Neutral Citation Number: [2021] EWHC 2110 (TCC)

Case No: HT-2021 -000178

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 27/07/2021

Before :

MARTIN BOWDERY QC
Sitting as a Deputy Judge of the High Court

- -

Between :

(1) TOPPAN HOLDINGS LIMITED **(2) ABBEY HEALTHCARE (MILL HILL) LIMITED**	**Claimants**
- and -	
SIMPLY CONSTRUCT (UK) LLP	**Defendant**

- -
- -

Tom Owen (instructed by **Watson Farley & Williams LLP**) for the **Claimants**
Michele De Gregorio (instructed by **Veale Wasbrough Vizards LLP**) for the **Defendant**

Hearing date: 1 July 2021

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Approved Judgment

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Covid-19 Protocol : This judgment will be handed down by the Judge remotely by circulation to the Parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Tuesday 27th July 2021.

Martin Bowdery QC :

INTRODUCTION

1. This is an application for summary judgment to enforce against the Defendant ("Simply") two adjudication decisions of Mr Peter Vinden each dated 30th April 2021.

2. The amounts the Claimants seeks to enforce are:

(1) In the Toppan Decision:

£1,067,247.14 inclusive of VAT as at 1st July. These sums to Toppan ("t**he Toppan Decision**") comprise:

a) £852,093.35 plus VAT, namely £1,022,512.02 total principal sum for damages for remedial works and professional fees inclusive of VAT.

b) £16,668.40 in interest to 30th April 2021.

c) £7,381.72 further interest from 30th April 2021 to 1st July 2021.

d) Further daily interest of £119.06 to judgment if not on 1st July 2021.

e) £20,685.00 VAT-inclusive: the unpaid share of the adjudicator's fees.

(2) In the Abbey Decision

£908,495.98 inclusive of VAT as at 1st July. These sums to Abbey ("**the Abbey Decision**") comprise:

a) £869,500.00 (exclusive of VAT - not applicable), as a principal sum for damages for loss of trading profit sustained by Abbey.

b) £17,008.60 in interest to 30th April 2021.

c) £7,532.38 further interest from 30th April 2021 to 1st July 2021.

d) Further daily interest of £121.49 to judgment if not on 1st July 2021.

e) £14,455.00 VAT-inclusive: the unpaid share of the adjudicator's fees.

THE PARTIES

3. Toppan is the freehold owner of Aarandale Manor Care Home in Mill Hill, London (the "**Care Home**").

4. Abbey is the occupational tenant and operator of the Care Home pursuant to a lease with Toppan dated 21st August 2017. Toppan and Abbey are under the same ultimate ownership.

5. The Defendant is a Scottish limited liability partnership construction contractor which built the Care Home.

BACKGROUND

6. The background to this matter may be best explained by means of a short chronology:

27th September 2007	Toppan incorporated and registered in the British Virgin Islands
23rd October 2012	Sapphire Building Services Limited ("**Sapphire**") registered in Northern Ireland, was incorporated on 23 October 2012. It is in members' voluntary liquidation. It has no connection with Toppan or Abbey or their group companies
29th June 2015	Sapphire engaged Simply by a JCT Design and Build Contract 2011 with amendments June 2015 ("**Building Contract**") for the construction of Aarandale Manor Care Home with a contract sum of c.£4.7m. (1) Clause 9.2 of the Building Contract contains express adjudication provisions. (2) Clause 7.1.3 (as amended) provides that Sapphire may at any time novate the Building Contract to Toppan. The agreed form of novation was in Appendix 2. (3) Clause 7C obliged Simply, on notification by Toppan, to execute a collateral warranty for the benefit of a tenant; and in favour of Toppan. As amended clause 7C provided for an agreed form of warranty in Schedule 5.
30th March 2015	Simply asserted it commenced works. In the Toppan Decision, the adjudicator found that works commenced on the 11th May 2015. In either case, and the latter is the binding finding, it was prior to the execution of the Building Contract.
10th October 2016	Practical Completion.
13th June 2017	By a settlement agreement dated 13th June 2017 Sapphire and Simply agreed certain matters including: (1) By clause 2.4, payment of the sum due under the settlement agreement "*shall not waive any claim which the Employer [Sapphire] may have in relation to any latent defect in the Works which is not apparent or capable of being discovered by the Employer through the exercise of reasonable diligence, at the date of this Agreement and the Contractor's [*Simply*] liability for any such latent defect shall be subject to the terms of the Building Contract.*

