Case No: HT-2021-000039

Neutral Citation Number: [2022] EWHC 1465 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: Wednesday 15th June 2022

Before:
MR ROGER TER HAAR QC
Sitting as a Deputy High Court Judge

- -

Between:

ML HART BUILDERS LIMITED
(IN LIQUIDATION)

Claimant

- and –

SWISS COTTAGE PROPERTIES LIMITED

Defendant

- -

Douglas James (instructed by **Circle Law LLP**) for the **Claimant**
Marc Lixenberg (instructed by **Seddons Law LLP**) for the **Defendant**

Hearing date: 13 May 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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 Wednesday 15th June 2022 at 10.30am

MR ROGER TER HAAR QC (Sitting as a Deputy High Court Judge)

Mr Roger ter Haar QC:

1. There is before me an application on the part of the Claimant ("Hart") under CPR Part 8 for certain declarations arising out of an Adjudicator's Decision.

2. In this action Hart seeks declarations as follows:

> "IT IS DECLARED THAT:
>
> "1. The accounting exercise provided for by clauses 8.7.4 and 8.7.5 of the Contract has not been agreed, established, ascertained or otherwise conducted by and/or as a result of the execution of the Acceptance Agreement dated 19 April 2017 between Aviva and Swiss Cottage.
>
> "2. Save to the extent that it dealt with the costs of the adjudication, the decision of Rowan Planterose dated 14 June 2019 was wrong and is no longer binding upon the Claimant or the Defendant.
>
> "3. The Claimant is entitled to launch a fresh adjudication to refer the dispute about the sums owing between the parties under the Contract to another adjudicator."

Background

3. On 23 January 2013 Hart and the Defendant ("Swiss Cottage") entered into a contract ("the Contract") to demolish a pub and design and build 14 flats and a commercial shell. The Contract Sum was £3,325,000. Article 9 of the Contract and clause 10.1 of the Employer's Requirements provided that Hart should submit to Swiss Cottage a performance bond in Swiss Cottage's favour for 10% of the Contract.

4. Clause 8.7.4 of the Contract provided:

> "If the Contractor's employment is terminated under clause 8.4, 8.5 or 8.6…
>
> "following the completion of the Works and the making good of defects in them (or of instructions otherwise, as referred to in clause 2.35), an account of the following shall within 3 months thereafter be set out in a statement prepared by the Employer:
>
> ".1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 8.7.1 and, where applicable, clause 8.5.3.3, and of any direct loss and/or damage caused to the Employer and for which the Contractor is liable, whether arising as a result of the termination or otherwise;
>
> ".2 the amount of payments made to the Contractor; and
>
> ".3 the total amount which would have been payable for the Works in accordance with this Contract."

5. Clause 8.7.5 then provides:

> "if the sum of the amounts stated under clauses 8.7.4.1 and 8.7.4.2 exceeds the amount stated under clause 8.7.4.3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor."

6. On 9 March 2013 Hart, Swiss Cottage and Aviva Insurance Ltd ("Aviva") entered into a Guarantee Bond ("the Bond"). Under the Bond Aviva agreed as guarantor that in the event of Hart's breach or insolvency it would, "*satisfy and discharge*" damages sustained by Swiss Cottage "*as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to [Hart].*" Aviva's maximum aggregate liability was £332,500.

7. Hart entered into a CVL on 27 February 2015. Hart's insolvency automatically triggered various obligations under clause 8.5 (and, via that, clause 8.7) of the Contract. As set out above, these obligations included the calculation of the costs of Swiss Cottage completing the Contract works. The parties disputed the amounts owed. On 27 September 2016 Swiss Cottage submitted a statement of final account claiming £435,175.39 from Hart. Hart, however, alleged that approximately £200,000 was due *to* Hart.

8. On 19 April 2017 Aviva and Swiss Cottage entered into an Acceptance Agreement ("the Acceptance Agreement"). Under the Acceptance Agreement Swiss Cottage agreed to accept £235,000 in full and final settlement of Aviva's obligations under the Bond. Hart was not a party to the Acceptance Agreement.

