adopt epithets such as "broad" when describing how it is or should be interpreted. The question in every case will be whether an agreement under consideration falls within the ambit of s. 104(1) as that may reasonably be understood.

95. *Fence Gate Limited v James R Knowles Limited* [2001] CILL 1757 was a decision on the meaning of s. 104(2). HHJ Gilliland held that a claim for fees for work done in an arbitration by a construction claims company was not the doing of architectural design or surveying work and that assisting in the arbitration was not the provision of advice in relation to construction operations. The Judge rejected the suggestion that the words "in relation to" in s. 104(2) should be given a "broad" interpretation. He contrasted the terms of s. 104(2) with the use of the phrase "in connection with" in an arbitration clause, where "there is a fairly clear policy in favour of upholding arbitration clauses"; but he found the comparison of no assistance when considering the meaning and effect of different words in a statute, saying (at [8]):

> "The starting point for that consideration must, it seems to me, be a consideration of the actual language of the statute and not what has been said in cases dealing with a different subject matter and in a different context."

To similar effect, he said at [10]:

> "There is in my judgment no reason why the court should seek to give what would be in my judgment a strained meaning to the ordinary meaning of the words "to do architectural design or surveying work" or "to provide advice on building or engineering" in order to bring within the language activities which are essentially part of the litigation or dispute resolution process and not part of the construction process. The words in S. 104(2) are ordinary words which are in everyday use and prima facie are used in their ordinary normal everyday sense."

96. I respectfully agree with and endorse HHJ Gilliland's approach as summarised in these observations.

97. In *Gillies Ramsay Diamond v PHW Enterprise Ltd* [2002] CILL1901/1903, [2003] SLT 162 Lady Paton held that the contract administrator's engagement, which included preparing specifications and drawings, seeking tenders, providing a tender report, programming the works, monitoring the words, administering the works and having responsibility for financial control (amongst other duties) meant that the contract administrator arranged for the carrying out of the construction operations: without his involvement the construction operations would not be carried out in a satisfactory way: see [45]. Accordingly, she held that the agreement was a construction contract within

the meaning of s. 104(1)(b). It had been urged upon her that this would be a "broad" interpretation, but she did not make any observation on that submission. What is apparent is that she simply measured the terms of the contract administrator's engagement and found that they satisfied the requirements of s. 104(1). Adopting the same approach Lady Paton also found that the contract administrator's duties included "surveying work … in relation to construction operations" and that the appointment also fell within the ambit of 104(2).

98. In my judgment neither *Fence Gate* nor *Gillies Ramsay Diamond* interpreted s. 104(1) "broadly" or supports a view that s. 104(1) should be given a "broad" construction.

99. In *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2655 (TCC), Akenhead J said of the terms of s. 104:

> "One must be careful about adopting a peculiarly syntactical analysis of what words mean in this statute when it is clear that Parliament intended a wide definition. An agreement "for…the carrying out of construction operations" is a broad expression and one should be able, almost invariably at least, to determine from the contract in question whether it fits within those words, without what could be a straight-jacketed judicial interpretation."

100. I agree that one should not strain to impose a meaning on the words that they do not reasonably or obviously bear. But the starting point with any statute is to look at what it says. Here, I do not consider it to be the imposition of a strait-jacket to adopt what I understand is agreed to be the normal meaning of the word "for": it is the fitting of a glove for which one is searching. Akenhead J was merely observing that the phrase "an agreement for the carrying out of construction operations" is a "broad expression". I agree; and I also agree that one should be able to determine whether the contract in question fits within those words without adopting a strained interpretation, in whatever direction the strained interpretation may pull.

101. I am unable to agree that the use of the words "related to" in s. 104(5) adds to or informs the meaning of the word "for" in s. 104(1). What the first sentence of s. 104(5) says is that, where there is a hybrid agreement that relates in part to construction operations and in part to other matters, Part II of the 1996 Act only applies so far as it relates to construction operations. In the words of the subsection, Part II does not apply to such an agreement to the extent that it relates to "other matters". But this does not mean that all agreements relating to construction operations are construction contracts within the meaning of s. 104(1). That is made clear by the second sentence which provides that an agreement "relates to construction operations" only "so far as it makes provision of any kind within subsection (1) or (2)". In other words, Part II will only relate to an agreement that makes provision of any kind specified in s. 104(1) or (2). Accordingly, unless the agreement is for (a) the carrying out of construction operations, (b) arranging for the carrying out of construction operations by others, or (c) providing labour for the carrying out of construction operations, or it satisfies the requirements of s. 104(2), Part II has no application. Far from expanding the scope of s. 104(1), it reinforces its boundaries. In my understanding, there is nothing in *C Spencer Ltd v M W High Tech Projects UK Ltd* [2020] EWCA Civ 331, [2020] 1 WLR 3426 to the contrary. The issue in that case was whether it was necessary in a hybrid agreement, which made provisions

in relation to payment for matters having nothing to do with construction operations which mirrored the provisions of the 1996 Act for Construction Contracts, to specify separately the sum being claimed in respect of construction operations and other matters respectively. This Court held that it was not. It did not, in my understanding, say anything material about the effect of s. 104(5) upon the interpretation of s. 104(1).

102. Nor am I able to discern a statutory purpose that requires a strained interpretation of s. 104(1) to be adopted. The statutory scheme for adjudication is generally regarded as beneficial but the legislature has chosen to impose limits upon it that do not always suggest a clear approach either of pragmatism or principle or policy. Thus, while I would hold that the terms of s. 104(1) and (2) are clear, "many contracts for works which, on any sensible definition, are construction operations, were excluded from the ambit of the Act", and aspects of the Scheme have been described as "uncommercial, unsatisfactory and a recipe for confusion", leaving the Court to attempt to find "a pragmatic solution to the illogical and uncommercial impact of section 104(5)": see *Spencer* at [2] and [31] per Coulson LJ and [33] citing O'Farrell J. It follows that, with some diffidence, I am unable to place the same weight upon the statutory purpose of introducing the right to adjudicate similar disputes arising between different parties as Coulson LJ does at [41] of his judgment.