	(2) Clause 4 obliged the execution of a deed of novation in an agreed form by Simply, Sapphire and Toppan as "Substitute Employer" in place of Sapphire.
14th June 2017	By a novation agreement dated 14th June 2017, Sapphire transferred all its rights and obligations under the Building Contract to Toppan.
12th August 2017	Toppan granted a long-leasehold interest to Abbey by a lease dated 12th August 2017. The term was 21 years and a day from 21st August 2017. There is a substantial (as opposed to nominal) commercial rent payable.
August 2018	In or around August 2018 Toppan discovered fire-safety defects in Aarandale Manor, in particular a lack of fire-resistant plasterboards and other protection to confer at least 60 minutes' fire resistance in the structural walls.
10th September 2018	Toppan commissioned the Buildings Research Establishment ("**BRE**") to inspect. BRE issued a report dated 10th September 2018, identifying fire-safety defects. Toppan commissioned a further report dated December 2018 by Lawrence Webster Forrest.
15th January 2019	Toppan notified Simply of the defects and requested it to rectify the defects.
21st September 2019	Toppan engaged Luciano Venetian Builders Limited to carry out remedial works to the fire-safety defects. Those works commenced on or around 25th September 2019 and achieved practical completion on 14th February 2020. During the remedial works, Toppan asserts that further defects were discovered which were rectified, including but not limited to creaking floors on the first and second floors.
14th July 2020	Toppan sent Simply a Pre-Action Protocol letter regarding the execution of the Abbey collateral warranty.
5th August 2020	Toppan issued a Part 8 Claim seeking specific performance of the obligations under Clause 7C of the Building Contract to execute the Abbey collateral warranty.
23rd September 2020	The Abbey collateral warranty was executed by Simply.
23rd October 2020	Toppan and Abbey executed the Abbey Collateral Warranty ("**the Abbey Collateral Warranty**") which Simply warranted *inter alia* that it has performed and will continue to perform diligently its obligations under the Building Contract.
11th December 2020	In the absence of agreement for a single adjudication, the Claimants served separate notices of adjudication ("**NOA**") on Simply.
14th December 2020	RICS nominated Mr Vinden as Adjudicator in both disputes, which proceeded in parallel.

	In the Abbey adjudication, Simply took the jurisdictional objection which it maintains on this enforcement, namely that the Abbey Collateral Warranty was not a construction contract. On 26th February 2021 the adjudicator gave a non-binding ruling on jurisdiction in favour of Abbey. That is, of course, not binding on the Court on enforcement. In the Toppan adjudication, Simply raised a jurisdictional objection of "*ambush*" and too "*nebulous*" a dispute. Those were rejected. It made no jurisdictional reservation.

7. Each of the adjudications proceeded under the same procedural timetable as follows:

    a) The Claimants served their Referral Notices on 18th December 2020;

    b) After various extensions, the Defendant served its Responses on 19th February 2021;

    c) The Claimants served their Replies on 5th March 2021;

    d) The Defendant served its Rejoinders on 19th March 2021;

    e) The Claimants served their Surrejoinders on 3rd April 2021;

    f) The Defendant served their Rebutters on 16th April 2021;

    g) The Claimants served their Surrebutters on 23rd April 2021; and

    h) Mr Vinden issued his decision on 30th April 2021.

8. Simply has not complied with the decisions. Simply has not commenced its own Part 7 proceedings to determine on a final basis any of the matters in issue. Simply has not commenced Part 8 proceedings in respect of any matters in issue.