9. After two abortive adjudications in June and July 2018, on 14 May 2019 Hart issued a Notice of Adjudication. In paragraph 13 of its Referral Hart asked the Adjudicator to decide, among other things, that Swiss Cottage's final account statement was incorrect, that Swiss Cottage had not proved any expenses for the purpose of clause 8.7.4, that no notice of LADs had been given, and that Hart was entitled to credit the £235,000 Swiss Cottage received from the Acceptance Agreement. Hart says that essentially it asked the Adjudicator to carry out the exercise envisaged by clause 8.7.4 of the Contract.

10. In response, Swiss Cottage's stance was that there was nothing for the Adjudicator to determine. Swiss Cottage contended that Hart was "*bound by*" the Acceptance Agreement. Swiss Cottage submitted that "*The agreed amount paid out pursuant to the [Bond, i.e. in the Acceptance Agreement] arises from an assessment of the clause 8.7.4 account*".

11. The Adjudicator accepted this point in paragraph 27 onwards of the Decision. In particular, at paragraphs 31-32 he decided:

> "31. In my view the matter has been settled by the agreement under the Bond [i.e. the Acceptance Agreement]. That the settlement was at a lower sum than the full amount of the [Bond] is of no relevance.
>
> "32. [Hart] were signatories to the Bond. They agreed its terms. Those terms include the establishment of the account taking in 'all sums due or to become due to [Hart].' As the Bond also says: 'the liability of [Aviva] shall be coextensive with the liability of [Hart] under the Contract'. The exercise under clause 8.7.4 [of the Contract] has been done. That seems to me to be an end to the matter. Essentially I accept the points made by [Swiss Cottage] in this respect in paragraph 2 of their Response in the June 2018 adjudication."

12. The Adjudicator therefore "*reject[ed] the claims to relief sought*".

13. This matter first came before me in December of last year when I considered whether CPR Part 8 is an appropriate method of resolving the parties' differences in respect of the issues covered by the declarations sought.

14. On 17 December 2021 I handed down judgment on that question and ordered

> "1. The Claim shall continue as a Part 8 claim.
>
> "2. The Claim shall be listed for a hearing, on the first open date, with a time estimate of 3 hours, to consider: (i) whether the accounting exercise provided for by clauses 8.7.4 and 8.7.5 of the Contract has been agreed, established, ascertained or otherwise conducted as a result of the execution of the Acceptance Agreement dated 19 April 2017 between Aviva Insurance Ltd and the Defendant; and (ii) if in view of the answer to (i) above the Decision was wrong, whether the Claimant is entitled to launch a fresh adjudication to determine the sums owing under the Contract."

15. This judgment follows upon the parties' arguments on the issues referred to in paragraph 2 of that order.

What is the effect of the Acceptance Agreement?

16. As set out above, the Adjudicator decided that the matter had been settled by the Acceptance Agreement. I am asked to decide whether he was right or wrong.

17. The Acceptance Agreement provided:

> **Background:**
>
> "1. The Surety entered in a Conditional Bond number 24937477 CBO ("the Bond") supporting the obligations of M L Hart Builders Limited ("The Contractor") to the Employer in respect of a contract for 14 apartments and a commercial shell at 75 Page Street, London for the original contract sum of £3,325,000.
>
> "2. The Employer has terminated the employment of the Contractor following the appointment of liquidators to that company. The Employer has completed the contract works and claims that its damages sustained as per condition 1 of the bond are in excess of the Bond Amount of £332,500 and calls upon the Surety to comply with its obligations under condition 1 of the Bond ("the Bond Call").
>
> "3. The Parties have agreed terms for the full and final settlement of the Bond Call and wish to record those terms of settlement on a binding basis in this Acceptance Agreement.
>
> **Agreement:**
>
> "4. The Employer hereby agrees to accept the sum of £235,000 (two hundred and thirty five thousand pounds) ("the Settlement Sum") in full and final settlement of the Bond Call and all and any other actions, claims, rights, demands and setoffs in whatever jurisdiction (whether or not presently known to the Parties or to the law, and whether in law or equity) that the Employer ever had, may have or hereafter can, shall have against the Surety arising out of or in connection with the Bond.