103. For these reasons, I consider that the defining characteristic for a contract to fall within s. 104(1) of the Act is that it should be a contract "for" one of the activities listed in the subsection. The section is clearly drafted and the use of the word "for" is conventional English usage. Given its clarity there is no call for a strained or purposive interpretation of the section.

The Abbey Collateral Warranty

The approach to be adopted

104. This is not the occasion for a detailed recital or restatement of the relevant principles, which are extremely well known, or for repetitive citation of authority. In briefest outline (and with due acknowledgment to the summary of basic principles provided by *Lewison on Contracts*, 7th Edition at page 1), when construing a commercial contract such as the building contract or the Abbey Collateral Warranty, the court seeks the objective meaning of the language used by the parties in its documentary and commercial context. The objective meaning is what a reasonable person having the background knowledge which would have been available to the parties would have understood the parties to be using the language in the contract to mean. The text must be assessed in the light of (i) the natural and ordinary meaning of the words, (ii) any other relevant provisions of the contract, and (iii) the overall purpose of the clause and the contract. The process is unitary and iterative. If the language of the contract is unambiguous the court must apply it. But if there are two possible interpretations the Court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other.

105. In applying this approach, I shall start with the natural and ordinary meaning of the most important words that appear in Clause 4 of the Abbey Collateral Warranty. I shall then look at them in their wider context, as provided by the Abbey Collateral Warranty as a whole and the building contract. Next I shall try to address the overall purpose of the clause and the agreement. I shall then look in some detail at *Parkwood*, bearing in

mind both the similarities between the clause in *Parkwood* ("the Parkwood Agreement") and Clause 4 of the Abbey Collateral Warranty and the differences. Finally I shall remind myself of the need for an iterative approach and, in the event of ambiguity, of the need to find an interpretation that is consistent with commercial sense as at the date of the contract.

The natural and ordinary meaning of the words

106. I have said that labels are not determinative, but it is of more than passing interest that everyone involved in this case (including Simply Construct in its skeleton argument for the appeal) refers to Clause 4 as a warranty. For the reasons that I explain below, they are right to do so.

107. The first and most important word to consider is the transitive verb "warrants": the contractor "warrants" that … . The normal meaning of the verb to warrant is to provide a promise about a fact, circumstance or outcome. This is reflected in dictionary definitions which typically involve a person providing a promise or a guarantee that something is true and making themselves answerable if it is not.

108. This understanding of the normal meaning of the transitive verb to warrant is embedded in legal usage. In *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 327–328 Lord Denning MR said:

> "I use the word "warranty" in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says, "I guarantee it", or "I warrant it", or "I give you my word on it". He means that he binds himself to it. That is the meaning which it has borne in English law for three hundred years from the leading case of *Chandelor v Lopus* [(1603) Cro Jac 4] onwards."

109. A person could warrant a fact, circumstance or outcome that is already the subject of a direct obligation between them and the person to whom the warranty is given; but typically, and particularly in the context of building operations and cases such as the present, the beneficiary wants the contractor to warrant the fact, circumstance or outcome precisely because the beneficiary is not a party to the building contract and is owed no direct obligations by the contractor. If the warranted fact, circumstance or outcome turns out not to be true or achieved, the person who warranted it will be liable for breach of their promise in warranting it. A liability for breach of the warranty is conceptually different from a liability for breach of direct obligations owed in respect of the underlying state of affairs: it rests simply upon the fact that the warranting person's promise is found to be broken. Thus, where a person (A) warrants to someone (B) that they have performed their obligations to a third person (C), that does not in normal or general usage involve or imply the creation of a direct or free-standing obligation owed by A to B to comply with the obligations that A owes to C: it merely means that if A fails to perform their obligations to C, they will be in breach of the warranty that A gave to B. The same is true if A warrants to B that A will perform their future obligations to C. If they do not perform those obligations, they will be in breach of their warranty and liable for that breach of promise: although it arises out of A's failure to perform their obligation to C, they are not liable to B for (that word again) their failure to perform their obligations, because they do not owe the underlying

obligations to B. Their liability rests solely upon the fact that they warranted a state of affairs which has proved to be untrue. One of the incidents of a warranty (in the sense that I have just described) is that an injunction will not lie to enforce the underlying obligation: the only question is whether what the person's warranty is shown to have been broken, which opens the way to a remedy in damages.

110. Thus it may be said that the object of A warranting to B that they have performed or will perform the obligations that they owe to C is to give B a right of action without making them a party to the direct obligations owed by A to C. That could be achieved, if the parties so wished, by making B a party to the contract between A and C, as was done in the present case by the novation of Sapphire's rights and obligations under the building contract to Toppan – another party identified as a potential beneficiary of a contractual warranty. But, obviously deliberately, no such step was taken in respect of Abbey. This situation was similar to that which prevailed in the *Swansea* case where O'Farrell J said (at [49]) that "the purpose of the Collateral Warranty was to provide a direct right of action by the Claimant against the Second Defendant in respect of its obligations under the Building Contract to which the Claimant was not a party."

111. That said, I accept that the use of the transitive verb warrant or the noun warranty within a clause or agreement does not preclude the possibility that the overall effect of the clause or agreement is to give rise to direct obligations. It is therefore necessary to focus intensely upon the precise terms of what Simply Construct warranted to be true. Here again, I consider that the words used are clear. By clause 4(1)(a) Simply Construct warranted that it "has performed and will continue to perform diligently its obligations under the Contract." This is a promise in relation to Simply Construct's obligations that are owed to someone else and not to Abbey. That is made clear by the last words of the sentence: what Simply Construct warranted was that it had performed and would perform its obligations "under the Contract" i.e. the obligations it owed to Sapphire/Toppan under the building contract. There is, in my judgment, nothing in the terms of the sentence that either says or implies that Simply Construct is undertaking direct obligations to Abbey: it is merely warranting its performance of obligations owed to someone else.