9. Simply resists enforcement of the Toppan Decision and the Abbey Decision and seeks a stay of execution on the following grounds:

    9.1 The Adjudicator did not have jurisdiction to decide the dispute referred by Abbey because the Abbey Collateral Warranty was not a "construction contract";

    9.2 The Adjudicator had no power to award interest;

    9.3 Toppan's entitlement to recover VAT is disputed; and

    9.4 Simply seeks a stay of execution on the basis that the Claimants would most likely be unable to repay the sums awarded, if required to do so in later proceedings.

10. Simply also challenged the amount claimed in the Particulars of Claim in respect of the Adjudicator's fees. The Claimants have now conceded that the amount outstanding in respect of Simply's share of the Adjudicator's fees is £35,140 (inclusive of VAT), comprising £14,455 in the Abbey adjudication (subject to the jurisdiction challenge) and £20,685 in the Toppan adjudication.

11. The issues for the Court to determine are:

    - Whether the Abbey Collateral Warranty is a construction contract for the purposes of section 104 of the Housing Grants, Construction and Regeneration Act 1996 ("**the Construction Act**");
    - Whether the Adjudicator had power to award interest;
    - Whether Toppan is entitled to recover VAT;
    - Whether Simply is entitled to a stay of execution on the basis that the Claimant would most likely be unable to repay the sums awarded, if required to do so in later proceedings.

    Taking each in turn.

1 Whether the Abbey Collateral Warranty is a "construction contract" for the purposes of Section 104 of the Housing Grants, Construction and Regeneration Action 1996 ("the Act").

12. The wording of the Abbey Collateral Warranty has to be construed against the relevant factual background. That much is common ground.

13. The Abbey Collateral Warranty was entered into by Simply, Toppan and Abbey on the 23rd October 2020:

    - some 4 years after practical completion of the original works; and
    - some 8 months after the remedial works carried out by another contractor to the fire safety defects had achieved practical completion.

14. The Abbey Collateral Warranty provided as follows:

    "BACKGROUND

    (A) The Developer has the benefit of the Contract entered into with the Contractor.

    (B) The Beneficiary 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 25 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 Contactor 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 Contact 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 Meriting 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."***

15. Section 104 of the Act provides:

> ***"(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) provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,***
>
> ***in relation to construction operations..."***

16. In **<u>Parkwood v Laing O'Rourke</u>** [2013] B.L.R. 589 Mr Justice Akenhead had to consider whether a collateral warranty was a construction contract. The decision turned on the particular terms of the warranty in issue. However, His Lordship did derive three points of principle at [23]:

> ***"(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".

17. However, in **Parkwood Leisure** having set out his reasons for concluding that the collateral warranty in that case was a construction contract, Mr Justice Akenhead said (at paragraph 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."***

18. In his helpful commentary on the **Parkwood** case, Sir Peter Coulson at paragraph 2.21 of the 4th Edition of Coulson on Construction Adjudication stated:

> ***"2.21 In Parkwood Leisure Limited v Laing O'Rourke Wales & West Limited the occupier, Parkwood issued a Part 8 claim seeking a declaration that the collateral warranty provided by the contractor was a construction contract for the purposes of the 1996 Act. Akenhead J noted at paragraph 20 of his judgment that there was no authority for the proposition that contracts such as the collateral warranty in that case were construction contracts for the purposes of Part II of the 1996 Act. He warned against adopting a peculiarly syntactical analysis of what the Act meant when it was clear that Parliament intended a wide definition by using the expression 'an agreement' for ... the carrying out of construction operations'. He had little hesitation in concluding that the collateral warranty in that case was a construction contract for the purposes of the 1996 Act. That was particularly because the underlying construction contract was 'for the design, carrying out and completion of the construction of a pool development'; that wording was***

> ***replicated expressly in the collateral warranty; and the words that the contractor warrants, acknowledges and undertakes' in respect of the works, both carried out and to be carried out, plainly related to the carrying out of construction operations. Although at paragraph 28 of his judgment, the judge noted that it did not follow from his conclusion that all collateral warranties given in connection with all construction developments would be construction contracts under the 1996 Act, it is safe to assume that, on this analysis, because the provision noted above is commonly found in such warranties, they will be so regarded. 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."***