> "5. The Settlement sum is fully inclusive of any and all legal costs interest and the like incurred or to be incurred by the Employer.
>
> "6. In consideration of and conditional upon payment of the full Settlement Sum, the Employer releases and forever discharges all and any actions, claims, rights, demands and set-offs in whatever jurisdiction (whether or not presently known to the Parties or to the law, and whether in law or equity) that the Employer may have or hereafter can, shall or may have against the Surety arising out of or in connection with the Bond and the Bond Call."
>
> ….
>
> "10. Each party warrants and represents to the other with respect to itself that it has the full right, power and authority to execute, deliver and perform this Agreement."

18. The Bond referred to in the Acceptance Agreement required by Clause 1 that damages had been "established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract" and provided in Clause 2 that the liability of the Guarantor shall be co-extensive with the liability of the Contractor under the Contract."

19. Mr. Lixenberg, on behalf of Swiss Cottage, referred me to the above terms of the Bond, pointing out that the Bond was a tripartite agreement between Hart, Swiss Cottage and Aviva. He submitted in his skeleton argument:

> "23. Accordingly, the accounting exercise mandated by clause 8.7.4 of the Contract, which MLH belatedly seeks to disrupt, has already been agreed, and agreed to have been established and ascertained.
>
> "24. MLH accepted by way of the above bond that there may be circumstances in which Aviva would establish and ascertain damages suffered by SCPL in accordance with the provisions of or by reference to the Contract.
>
> "25. The bond provides a process/mechanism by which the liability as between SCPL/MLH, and of Aviva, is established – the degree of deference to such process being conveyed by the fact that the liability need not have been established 'in accordance with the provisions of the Contract', as opposed to simply 'by reference to' the Contract.
>
> "26. Clause 2 confirms the correspondence between the liability of Aviva (as established and ascertained in accordance with the above process/mechanism) and the liability of MLH.
>
> "27. The above contractual analysis is also consistent with legal principle. In particular, a surety in Aviva's position benefits from certain rights as follows:
>
> a. *"A surety who has performed the obligations of the principal which are the subject of his guarantee is entitled to stand in the shows of the creditors and to enjoy all the rights that the creditor had against the principal. This is an equitable right analogous to the right to contribution from his co-*

sureties,147 and was described thus by Sir Samuel Romilly in Craythorne v Swinburne (1807) 14 Ves. Jr. 160: "[A] surety will be entitled to every remedy, which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety; having a right to have those securities transferred to him; though there was no stipulation for that, and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract but upon a principle of natural justice: the same principle, upon which one surety is entitled to contribution from another." " (Andrews and Millett, The Law of Guarantees (7th ed., 11-017).

b. To an indemnity:

The claim for an indemnity is usually a claim in debt, and consequently there is no obligation on the surety to mitigate his loss (for example, by defending the creditor's claim or seeking a compromise). Moreover, in the absence of express contractual provision, it is not usually open to the principal to argue that instead of paying the creditor, the surety should have availed himself of defences which may have been available to him on the guarantee alone, or even that he should have raised defences which may or would have been available to the principal

If the claim against the guarantor is compromised, an argument by the principal that he could have obtained more favourable terms is unlikely to avail him, for much the same reasons. Since it appears that the guarantor may not be entitled to an indemnity from the principal in respect of the costs of defending a claim on the guarantee when the defence would only benefit the guarantor (see para.10-020), then there would appear to be no justification for a rule which obliges the guarantor to incur those costs prior to claiming his indemnity. Accordingly, in the normal case, and absent any contractual term to the contrary, the guarantor who does have arguable defences under the guarantee alone would appear to have a free choice as to whether he should pay in full, compromise the claim, or raise those defences. [10-017]

Even if the creditor's claim is not clear-cut, the surety may reach a reasonable compromise with him. So long as the settlement is reasonable, the surety is entitled to recover what he has paid, even if that is more than the surety might have been obliged to pay if the matter had been taken to trial. [10-020]

[Emphasis added in the skeleton argument.]