112. Reliance has been placed upon the fact that Simply Construct warrants both its past and its future performance of its obligations under the building contract. There is nothing in this point, for two reasons. First, given that the whole purpose of the warranty was to provide Abbey with a right of action in relation to Simply Construct's performance of its obligations under the building contract, it was necessary to make clear that Simply Construct's warranty covered all of those obligations, irrespective of whether they arose before or after the execution of the Abbey Collateral Warranty. Second, and related to the first, the wider context shows that the terms of the collateral warranty were fixed at a time when it was not known when the warranties would actually be given. It seems to me to be obvious that the collateral warranty provided for by Schedule 5 of the building contract must mean the same thing whenever it was executed – a point to which I will return. That being so, it was necessary to adopt a form of words which made clear that all of Simply Construct's performance of its obligations was warranted in the same terms and to the same effect whenever the warranty was executed.

113. It therefore seems to me that Clause 4.1(a) of the Abbey Collateral Warranty is clearly and unambiguously adopting the normal and established meaning of the words used. Simply Construct warrants (i.e. guarantees) its performance of its obligations under the

building contract. And it does so in the same terms as it would have done if called upon pursuant to Clause 7C to provide a Collateral Warranty (as it was there described) either to Toppan, or to Abbey or to any Purchaser as defined in the building contract, whenever it was required to execute or did in fact execute it. Those terms make clear that Simply Construct warrants the performance of all of the obligations it owes to the Employer under the building contract.

114. The same analysis applies to Clause 4.1(b) of the Abbey Collateral Warranty. Simply Construct warrants that "in carrying out and completing the Works" it "has exercised and will continue to exercise all the reasonable skill care and diligence to be expected of a properly qualified competent and experienced contractor experienced in carrying out and completing works of a similar nature value complexity and timescale to the Works." The "Works" are defined as "the construction of the development at the Site as more particularly described in the [building contract]". Clause 4.1(b) is therefore providing a further binding promise (i.e. warranty) about Simply Construct's performance of the building contract Works. If it is subsequently proved that it has not exercised the warranted levels of skill care and diligence, Simply Construct will be in breach of its warranty and Abbey has a direct right of action for breach of warranty. That would be so whether or not the level of performance warranted by Simply in Clause 4.1(b) is congruent to the level of performance required as a matter of direct obligation by Simply Construct to the Employer under the building contract. The clause, in my judgment, neither says nor implies that Simply Construct is assuming a direct obligation of skill and care to, or even a direct primary obligation to carry out the Works for Abbey.

115. Clause 4.1(c) adopts the same approach and structure in relation to Simply Construct's design of the Works. The same analysis follows.

116. Clause 4.5 is a further example of Simply Construct providing a binding contractual promise in the form of a performance warranty, this time about the quality of materials that it has used or will use in the Works. Once again, Simply Construct provides a warranty upon which Abbey may rely whether or not the warranty adopts terms that are the same as are to be found in the building contract. The point is that, by its express terms, Simply Construct provides what may be described as a free-standing warranty, breach of which may give Abbey a right of action.

117. Thus, at this early stage of the iterative process of contractual interpretation, I consider that the terms of Clause 4.1(a)-(c) and Clause 4.5 are clear and unambiguous; and that they neither say nor imply that Simply undertakes a separate and direct obligation to Abbey to carry out the works either at all or to any particular standard. If Abbey is to have a right of action it will be for breach of warranty, not breach of any direct obligation assumed by Simply Construct to Abbey to carry out the Works.

The context provided by the Abbey Collateral Warranty

118. The immediate context for Clauses 4.1 and 4.5 is provided by the rest of Clause 4 and the other provisions of the Abbey Collateral Warranty. Both, in my judgment, support the "normal" interpretation that I have just described. Clause 4.2 reflects the awareness of the need to clarify the effective date of the building contract to which I referred in [84]-[88] above. It brings the terms of the warranty into line with Simply Construct's performance of its obligations under the building contract, whenever the building

contract or the Abbey Collateral Warranty were executed. It says nothing about Simply Construct assuming direct obligations to Abbey in respect of the Works or the building contract. Clause 4.3 is conventional in clarifying that Abbey is not in a better position by virtue of any right of action pursuant to Simply Construct's warranties than it would be had it been a party to the building contract. Other than re-emphasising that Simply Construct owes no direct obligations to Abbey pursuant to the building contract, it is uninformative for the purposes of the present issue. Clause 4.4 adds nothing.

119. Clause 5 of the Abbey Collateral Warranty concerns the provision of insurance and is in terms which are material because they contrast with the specific use of the word "warrants" in Clause 4. The building contract imposed obligations upon the contractor to take out and maintain professional indemnity insurance. The parties could have resorted to the language of warranty in the same way as in Clause 4 of the Abbey Collateral Warranty; but instead they chose to adopt language that imposed a direct contractual obligation upon the Contractor to maintain insurance as follows:

> "5.1 The Contractor has professional indemnity insurance with a limit of indemnity of not less than £5,000,000 for any one claim and in the annual aggregate.
>
> 5.2 The Contractor *shall maintain* the Insurance referred to in Clause 5.1 during the carrying out of the Works and for a period of 12 years commencing on the date of practical completion of the Works … .
>
> 5.3 The insurance held or taken out under clauses 5.1 and 5.1 *shall be* with well established insurers of good repute carrying on business in the United Kingdom.
>
> 5.4 If the Insurance referred to in Clauses 5.1 and 5.2 ceases to be available at commercially reasonable rates the Contractor *shall give notice* to the Beneficiary immediately … .
>
> 5.5 As and when the Contractor is reasonably requested to do so by the Beneficiary the Contractor *shall produce promptly* for inspection documentary evidence that professional indemnity insurance has been effected and/or is being maintained in accordance with this Clause 5." (Emphasis added)

120. Coming immediately after Clause 4, it is impossible to suggest that this difference in language is accidental; or that it is immaterial. What it demonstrates is that the decision to express Clauses 4.1 and 4.5 in terms of Simply Construct "warranting" as it did was because of a conscious differentiation between warranting (as in Clause 4) and imposing or accepting direct contractual obligations (as in Clause 5). It therefore supports giving the use of the language of warranting and warranties their normal meaning as I have attempted to explain it.