19. I was also reminded of the findings of Mrs Justice O'Farrell in **Swansea Stadium Management Limited v. City and County of Swansea** [2018] BLR 652 where she stated that the collateral warranty in that case, which was in similar form to the **Parkwood** collateral warranty and stated "the contractor warrants acknowledges and undertakes that…..", should have retrospective effect, see paragraph 56 of the Judgment which states:

> ***"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."***

20. In **Parkwood** Mr Justice Akenhead reviewed the precise wording of the collateral warranty and looked at each of the verbs, "warrants, acknowledges and undertakes" as having a different meanings. At paragraph 27 of the judgment he stated:

> ***"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, 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 sub- paragraphs 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 -K 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."***

21. The Abbey Collateral Warranty does not include the verbs "acknowledges" or "undertakes".

    Simply 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).

22. Whilst the Abbey Collateral Warranty refers to both a past state of affairs and future performance:

    "will continue to perform"; and

    "will continue to exercise";

    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 was an agreement for "*the carrying out of construction operations*". As Mr Justice Akenhead stated in **<u>Parkwood</u>**:

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

23. Mr Justice Akenhead accepted that not all collateral warranties will be agreements for the carrying out of construction operations but he seemed much exercised by the timing of the warranty being executed before practical completion so that it partly relates to future works. Coulson on Construction Adjudication does not criticize the approach adopted by Mr Justice Akenhead.

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.

28. A collateral warranty might be parasitic upon a building contract but so would a parent company guarantee. No one would construe a parent company guarantee as a construction contract.

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 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.

30. Contrary to the submissions of Abbey, by the time the Abbey Collateral Warranty was executed it was a warranty of a state of affairs past or future akin to a manufacturer's product warranty.

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.

2 Whether the Adjudicator had power to award interest.

32. Simply contends that there was no relevant provision in either the Building Contract or the Abbey Collateral Warranty for the payment of interest and that the Claimants'

inclusion of claims for interest in their Notices of Adjudication did not give the Adjudicator jurisdiction to determine such claims.

33. However, Simply raised no jurisdiction objections to the interest claim. Interest from the outset was in issue, see:

- paragraph 18.3(a) of the Toppan Notice of Adjudication;
- paragraph 21.3(a) of the Abbey Notice of Adjudication;
- paragraphs 86 and 87 of Simply's respective responses; and
- in response to the Defendant's submissions the Adjudicator reached his decision to award interest in both decisions.

34. In the absence of a jurisdictional objection the Adjudicator's Decision, right or wrong, cannot be challenged other than by Part 8 Proceedings.

3 Whether Toppan is entitled to recover VAT

35. VAT was clearly an issue in the Adjudications. It was claimed in the Toppan Notice of Adjudication. Simply took no point regarding VAT in their submissions and made no jurisdictional objection or reservation.

36. The Adjudicator decided that VAT as was applied should be paid. There is as yet no Part 8 challenge.

37. For the avoidance of doubt and perhaps unnecessarily, Toppan's accountants, as explained in the First Witness Statement of Andy Taylor, have confirmed:

- The VAT status of the First Claimants;
- VAT was paid in full in respect of the remedial works and associated fees; and
- VAT was not recovered as input tax or otherwise.

Accordingly I find that Toppan is entitled to recover VAT.

4 Whether Simply is entitled to a stay of execution on the basis that the Claimants would most likely be unable to repay the sums awarded if required to do so in later proceedings.

38. The Power of the Court to grant a stay of execution is derived from CPR 83.7(4), which mirrors the wording of the former RSC Order 47. CPR 83.7(4) provides that the Court may stay the execution of a judgment, either absolutely or for such period and subject to such conditions as it thinks fit, if the Court is satisfied that "*there are special circumstances which render it inexpedient to enforce the judgment or order*".