"28. It follows from the above principles surrounding indemnities that MLH would be aware as a matter of legal principle – consistent with SCPL's analysis of the terms of the bond in the present case itself – that MLH's position could be affected by an agreement reached between Aviva and SCPL to which MLH was not a party.

> "29. Moreover, it would be inconsistent with, and undermine, Aviva's rights of subrogation for MLH to be able to dispute the basis for the agreement reached between Aviva and SCPL. The said rights of subrogation – whereby Aviva potentially steps into the shoes of SCPL as against MLH – again confirm how as a matter of legal principle an agreement reached between Aviva and SCPL can impact on the position as between MLH and SCPL.
>
> "30. Finally, it is unclear how MLH contends the accounting process would work upon it being determined as between MLH and SCPL in any future proceedings that a different sum resulted from the operation of clauses 8.7.4 and 8.7.5 than that reflected in the Acceptance Agreement. Indeed, in the context of MLH's liquidation MLH's claim may subvert the effect of the compromise between Aviva and SCPL insofar as Aviva (given its rights as summarised above) would stand to benefit financially from any recovery made from SCPL."

20. In his submissions, Mr. James, appearing for Hart, placed considerable emphasis upon the decision of Coulson J. in ***Ziggurat (Claremont Place) LLP v HCC International Insurance Company PLC*** [2017] EWHC 3286 (TCC). That decision is of great assistance both because of the general review of the relevant authorities contained in it, but also because it also concerned Clause 8.7.4 of the JCT form of contract.

21. At paragraph [23] Coulson J. said:

> "A bond of this sort is an instrument of secondary liability. The surety cannot be in a worse position, as against the employer, than the contractor. In ***Tower Housing Association Limited v Technical and General Guarantee Co. Limited*** (1998) 87 BLR 74, Judge Humphrey Lloyd QC said:
>
> > "As the claim is made on the bond, certain basic principles have to be born in mind in approaching a bond of this kind. First of all, it is well established and it must, I assume, be taken as common ground that a bondsman in the position of the defendant is entitled to avail itself of all the defences that might have been available to the contractor had the contractor either not been insolvent and obviously, where it is either insolvent or in financial difficulties, the defences available to the administrative receivers. Secondly – and this was prayed in aid by Mr. Darling in the course of his submissions – that, in general terms, one would approach the terms of the bond on the basis that they are to be 'strictly construed and no liability is imposed which is not clearly and distinctly covered by the terms of the agreement'…"

22. At paragraphs [28] and [29] Coulson J. said:

> "28. The importance of the contractual ascertainment exercise was restated in ***Paddington Churches Housing Association v Technical and General Guarantee Co Limited*** [1999] BLR 244. Again, that was a claim on a bond in the absence of any ascertainment of the debt due under clause 27. Judge Bowsher QC reiterated both the secondary liability that arose under the bond and the importance of the contractual mechanism. At paragraph 24 he said:
>
> > "The defendants are liable as surety only, and it seems to me to be plain on the face of the bond that the defendants are liable to pay the amount (if any)

> shown to be due to the plaintiffs on a statement made by the employer in accordance with the terms of the contract. That contract was imported into the bond by the recitals. Clause 27 of that contract is referred to specifically in the conditions. Both in case of default and in case of determination on insolvency (or indeed in any case where it were relevant, for corruption) the damages are calculated by reference to the code of the contract, which are in any event unlikely to be different from the damages at general common law. The accuracy of the employer's statement might be challenged in the courts, but the employer's statement is required before the damages can be said to be ascertained and there is no liability on the defendants until those damages are ascertained. The plaintiffs submit that the employer's statement is only a mechanism and not a condition precedent to payment, but no other mechanism for ascertaining the net damages is put forward or relied on by the plaintiffs."

> "29. The judge said that the absence of the statement was fatal to the employer's claim. At paragraph 30 he said that, "When such a statement is provided, if it shows a net sum due to the plaintiffs, the defendants will become liable up to the amount of the bond."