121. Similar observations may be made in respect of Clause 6 of the Abbey Collateral Warranty, which relates to copyright and adopts the language of direct contractual obligations until it concludes with a specific warranty in Clause 6.6, which states that: "The Contractor hereby warrants that the use of the Contractor's Design Documents for

the purposes of the Project shall not infringe the intellectual property rights of any third party." To my mind, this use of the language of warranty is entirely consistent with its use in Clause 4 and the absence of its use elsewhere. It provides strong support for a conclusion that the use of the language of warranty was deliberate, conventional and unambiguous.

The wider context

122. Turning to the wider context provided by the building contract leads to a point where I am unable to agree with the reasoning of the judge below. In the passages set out by Coulson LJ at [18] above, he appears to have treated as determinative the fact that the Abbey Collateral Warranty was executed long after practical completion and all remedial works had been carried out. This raises the prospect that if the Abbey Collateral Warranty had been executed before the Works had been started or completed the result might have been different. It amounts to saying that whether the works have been started or completed forms part of the factual matrix that may inform the proper understanding and interpretation of a contract. I agree that the date on which a contract is executed may in principle be part of the relevant factual matrix; but the relevant factual matrix in this case extends further than the date on which the Abbey Collateral Warranty was executed.

123. The Abbey Collateral Warranty refers extensively to the building contract, including, by Clause 7, giving Abbey the right to step in and assume all of the employer's obligations under the building contract if the employer becomes insolvent. It therefore seems overwhelmingly probable that the terms of the building contract would have been available to Abbey as well as to the employer and to Simply Construct as contractor. Accordingly, all parties would have known that (a) the terms of the Abbey Collateral Warranty had been fixed in advance by Schedule 5 to the building contract; and that (b) as is usual in such contracts, the building contract made provision for agreements in those terms to be executed in favour not just of Abbey but of others too; and that (c) the date on which such agreements might be executed could not be predicted. These features seem to me to be overwhelmingly more important than the date upon which an agreement in favour of a particular beneficiary came to be executed. They lead to the conclusion that any executed agreements in the pre-ordained form must have a constant meaning irrespective of (a) the identity of the beneficiary in whose favour they were executed, and (b) the date on which they were executed, and (c) the state of the Works when the agreement was executed. Put shortly, it would be intolerable (by which I also mean not commercially sensible) if either the contractor or a beneficiary could manipulate the meaning of the agreement by executing it before or after a given date or a given state of progress of the Works. I therefore agree with Coulson LJ that, on the facts of the present case, the date on which the Abbey Collateral Warranty was executed does not matter.

124. The fact that the date on which the Abbey Collateral Warranty was executed does not affect its the proper construction does, however, provide a simple and obvious explanation for the references in Clauses 4.1 and 4.5 to both past and future performance of the contractor's obligations and operations under the building contract: it is to make clear that the warranties that the contractor is giving applies to all of their obligations and performance under the building contract whether before or after the execution of the Abbey Collateral Warranty. In my judgment no other explanation is

either needed or justified in the face of the clear language of the warranties to which I have already referred in detail.

Overall purpose?

125. I am unable to identify anything in the form of an overall purpose of either the Abbey Collateral Warranty as a whole or Clause 4 in particular which should lead to the adoption of a different interpretation of Clause 4 from that which is indicated by the normal meaning of the words used. There is nothing in the Abbey Collateral Warranty that indicates a broader purpose than that indicated by the normal meaning of the terms used. More specifically, there is nothing to indicate that the Abbey Collateral Warranty had as an ulterior purpose the ability to refer of disputes arising under it to adjudication. That could have been simply done either (a) by stating in unstrained language that the contractor assumed direct obligations to Abbey to carry out for Abbey the works that it was already carrying out for the employer or (b) by stating that any dispute arising under the Abbey Collateral Warranty in general or Clause 4 in particular should be deemed or treated as being a Construction Contract and should be referable to adjudication.

126. While such an approach would have given a clear answer to the question whether an adjudicator would have jurisdiction, it would have left difficult problems to be solved, the first of which would be to identify what were the terms and consequences of the (deemed or actual) Construction Contract so created. Assuming, as seems obvious, the terms were not congruent with the terms of the building contract, the answer to this problem seems intractable. These are problems which arise on the interpretation for which Abbey contends on this appeal and, if the approach advocated by Abbey were to be adopted, they would be real and not hypothetical. They therefore cannot be ignored in the iterative process of interpretation. I mention only one.

Injunctive relief

127. In *Parkwood* at [27(g)], which is cited by Coulson LJ at [24] above and is part of the reasons given by Akenhead J for concluding that the wording in that case was and was to be treated as a Construction Contract, the Judge said:

> "The Collateral Warranty, being contractual in effect, will give rise to the ordinary contractual remedies. Thus, if [the contractor] completes the Works but not in compliance with, say, the Employer's Requirements or the standards therein specified, there will be an entitlement for Parkwood to claim for damages because there will be a breach of contract. Similarly, there could be remedies if [the contractor] had repudiated the Contract because it will then have failed to complete the Works at all. It is at least possible that, in those circumstances, Parkwood would have had locus to seek injunctive relief in terms of a mandatory injunction or specific performance, albeit that it is often difficult to secure such injunctions or orders in practice when they relate to the execution of detailed and extensive construction work"

128. Coulson LJ at [47] above identifies this as being an important point and says:

> "If the beneficiary of a warranty such as this might be able to require the contractor to perform the construction operations in question, that would be a strong indicator that the warranty was a construction contract for the purposes of s.104(1)."