39. As to the exercise of this discretion in respect of adjudication enforcement, the relevant principles were summarised by HHJ Peter Coulson QC (as he then was) in **Wimbledon v Vago** [2005] BLR 374 (TCC), at paragraph 26:

"In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

(a) ***Adjudication... is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.***

(b) ***In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.***

(c) ***In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under Order 47 [now CPR 83.7] with considerations (a) and (b) firmly in mind...***

(d) ***The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances... rendering it appropriate to grant a stay...***

(e) ***If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted...***

(f) ***Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:***

(i) ***the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made...; or***

(ii) ***the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator..."***

40. In **Gosvenor London v Aygun Aluminium UK** [2018] BLR 353 (TCC), Fraser J added a further principle, at paragraph 39:

> ***"(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."***

41. At paragraph 40, Fraser J held that:

> ***"(2) Such a feature is only likely to arise in a very small number of cases, and in exceptional factual circumstances. This addition to the principles is not intended to re-open the whole issue of the basis upon which stays of execution will be ordered in adjudication enforcement cases, or to define a specific, exhaustive and closed set of circumstances that can constitute "special circumstances" in the terms of CPR Part 83.7(4). In the vast majority of cases, the existing principles in Wimbledon v Vago will suffice and recourse to principle (g) will be extremely rare.***
>
> ***(3) A high test will be applied as to, whether the evidence does indeed reach the standard necessary for this principle to apply. I consider that in order to fall into this category the standard is broadly the same as that necessary to justify the grant of a freezing order (what used to be called Mareva relief)."***

42. I was also referred to **BW Rendering v Everwarm 2018** [EWHC] 2356 (TCC) and to the following passage of Mrs Justice O'Farrell's judgment:

> ***"11. To that should be added Grosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 227 at paragraph 39:***
>
> > ***"if the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs for the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."***
>
> ***12. As summarised by Mr Saunders in his helpful skeleton, the evidential burden lies with the party applying for the stay and the burden is high (see Total***

***M&E Services Ltd v ABB Technologies* [2002] EWHC 248 (TCC) by His Honour Judge Wilcox QC at para.52). The party seeking the stay is not entitled to embark on a fishing expedition and demand access to confidential commercial information from the respondent (see *Farrelly (M & E) Building Services Ltd v Byrne Brothers (Formwork) Ltd* [2013] EWHC 1186 (TCC) at para.91). The question that the court must ask is not as to the financial position now or in the past of the company but when any final determination is likely to be made and any sum repaid (see *Berry Piling Systems Limited v Sheer Projects Limited* [2012] EWHC 241 (TCC) at paras. 16-18).**

13. To that should be added the principles helpfully set out by Mr Quirk in his skeleton argument. First of all, the exercise of the court's discretion is a balancing exercise (LXB RP (Crown Road) Ltd v Squibb Group Ltd [2016] EWHC 2669 (TCC) at para. 11). If the financial information made available by the claimant is unsatisfactory that may lead to a refusal to enforce the adjudication decisions (Equitix ESI CHP (Wrexham) Limited v Bester Generacion UK Limited [2018] WHC 177 at para. 61). Inappropriate circumstances the court may order a guarantee or other form of security as a condition attached to enforcement of the adjudication decision (see FG Skerritt Ltd v Caledonian Building Systems Ltd [2013] EWHC 1898 (TCC), Ramsey J at para.58).”

43. I was informed by Counsel for the Defendant that: -

> ***“In the adjudications, Simply relied upon expert reports of a chartered architect in relation to the fire resistance requirements for the walls at the Property. The Adjudicator preferred the expert evidence of the Claimants' fire and access consultant surveyor. Simply intends to commence court proceedings to seek a final determination on the issues referred to adjudication, and is in the process of obtaining further expert evidence, in particular from a fire engineering expert, to enable proceedings to be brought.***
>
> ***For the reasons explained in Mr Von Pahlen's statement, at paragraph 7, Simply is concerned that if it were to pay the sums awarded by the Adjudicator, the Claimants would be unable to repay those sums to Simply if later required to do so by the Court.”***

44. I do not consider that there is a threshold bar to a successful stay application. Although Simply has not yet commenced proceedings I am satisfied by the explanation as to why proceedings have not yet commenced and I am satisfied that Simply intend to

commence proceedings to seek a final determination on the issues referred to adjudication where necessary.