23. At paragraph [38] the learned judge said:

> "Paragraph 2 of the Bond refers to damages "payable under this Guarantee Bond…following the insolvency…of the contractor." Thus, the Bond is making it as clear as possible that the defendant is liable for sums payable by County under the building contract, but which have not been paid as a result of, or following, County's insolvency. In addition, the accounting exercise set out in clauses 8.7.4-8.7.5 of the building contract follows the insolvency, and results in a debt payable by the contractor to the employer. Thus, the wording of the building contract is echoed by clause 2 of the Bond."

In his submissions, Mr. James emphasised the words "results in" to be seen in the penultimate sentence of that passage.

24. Finally, I would refer to paragraphs [55] to [57] of the judgment:

> "55. The original debate under the umbrella of Declaration 2 ranged far and wide. At one point, the defendant was suggesting that the claimant needed either to get a judgment against County, or at least get County's agreement that they were liable for the debt, before any claim could be made under the Bond. That is wholly incorrect: the decisions in *Tower Housing* and *Paddington Churches* make plain that what is required to trigger a claim under the Bond is the completion of the ascertainment exercise under clause 8.7. Once that has happened, a claim can be made under the Bond.

> "56. Once the process under clause 8.7 of the building contract is concluded, it is not only quite unnecessary for the claimant to pursue County before making a claim against the defendant, but it is also unnecessary for the claimant to have any further communication of any kind with County. The claimant can look to the defendant for payment.

> "57. Any other result would destroy the commercial value and purpose of the Bond. The Bond is required to provide the claimant with the ability to recover at least some of its losses against a solvent party. It would circumvent that commercial purpose if the claimant was then required to issue separate proceedings against that insolvent party (and get the necessary permission to do so) and/or to reach an agreement with the insolvent party, in order to establish either liability or quantum under the Bond."

25. Mr. James argues that no ascertainment under Clause 8.7.4 of the Contract has been carried out. As I read the submissions before the Adjudicator, it was then argued that the agreement in the Acceptance Agreement was that ascertainment.

26. As I understood Mr. Lixenberg did not abandon that argument, but suggested by way of alternative that one or other of the documents headed "Summary of initial additional expense as a consequence of M L Hart going into administration" at pages 272 and 273 of the hearing bundle constituted that ascertainment.

27. I do not accept that the Acceptance Agreement can be viewed as either being the ascertainment or containing such as ascertainment. Firstly, nowhere does it contain any statement that it is or contains that ascertainment. Secondly, it does not contain the statements required by Clause 8.7.4. Finally, Clause 8.7.4 contemplates a statement having primary efficacy as between the parties to the construction contract. An agreement between the Employer and the Surety settling liability under the Bond is not an agreement on its face having efficacy between the parties to the construction contract – a point I refer to in greater detail below.

28. Of course, as Coulson J. explained in ***Ziggurat*** an ascertainment under Clause 8.7.4 may result in a debt payable by the contractor which the Surety may be required to discharge pursuant to its secondary liability if the contractor does not discharge the debt: but that does not change the nature of the ascertainment as being an exercise having primary efficacy between the parties to the construction contract.

29. Thus, for example, if the ascertainment were in the sum of £1 million due from the contractor to the employer, and there was a bond in the sum of £250,000, the employer would be free to recover £250,000 from the Surety, but would be free to seek to recover the balance of £750,000 from the contractor or its liquidator.

30. I turn to consider whether one or other of the documents at pages 272 and 273 of the hearing bundle can be regarded as the contractual ascertainment.

31. The first of these documents is dated 27 September 2014. As I have set out above, it is headed "Summary of initial additional expense as a consequence of M L Hart going into administration". It sets out the "total cost to complete works" in the sum of £4,115,653.21. It then deducts £3,680,477.82 as "Notional Final Account Total", giving a net figure of £435,175.39 under a heading "Summary of Claim on Performance Bond" and against an entry "Initial assessment of nett deficit to be reimbursed by Performance Bond". Finally, at the bottom of the page it reads "Notes. The total additional costs, including additional funding, legal and other professional costs are still being reviewed and will be finalised in due course."