He then, at [48]-[51] addresses the question whether the beneficiary of a "contractual warranty of this kind can claim a remedy other than damages for breach of warranty" and concludes that it is not free from doubt.

129. It is not clear to me whether Akenhead J's reference at the start of [27(g)] of *Parkwood* to the Parkwood Agreement being "contractual in effect" meant (a) that what the contractor had warranted was a contractual warranty or (b) that he was assuming that the warranty took effect as a Construction Contract and was looking at the consequences of that assumption. In either event, it does not seem to me that [27(g)] provides a reason for concluding that the Parkwood Agreement in that case should be interpreted as giving rise to a Construction Contract. If the former limited meaning was what Akenhead J intended, I would not accept that breach of a performance warranty (in the sense that I have described above) could or would give the beneficiary locus to seek an injunction in any circumstances. As I have said, the contractual remedy for breach of a contractual warranty (in the sense that I have described) is a claim for damages. It would, in my judgment, be both wrong in principle and a retrograde step to suggest that the beneficiary of a collateral warranty such as we are considering could intervene in the workings of the underlying building (or other) contract to which he has deliberately not been made a party. It would be retrograde because, whatever else may be said, he would be a stranger to the building contract and his intervention could (and likely would) disrupt the dealings of the actual parties to it, as I illustrate below.

130. If [27(g)] of *Parkwood* is to be taken as contemplating the consequences of the collateral warranty being treated as a Construction Contract, different considerations apply. Coulson LJ recognises that the courts rarely compel performance of building contracts. I agree; and the truth of the observation is demonstrated by the tenuous nature of the two examples cited at [49] of Coulson LJ's judgment above. *Jeune* was a case where the court enforced a landlord's covenant to repair. It was not about a building contract as generally understood. The court emphasised that, although it had jurisdiction to compel the landlord, it was a jurisdiction that should be exercised "with care". In *Price*, that principle was reiterated, though the specific performance being sought was not for the carrying out of building works (which had been completed) but for the granting of a lease as had been agreed. Neither detracts from the basic proposition that the courts rarely compel performance of building contracts.

131. I agree that if an agreement gives rise to a contract for the carrying out of construction operations within the meaning of the 1996 Act, there is no principled reason why the beneficiary should be debarred from pursuing any remedy that would be open to any other party to a Construction Contract. But that is not a reason for holding that a particular agreement is a Construction Contract: it is a consequence of a decision that it is. For the purposes of interpreting the terms of the Abbey Collateral Warranty it is, to my mind, of no assistance at all. At best it is circular.

132. If it is being suggested that the remote possibility of the availability of injunctive relief would be a benefit that should influence the interpretation of the Abbey Collateral Warranty, I would respectfully but profoundly disagree. The practical considerations

of a beneficiary's potential intervention are daunting. First and foremost, the terms of the beneficiary's (assumed) Construction Contract are barely defined and are not the same as those of the building contract. An obvious example which illustrates this obvious fact is price: the consideration for the Abbey Collateral Warranty is £1, while the contract price of the building contract is measured in millions. Akenhead J at [27(g)] of *Parkwood* cites the case of repudiation of the underlying contract by the contractor. It is not to be assumed that the employer, who is a party to the building contract, will see eye to eye with the beneficiary, who is not. It is entirely conceivable that the employer may not wish to try to compel the repudiating contractor to complete but wishes to engage someone else. And if intervention were to be entertained in a case of repudiation, it is by no means clear what happens if the contractor's repudiation is not accepted by the employer; or what happens if the beneficiary considers the contractor's conduct to be repudiatory but the employer and contractor do not.

133. These considerations may arise necessarily if Clause 4 is or gives rise to a Construction Contract. They are not, to my mind, considerations that should influence the court towards finding that it is or gives rise to a Construction Contract.

134. For these reasons I would hold that, *if* the terms of the Abbey Collateral Warranty were to be ambiguous (which they are not) *and* interpreting it as giving rise to a Construction Contract would give the beneficiary the right to apply for injunctive relief (which I respectfully think is highly unlikely) that would be support for the view that interpretating it as giving rise to a Construction Contract made no commercial sense as at the date of the contract. There is no countervailing objection to treating the Abbey Collateral Warranty as a warranty that does not give rise to a Construction Contract. If the contractor fails to complete the Works, they would be in breach of the warranty at Clause 4.1(a) and the beneficiary has its remedy in damages. That is not because Simply Construct has undertaken a direct obligation to Abbey to complete the works. It is because Simply Construct has warranted that the Works would be completed, which is different. That seems to me to be a conventional, satisfactory and commercially sensible outcome where Abbey has not been joined as a party to the underlying building contract.

Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd

135. I have left *Parkwood* till last because it concerned different wording in a different context. The material terms of the Parkwood Agreement, after Recitals that do not need to be repeated here, were:

> NOW IT IS AGREED in consideration of the payment of £1… and without prejudice to the rights and obligations of the Contractor under any contract or sub-contract to which the Contractor is a party, the following warranties and undertakings shall apply as between the Contractor and the Beneficially –
>
> 1. The Contractor warrants, acknowledges and undertakes that:—
>
> 1 it has carried out and shall carry out and complete the Works in accordance with the Contract;

2. subject to this Deed, it owes a duty of care to the Beneficiary in the carrying out of its duties and responsibilities in respect of the Works;

3 in the design of Works or any part of the Works, in so far as the Contractor is responsible for such design under the Contract, it has exercised and will continue to exercise all reasonable skill and care to be expected of an architect or, as the case may be, other appropriate professional designer…

4 all materials and goods supplied or to be supplied for incorporation into the Works are or shall be of a quality, kind and standard which complies with the express and implied terms of the Contract;

5 all materials and goods recommended or selected or used by or on behalf of the Contractor shall be in accordance with good building practice and the relevant provisions of British Standard documents to the extent required by the Contract;

6 all workmanship, manufacture and fabrication shall be in accordance with the Contract;

7 it has complied and will continue to comply with the terms of regularly and diligently carry out its obligations under the Contract

Provided that the Contractor shall have no greater liability, duties or obligations under this Deed than it would have had if the Beneficiary had been named as joint employer with the Employer under the Contract and the Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation or term in the Contract and to raise the equivalent rights in defence of liability as it would have against the Employer under the Contract…

3. Nothing in the Contractor's tender or in any specification, drawing, programme or other document put forward by or on behalf of the Contractor and no approval, consent or other communication at any time given by or on behalf of the Employer or the Beneficiary shall operate to exclude or limit the Contractor's liability for any breach of its obligations hereunder provided that nothing in this Deed shall preclude the Contractor from raising the defence of contributory negligence.

…

10. The Contractor shall have no liability under this Deed or at all for and in respect of any delay in the progress and/or completion of the Works or any part of them.

> 11. No action or proceedings arising under out of or in connection with this Deed…shall be commenced against the Contractor after the expiry of 12 years from the date of Practical Completion.
>
> 12. In the event of any breach of this Agreement the Contractor shall be liable for the reasonable cost of repair renewal and/or reinstatement of any part or parts of the Works to the extent that the Beneficiary incurred such costs and/or the Beneficiary is liable either directly or by way of financial contribution for such costs. The Contractor shall also be liable for further or other losses or damages or costs incurred or suffered by the Beneficiary as a result of breach of this Agreement by the Contractor including without limitation loss of use, loss of profit or other consequential losses up to a maximum aggregate sum of £2,500,000".

136. The similarities between the terms of the Parkwood Agreement and those of the Abbey Collateral Warranty are obvious, including that in Clauses 1(1), 1(3), 1(4) and 1(7) there is a reference to activities both past and future. However, it is the differences that are striking. To my mind, there are two that are of particular importance.

137. First, the relevant clauses are not merely stated in terms of warranting or warranty. To the contrary, the introductory paragraph refers to "the following warranties *and undertakings*" applying as between the Contractor and the Beneficiary; and the governing words at the start of Clause 1 are that the Contractor "warrants, *acknowledges and undertakes* that…".

138. Second, the Parkwood Agreement Clauses expressly accept the existence of direct obligations owed to the beneficiary which go beyond merely warranting past or future performance of obligations owed to others and are inconsistent with the agreement as a whole being nothing more than the warranting of past or future performance of obligations that are owed to others. Thus:

    i) Clause 1.1 contains an undertaking to the beneficiary that it has carried out and will carry out and complete the works in accordance with the building contract;

    ii) Clause 1.2 expressly accepts that the contractor owes a duty of care (directly) to the beneficiary in the carrying out of its duties and responsibilities in respect of the works;

    iii) Clause 3 prevents reliance by the contractor on contractual limitations that would serve to limit its liability under the main building contract, stating that they shall not operate to exclude or limit the Contractor's liability "for any breach of its obligations hereunder" save that the Contractor may rely upon the defence of contributory negligence. This is the language of free-standing obligations and duties owed directly to the beneficiary, in respect of which contributory negligence is a relevant defence, and is not the language of warranting a state of affairs, in respect of which it is not.

139. Akenhead J placed considerable weight on the first of these factors and, in my judgment, he was right to do so. In [27(d)] he rightly assumed that the three words, "warrant, acknowledges and undertakes" had different meanings. Specifically, he was right to point out that "an undertaking often involves an obligation to do something." In the context of the Parkwood Agreement, that was the sense in which it was used as a matter of normal meaning and usage; and there is no sound reason either to disapply this meaning or to discount its proper place and effect as used in the Parkwood Agreement. In my judgment the distinction that Akenhead J drew between warranting and undertaking in [27(e)-(f), (i) and (j)] was correct. I am unable to discard it as semantic hair-splitting. Put shortly and bluntly, by the Parkwood Agreement the contractor undertook and assumed direct obligations to the beneficiary. By the Abbey Collateral Warranty Simply Construct did not.

140. I have given what I consider to be the obvious explanation why the Abbey Collateral Warranty warrants both past and future performance. Different considerations apply to the Parkwood Agreement because of the different language and its creation of direct primary obligations, which Akenhead J interpreted as applying to future performance of works that were outstanding at the time of the execution of the Parkwood Agreement. On the facts of *Parkwood* that was a finding that was open to him; and it does not affect the proper interpretation of the differently worded Abbey Collateral Warranty. More generally, I would agree that whether or not the relevant contractor is undertaking direct primary obligations to the beneficiary to carry out construction operations is an important consideration when deciding whether an agreement gives rise to a Construction Contract. I would also agree that if the contractor is simply warranting a state of affairs (past, present or future), that is likely to be (as in this case) a pointer against the agreement giving rise to a Construction Contract. For the reasons I have given, these pointers pointed in the same direction in *Parkwood*. They point in the opposite direction in the present case.

141. It follows that, in my judgment, Akenhead J's decision in *Parkwood* was correct; but it does not lead to the conclusion that the same outcome should obtain under the Abbey Collateral Warranty. To the contrary, the two important differences to which I have referred indicate that, although the Abbey Collateral Warranty could have included terms that would have given rise to a Construction Contract, it did not do so. Akenhead J was unquestionably right to say that it did not follow from his decision that all collateral warranties given in connection with all construction developments would be Construction Contracts. Whether they are or not depends upon the proper interpretation of the agreement in issue, as I have attempted to explain above.