45. Applying the applicable legal principles to the factual evidence.

- **Toppan Decision**

46. Toppan are a substantial and financially strong company as it's accounts and evidence demonstrate. It has net assets exceeding £9m. I find no evidence of a probable inability to repay the monies.

- **Abbey Decision**

47. If I am correct that Simply's jurisdictional objection is valid and justified and that the Adjudicator had no jurisdiction to make his decision what follows is somewhat academic.

48. However, in respect of the application that there should be a stay of execution of any judgment arising out of the Adjudication decision in the Abbey Adjudication:

I find and so hold that Abbey:

- is part of a substantial and well known group of care providers;
- is a long leaseholder of Aarandale Manor until 2038;
- has the benefit of the following letter of financial support:

"5th Floor
Sutherland House
70 - 78 West Hendon Broadway
London NW9 7BT

Tel 020 3356 7070
Fax :020 8731 0985

Support Letter

Abbey Healthcare (Mill Hill) Limited
5th floor, Sutherland House
70 - 78 West Hendon
Broadway London
NW9 7BT

15 June 2021

Dear Sirs

FINANCIAL SUPPORT

We refer to the dispute between Abbey Healthcare (Mill Hill) Limited and Simply Construct (UK) LLP in relation to the construction of the Aarandale Care Home at Holders Hill Circus, London NW7 l HP (the "Dispute").

We are the directors of the companies listed and set out overleaf for which Abbey Healthcare (Mill Hill) Limited is a sister company.

We confirm that we will continue to provide financial support to Abbey Healthcare (Mill Hill) Limited by providing working capital loans and not seeking repayment of intercompany indebtedness to enable Abbey Healthcare (Mill Hill) Limited to continue its business operations as a going concern for the foreseeable future and until if and when the Dispute is finally resolved by court proceedings.

Yours faithfully

A Taylor ***M Cloonan***
Director ***Director***

Directors acting on behalf of Abbey Healthcare Group of Companies (Listed below)

Trees Park (East Ham) Ltd
Trees Park (Kenyon) Ltd
Trees Park (Callands) Ltd
Browgil Ltd
R H Independent Healthcare Ltd
Abbey Healthcare Homes Ltd
Abbey Healthcare Homes (East Kilbride) Ltd
Abbey Healthcare (Farnworth) Ltd
Abbey Healthcare (Kendal) Ltd
Abbey Healthcare (Cromwell) Ltd
Abbey Healthcare (Aaran Court) Ltd
Abbey Healthcare (Westmoreland) Ltd
Abbey Healthcare (Mill Hill) Ltd
Abbey Healthcare (Hamilton) Ltd
Abbey Healthcare (Huntingdon) Ltd
Abbey Healthcare (Festival) Ltd
Festival Care Hornes Ltd
Applecroft Care Horne Ltd
Barleycroft Care Home Ltd
Elmcroft Care Horne Ltd
Abbey Healthcare Management Services Ltd
Abbey Healthcare (Procurement) Ltd"

49. Simply complain that this is not the same as a parent company guarantee. However, I consider that this statement of continuing financial support is credible. In all the circumstances I do not consider Simply's "concerns" justify a finding that it is probable that Abbey would be unable to repay the judgment sum if or when it fell due.

50. The "concerns" of Simply appear to be those as explained in Mr Kai Von Pahlen's witness statement:

> ***"7.4 Both Toppan and Abbey are "limited liability" companies under the same ultimate ownership (as confirmed in the POC at para.4). No information about the ownership of Toppan is publicly available because it is a BVI company [KVP1:6], According to Companies House [KVP1:8], Abbey is owned by Mr Prabhdyal Singh Sodhi who is also a former director of Abbey and has 35 other appointments recorded against his name. The corresponding companies are marked as "Dissolved", "Receiver Action" or "Active" (Mr Sodhi has resigned from the "Active" companies and many of them have "Abbey" in their name). Simply understands that Mr Sodhi was jailed after using false documents during a tax fraud investigation and refers to the attached Times article"[KVP1:11], which states that Mr Sodhi (and Rajesh Doshi) created and submitted fraudulent documents to support tax relief claims worth £270,000."***