32. The second document is identical in format and contents save that the date is 24 May 2015, and the figures have changed (most importantly, the figure of £435,175.39 has become £415,025.39).

33. In my judgment neither of these documents is or evidences a Clause 8.7.4 assessment. Firstly, neither purports to be such an assessment: on the contrary they purport to be prepared for an allied but different purpose, namely a claim upon the Bond. Secondly, a Clause 8.7.4 assessment is or should be a one time definitive assessment: these documents do not purport to be anything other than "Initial": that was an accurate description, as the figures changed between the first and second documents, and there was no reason to suppose that the figures might not have changed again. Finally, the dates of both documents are inconsistent with the timescale laid down in Clause 8.7.4.

34. After the hearing was concluded, I invited submissions from the parties as to the effect in law of a conclusion on my part that the Adjudicator had reached the wrong conclusion as to the effect of the Acceptance Agreement. In addition to addressing that question, Mr. Lixenberg placed before me a third document dated 1 March 2017. This was in the same format as the previous two documents, but now showed a deficit of £378,316.89. Mr. Lixenberg also provided me with copies of other documentation showing discussions as to the figures.

35. Mr. James objected to documents which were not part of the evidence before the Court.

36. I have looked at this evidence *de bene esse*: it does not change my conclusion set out above.

37. Accordingly, I hold that there has not been any assessment under Clause 8.7.4.

38. Can it be said that the Acceptance Agreement evidences an intention to do away with any Clause 8.7.4 process?

39. I certainly accept that as between Swiss Cottage and Aviva there was an agreement for the purposes of Swiss Cottage's call on the Bond that it would not be necessary for a Clause 8.7.4 assessment to take place: this was a valuable agreement for Swiss Cottage since the decision of Coulson J. in ***Ziggurat*** supports the view that Aviva would have been entitled to insist upon such an assessment taking place before paying under the Bond. The agreement was also valuable for Aviva since it crystallised Aviva's liability in a fixed sum less than the amount claimed in the "Interim Assessments".

40. However, the question which I must decide is, what is the status of the Acceptance Agreement as between Hart and Swiss Cottage? (I do not need to consider the effect of the Acceptance Agreement as between Hart and Aviva). In my judgment, subject to the estoppel argument with which I deal below, the Acceptance Agreement has no binding effect as between Hart and Swiss Cottage. I reach this conclusion for the following reasons:

    (1) the Agreement does not purport on its face to do more than to settle the Bond Call – see paragraph 3;

(2) the contents of the Agreement make it clear that (a) it is a settlement of the Bond Call and (b) that it is a settlement between the Employer and the Surety – see paragraphs 4 and 6;

(3) Hart is not a party to the Agreement;

(4) given that Hart never expressly agreed to the Agreement nor became a Party to the Agreement, the warranty of authority in paragraph 10 makes sense. However, if Hart were to be regarded as a party to the Agreement, it would not make sense.

41. It is submitted by Mr. Lixenberg that the above conclusion is inconsistent with the Surety's rights of subrogation. I take the opposite view: because the Surety upon payment under the Bond becomes subrogated to the rights of the Employer, it places the Surety in a situation of potential conflict with the Contractor: accordingly it is not a natural or necessary inference that the Surety, in reaching an agreement with the Employer, is in some way binding the Contractor. In the absence of agreement from the Contractor, it is an inference which can be drawn that the Contractor might well not consent to such an agreement, not only because of the right of subrogation vesting in the Surety, but also because of the Surety's right of indemnity against the Contractor.

42. Accordingly, I hold that there is nothing in the Acceptance Agreement which precludes Hart from seeking a Clause 8.7.4 assessment. I turn now to consider the submission that Hart is estopped from seeking such an assessment.

Estoppel

43. Mr. Lixenberg contended that even if the Acceptance Agreement is not binding upon Hart, there is an estoppel by conduct preventing Hart from seeking an assessment under Clause 8.7.4.