142. Standing back, I can see no compelling reason to depart from the normal and clear terms of s. 104(1) and the Abbey Collateral Warranty. I acknowledge the procedural advantage of linked adjudications, but I am unable to detect either a statutory purpose or a purpose that emerges from the terms of the Abbey Collateral Warranty that could justify departing from the clear meaning of the section or of the Abbey Collateral Warranty. I do not know what parties have thought since *Parkwood*; but if they read Akenhead J's judgment they should have seen and noted the observation that his decision did not mean that all "collateral warranties" (loosely so called) would be Construction Contracts. If the parties to the Abbey Collateral Warranty wished to create direct primary obligations or to create a Construction Contract so as to give jurisdiction to an adjudicator in case of dispute, they could have done so simply by

following the terms of the Parkwood Agreement: *Parkwood* was decided some two years before the building contract in this case was executed. Or they could have simply agreed that in the event of dispute they would confer jurisdiction upon an adjudicator as if theirs was a Construction Contract. In the event, they did neither of these things but adopted terms that were materially different from those of the Parkwood Agreement. I see no basis for interfering with the clear meaning of the terms that they chose to agree.

Conclusion

143. I would dismiss this appeal for the reasons I have given. However, as my Lords have reached the different view, the appeal will therefore be allowed.

LORD JUSTICE PETER JACKSON:

144. I am grateful to have had the opportunity to read the above judgments in draft.

145. I would allow the appeal for the reasons given below. The Abbey Collateral Warranty ('ACW') was in my opinion a construction contract within the meaning of section 104 of the 1996 Act, and accordingly the adjudicator rightly exercised jurisdiction. The judge's reason for declining to enforce the award (the timing of the agreement) was, it is now accepted, insufficient, and the further arguments advanced in support of his order do not in my view lead to a different conclusion.

General observations

146. The issue here is a procedural one: where does a remedy lie for breach of the ACW? Is it through adjudication, as with the main construction contract, or must the parties to the ACW litigate through the courts? The answer to this somewhat dry question lies in the construction of the statute and its application to the terms of the ACW.

147. Where more than one entity complains about the quality of the same building work, there are obvious reasons for preferring an arrangement that resolves the complaints at the same time, swiftly and economically, and above all consistently. However, these advantages, apparently achieved to a high degree in this case, cannot justify the expansion of the statutory right to adjudication outside its proper province. In many other cases, there will not be multiple complainants, and if there are, they might not complain at the same time or in the same manner.

148. The process of statutory construction must therefore be approached in the normal way: what does the statute say and what is it seeking to achieve by what it says? I agree with Coulson LJ that traditional views about what comprises a building contract or a collateral warranty are of limited value in this process. Similarly, questions about the availability of specific performance take matters no further forward, since the remedy is unlikely to be available in this sphere, however an agreement is characterised.

149. Normal principles of contractual construction also apply: what did the parties agree? In addressing the latter question, the label given to an agreement does not help much and may even mislead. In particular, the descriptions in the contractual documents of the ACW as a 'collateral warranty' is of little significance in comparison to its operative terms. What matters is that it is an 'agreement', and as such potentially eligible under

section 104. To emphasise the label 'warranty' risks creating a colloquial association with a product warranty.

The legislation

150. Section 104(1) of the 1996 Act provides that

> "(1) In this Part a "construction contract" means an agreement with a person for any of the following—
>
> (a) the carrying out of construction operations;
>
> (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
>
> (c) providing his own labour, or the labour of others, for the carrying out of construction operations."

151. The sub-section as a whole shows that the "person" is the entity carrying out the operations, whether as constructor, sub-contractor or labourer. The counterparty will be the client in any one of a number of guises: landowner, developer, tenant, etc. So the parties to the agreement are not certainly confined to the original parties to a main construction contract.

152. However, not every agreement that is related to construction operations will be a construction contract. The word "for" requires that the purpose or object of the agreement must be the *carrying out* of construction operations. It is concerned with the *performance* of construction operations and not with their *consequences*. It is not enough that the agreement concerns the *quality* of the work.

153. This approach does not strain the statutory words, or apply them in unintended circumstances for policy reasons. The wording is intrinsically broad, but it only stretches so far.

154. In considering section 104(1) I do not gain any help from section 104(5), which has a different function.

The Abbey Collateral Warranty: the decisive second issue

155. The ACW sprang from an obligation arising under the main contract between Simply Construct and Sapphire/Toppan in the standard 2011 JCT form. This provided at Clause 7C for the granting by Simply Construct of a Collateral Warranty to a Purchaser or Tenant in JCT form CWa/P&T. By that form:

> "1.1 The Contractor warrants… that he has carried out the Works… in accordance with the Building Contract…"

In the event of breach, the Contractor was to be liable for the reasonable cost of repairs and for certain other losses incurred by the Purchaser or Tenant. At the end of the form, the commentary on this clause states that it confirms that the Contractor owes the same obligation to the Purchaser or Tenant as he owes to the Employer under the Building Contract.

156. The form of warranty in fact chosen by the parties is in somewhat wider terms than form CWa/P&T, and reads:

> "4 SKILL AND CARE
>
> 4.1 The Contractor warrants that:
>
> (a) the Contractor has performed and will continue to perform diligently its obligations under the Contract;
>
> (b) in carrying out and completing the Works the Contractor has exercised and will continue to exercise all… reasonable skill care and diligence …;"

157. As to other provisions,

(1) The Contract is defined in Clause 1 as

> "… the contract in the form of a JCT Design and Build Contract dated 29 June 2015 entered into by Sapphire Building Services Limited and the Contractor under which the Contractor is to carry out the Works..."

(2) The Works are defined in the same clause as

> "… the construction of the development at the Site..."