51. However in the first witness statement of Andy Taylor, a director of Abbey, it is explained that:

> ***"38. In respect of Mr Sohdi, I confirm that he is a beneficiary of the trusts which ultimately own the group. Mr Sodhi was convicted of cheating the public revenue and sentenced to three years in prison. An appeal against both conviction and sentence has been submitted. The case was against Mr Sodhi as an individual and not any of the Abbey group entities. Mr Rajesh Doshi, a company secretary (who was not an officer of Abbey Healthcare (Mill Hill) Limited) was also convicted and sentenced to one year in prison, suspended for two years.***
>
> ***39. The conviction concerns incorrect claims for group relief on taxes for the years 2007 to 2013, where group relief had previously been claimed by the groups previous accountants Mackintyre Hudson. In fact, group relief was not available due to the group being directly owned by a trust. The conviction was grounded on the backdating of share certificates to remedy this issue of group relief being unavailable.***

HMRC has accepted that the group is now correctly formulated and any outstanding tax has been fully settled.

40. ***While he was the original founder of the group Mr Sodhi has not been a director of the companies nor has he held any role in the day to day functioning of the businesses since his resignation on 9 September 2019. The Abbey group companies have and will continue to operate as usual. The current Directors (including myself) have been in complete control of the running of the group since appointment on 31 December 2018. The remedial works to the Care Home (which are the subject of the adjudicator's decision in favour of Abbey) were executed by Luciano Venetian Builders Limited from 25 September 2019 and completed on 14 February 2020. This post-dated Mr Sodhi's involvement. Mr Sodhi's position has not had any impact on the running of the group or Abbey. As Mr Sodhi is not a Director or responsible person for CQC purposes it has not affected the CQC ratings of the Abbey group care homes. The two existing directors of Abbey (myself and Mr Mark Cloonan) were not officers of Abbey when the relevant events referred to above occurred.***

41. ***In respect of the Defendant's evidence (paragraph 7.8 of the Defendant's witness statement), Mr Yeardley by his own admission noted that such an issue is "...almost impossible to quantify", and the performance of Care Homes relies to a much greater extent on metrics such as price, CQC ratings and the standard of facilities. Indeed, to date, since his conviction, the financial performance of the group has improved.***

42. ***In summary:***

(a) ***Toppan is in a strong financial position to repay the enforced award if necessary (including that of Abbey), including positive net assets of approximately £9million;***

(b) ***Abbey's financial position is mitigated by group support offered through the letter of financial support and its steady trading position, including a limited impact from Covid-19. Abbey is subject to a long-term lease and has steady occupancy figures;***

(c) ***The Abbey group itself is in a strong financial position in terms of cash reserves (approximately £8million)***

and net assets (approximately £71 million). The entities which form the group are the same entities which have provided the letter of financial support;

(d) ***There are no outstanding costs incurred as a result of the defects which were the subject of the adjudications; and***

(e) ***There is no evidence that either Covid-19 or the reputational issues referred to have or will have a significant impact on the Claimants' financial performance."***

52. I accept this evidence which I find to be clear, consistent and convincing.

53. In the circumstances, I do not consider that on the evidence I have been taken to, Simply has established, if I am wrong on the jurisdiction issue, that Abbey would probably be unable to repay the judgment sum when it fell due.

54. Accordingly, I order that Simply should pay Toppan:

£1,070,342.70 (inclusive of VAT as at 1st July 2021). These sums due to Toppan ("the Toppan Decision") comprise:

(a) £852,093.35 plus VAT, namely £1,022,512.02 total principal sum for damages for remedial works and professional fees inclusive of VAT.

(b) £16,668.40 in interest to 30th April 2021.

(c) £10,477.28 further interest from 30th April 2021 to 27th July 2021.

(d) £20,685.00 VAT-inclusive: the unpaid share of the adjudicator's fees.

- 1 The claim for summary judgment by Abbey is dismissed.

- 2 All further orders including orders as to costs will be dealt with after the Judgment has been handed down.