44. In support of his contention, he referred to three authorities: *Nana Ofori Atta II, Omzanhene of Akyem Abuakwa and Another v Nana Abu Bonsra II As Adanshene, and as Representing The Stool of Adanse, and Another* [1957] 3 All ER 559; *House of Spring Gardens Ltd. v Waite And Others* [1991] 1 Q.B. 241; and *Rust Consulting Limited v Pb Limited* [2010] EWHC 3243 (TCC).

45. In my judgment these three cases are all best regarded as cases of issue estoppel and/or abuse of process concerning attempts by a party to circumvent a decision of a court in proceedings to which that party was not formally a party, but in which that party had sufficient interest to be regarded as a privy. Thus in *House of Spring Gardens* Stuart-Smith L.J. said at page 252B-E:

> "He was not a party to the action, but an estoppel will bind those who are privy to the parties bound: *Carl Zeiss Stiftung v Rayner & Keeler (No.2)* [1967] 1 A.C. 853. The requisite privity is said to be privity of either blood, title or interest: *per* Lord Reid in the *Carl Zeiss* case, at p. 910. The only relevant one is privity of interest. It is not easy to detect from the authorities what amounts to a sufficient interest. It has been held that judgment against a defendant in one capacity does not bind him in another capacity (*Marginson v Blackburn Borough Council* [1939] 2 K.B. 426), though I would wish to reserve my opinion as to whether on the facts of that case the plaintiff's representative claim might not have been struck out as an abuse of

process. A mere interest in the outcome of the litigation is not sufficient. In *Gleeson v J. Whippell & co. Ltd.* [1977] 1 W.L.R. 510, 515, Sir Robert Megarry V.-C. propounded this test:

> "but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest.'"

"He continued, at p. 516:

"A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in terrorem of other and more stalwart possible defendants, but as a decisive weapon against them"."

46. In *Rust Consulting Ltd* at paragraph [45] Akenhead J said:

"(d) Estoppel of the various different types can of course, on the facts of any given case, come into play in the field of guarantees or indemnities.

"(e) Where what is being guaranteed or indemnified against includes claims, proceedings or judgements against the beneficiary, the giving of notice to the guarantor or indemnifier may form at least one basis for or strand of a case in estoppel. The active participation of the guarantor or indemnifier in the proceedings, may, depending on the circumstances, level and scope of the participation, go much further to establish an estoppel against it. The positive concurrence by the guarantor or indemnifier with a consent judgement against the beneficiary will go further still.

"(f) Given the wide range of factual permutations which may arise in any particular case, it is inappropriate for this court to lay down any specific requirements needed to establish an estoppel in these types of circumstances. Whilst the giving of notice to, the active participation by and the giving of approval to a consent judgement by the guarantor or indemnifier may in many cases give rise to an estoppel against it so as to prevent it from denying an obligation to indemnify against or pay out for the amount of the consent judgement, it would be wrong to be absolutely prescriptive. It is necessary to look at all the relevant evidence and circumstances before deciding whether there is or is not an estoppel."

Akenhead J. did not decide in the judgment to which I was referred that there had been an estoppel, but left that issue to be determined at a later stage in those proceedings, if appropriate.

47. Mr. Lixenberg took me carefully through the relevant documentation and showed that those representing the liquidators of Hart were aware that Swiss Cottage and Aviva were discussing the amount payable – as he put it in paragraph 32(b) of his Skeleton Argument, "M L Hart was content to defer to Aviva as to the quantum of SCPL's entitlement to payment". I read the correspondence slightly differently. In my judgment the following is made out:

(1) Aviva's primary interest was to agree and, insofar as possible, limit its liability under the Bond;

(2) Swiss Cottage was keen to obtain the best recovery it could under the Bond;

(3) The expectation was that, apart from what might be payable under the Bond, Swiss Cottage's opportunity to recover monies was perceived as minimal because the expectation was that the dividend in the liquidation would only be a few pence in the pound;

(4) In those circumstances it suited all parties for Swiss Cottage to reach the best deal it could with Aviva (and vice versa);

(5) Whilst the liquidators of Hart were aware of the negotiations between Swiss Cottage and Aviva, they were content to allow those to continue without any participation;

(6) Importantly, once the Acceptance Agreement had been concluded, the liquidators' representative inquired whether Swiss Cottage had any further claim in the liquidation: as I understand the position there was no response to this inquiry, but it is consistent with the liquidators believing (correctly) that the Acceptance Agreement did not preclude Swiss Cottage from claiming sums which it had not recovered under the Bond.