(3) Clause 4.2 provides that if the Contractor had performed part of its obligations under the Contract, the agreement should take effect as if it was dated prior to that performance.

(4) Clause 4.3 provides that the duties owed by the Contractor to the Beneficiary under the terms of the ACW shall be no greater than those owed to the Beneficiary had the Beneficiary been named as the employer under the Contract.

158. So, Simply Construct warrants to Abbey that it has performed and will continue to perform diligently its obligation to Sapphire/Toppan to carry out the construction works. Is that a promise to Abbey, or merely a promise to compensate Abbey if there is a default under the Contract? In my view it is the former. By the word "warrants" at the head of Clause 4.1, Simply Construct promises that what follows is true and makes itself answerable to Abbey if it is not. The two sub-clauses that then follow straddle the line drawn by section 104. Sub-clause (b) is a classic warranty ("in carrying out and completing the Works the Contractor has exercised and will continue to exercise all the reasonable skill care and diligence …;"). In contrast, sub-clause (a) contains a primary obligation ("*has performed and will continue to perform* diligently its obligations under the Contract") (emphasis added). Although the scope of the obligation is set with reference to the main contract, the promise to carry out the works arises under the ACW itself and is a promise made directly to Abbey.

159. The judgment of Stuart-Smith LJ shows that a different interpretation of the terms of the ACW is possible. However, I would make observations on these paragraphs in his judgment:

(109) The fact that A owes a primary obligation to C does not prevent it from also owing a primary obligation to B. It depends on the terms of the agreement.

(110) Clause 7.1.3 of the main contract between Simply Construct and Sapphire provided for novation to Toppan only. The absence of a provision for novation in favour of anyone else cannot in my view be a significant factor in interpreting the ACW. If it were, it could be argued that every collateral warranty should escape section 104 because there had been no novation, nor any provision for it.

(111) For the reasons given above, I consider the words 'under the contract' in Clause 1.1(a) define the scope and not the source of the obligations towards Abbey.

(112) I would agree that the prospective nature of the obligations under the ACW is not conclusive, but it is in my view material. What is critical is the promise *to carry out* construction operations.

(113-114) As I have explained, I believe that there is a distinction between the obligations arising under sub-clauses (a) and (b).

(120) I find that other clauses of the ACW shine little if any light on the question we have to decide.

Parkwood

160. In my view *Parkwood* was correctly decided and its reasoning is sound. The relevant wording was as follows:

> "…the following warranties and undertakings shall apply as between the contractor and the Beneficially *(sic)*–
>
> 1. The contractor warrants, acknowledges and undertakes that:
>
> 1. it has carried out and shall carry out and complete the works in accordance with the contract;
>
> 2. subject to this Deed, it owes a duty of care to the beneficiary in the carrying out of its duties and responsibilities in respect of the works;
>
> …
>
> 6. all workmanship, manufacture and fabrication shall be in accordance with the contract;
>
> 7. it has complied and will continue to comply with the terms of regularly *(sic)* and diligently carry out its obligations under the contract."

So that contractor undertook to that beneficiary to carry out and complete the contract works. In the present case, the contractor warranted that it had performed and would continue to perform its obligation to carry out the contract works. The wording in *Parkwood* is somewhat stronger in that there was an undertaking to carry out and

complete the works. However, I regard the distinction between the two forms of wording as too fine to lead to a different outcome. In particular, the words 'warranty' and 'undertaking' are both forms of binding promise. It may be easier to construe an undertaking as giving rise to primary liability, but a warranty can also do so.

161. At paragraph 138, Stuart-Smith LJ closely analyses the *Parkwood* agreement to contrast it with the present case, but I do not see such a contrast. The other *Parkwood* terms have broad equivalents in the ACW, for example in Clauses 4.2 and 4.3. In any case, there is a limit to how useful comparisons can be. I do however share the view he expresses at paragraph 82 that one should be cautious about generalising. With diffidence, it seems to me that the last sentence of the commentary on *Parkwood* in paragraph 2.21 of Coulson on Construction Adjudication (4th Ed.) may be open to misinterpretation in saying that:

> "From a broader perspective, if the underlying contract was a construction contract, it makes commercial common sense for any parasitic warranties to be treated in the same way."

I have acknowledged that adjudication may well make commercial common sense, but the question of law is not whether warranties are parasitic, but what they contain.

The other issues

162. For completeness, I confirm my agreement with the views expressed above in relation to the first and third issues identified at paragraph 26.

163. On the first issue, I agree with Coulson LJ's 'short answer' (paragraphs 29-31 above) to the question of whether a collateral warranty can ever be a construction contract.

164. On the third issue, I agree that the date on which the Abbey Collateral Warranty was executed does not prevent it from being a construction contract. The terms of the warranty appended to the main contract applied retrospectively to all work done or yet to be done. The inquiry into the character of the warranty must take account of its wording and all the relevant factual background. The fact that the work had been completed by the time the warranty was signed is part of the factual background but it is not a complete answer. One must first and foremost look at the terms of the agreement.

165. On this question, the judge cited paragraph 28 of *Parkwood*:

> "It does not follow from the above that all collateral warranties given in connection with all construction developments will be construction contracts under the Act. One needs primarily to determine in the light of the wording and of the relevant factual background each such warranty to see whether, properly construed, it is such a construction contract for the carrying out of construction operations. A very strong pointer to that end will be whether or not the relevant Contractor is undertaking to the beneficiary of the warranty to carry out such operations. A pointer against may be that all the works are completed and that

> the Contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard."

I agree. However, in this case the judge laid decisive emphasis on the fact that the works had been completed without also focusing on the fact that the warranty did not simply concern a past state of affairs, and in this way he was in error.

Conclusion

166. I would allow the appeal and enter summary judgment in favour of Abbey in the amount awarded by the adjudicator.