48. In my judgment, these facts are not sufficient to establish the estoppel for which Swiss Cottage contend.

49. Firstly, I have considerable doubts as to whether the authorities relied upon apply outside a situation amounting to issue estoppel and/or abuse of process in connection with court proceedings.

50. Secondly, both counsel before me were in agreement that such an estoppel could only arise where what was proposed would be unconscionable: I do not regard what happened in this case as coming close to passing that threshold.

51. Thirdly, the effect of the estoppel would be to prevent Hart from relying upon its contractual right to a Clause 8.7.4 assessment: in my judgment the Court should be slow to hold that an agreement to which Hart was not a party would have such a preclusive effect.

52. For these reasons, I hold that Hart is not estopped from seeking an assessment under Clause 8.7.4.

The first two declarations

53. For the above reasons I have come to a different conclusion from the very experienced Adjudicator in his Decision referred to above.

54. Accordingly, Hart is entitled to the first and second declarations sought as set out at paragraph 2 above.

Is Hart entitled to launch a fresh adjudication?

55. The effect of what I have held to be a mistaken view of the effect of the Acceptance Agreement was that the Adjudicator declined to enter into consideration of the merits of an assessment under Clause 8.7.4.

56. It is Mr. James's contention that Hart is entitled to launch a fresh adjudication. Mr. Lixenberg contends that this impermissible because of the effect of Paragraph 9(2) of the statutory scheme.

57. As I have said above, I invited submissions from the parties as to whether the Decision should be treated as a nullity. I was referred to some authority including *Ballast plc v The Burrell Co. {Construction Management) Ltd* [2001] S.C.L.R. 837 and *Urang Commercial Ltd v Century Investments Ltd.* [2011] EWHC 1561 (TCC).

58. Applying those authorities I am satisfied that on the issue upon which he based his Decision, the Decision, although in my view wrong in law, was not a nullity.

59. However, having reached that conclusion, the Adjudicator declined to determine the amount(s) due as between the parties. The question for me is whether that erroneous Decision prevents the financial dispute now being determined in a fresh adjudication.

60. In my judgment the following passages from the 4th Edition of *Coulson on Construction Adjudication* are of assistance by way of general background to the Court's approach:

> "4.66 …. If the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that earlier adjudication, then paragraph 9(2) is unequivocal: in such circumstances, the adjudicator must resign. Doubtless as a result of this finality, there have been a large number of reported cases in which the responding party has sought a declaration or a finding that the adjudicator should have resigned and that, in consequence, he had no jurisdiction to give the decision that he did …
>
> "4.67 Perhaps unsurprisingly, the majority of the reported cases dealing with what might be called attempted readjudication demonstrate a general desire to find that the disputes in question were not the same or substantially the same …."
>
> ….
>
> "7.150 It is instructive to note that, just as with the cases in which the argument has been advanced that the adjudicator dealt with more than one dispute and therefore did not have the appropriate jurisdiction, the submission that the adjudicator was dealing with a matter previously decided by another adjudicator, although regularly made, has also been largely unsuccessful…."

61. In *Harding v Paice* [2015] EWCA Civ.1231, Jackson L.J. said at paragraphs [57] and [58]:

> "57. It is quite clear from the authorities that one does not look at the dispute or disputes referred to the first adjudicator in isolation. One must also look at what the first adjudicator actually decided. Ultimately, it is what the first adjudicator decided, which determines how much or how little remains available for consideration by the second adjudicator.
>
> "58. In my view Mr Sears' argument is correct. The word "decision" in paragraph 9(2) means a decision in relation to the dispute now being referred to adjudication. I arrive at this interpretation as a matter of construction rather than implication. It is what the paragraph obviously means. Parliament cannot have intended that if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, further adjudication about the other matters is prohibited."

62. In *Hitachi Zosen Inova AG v John Sisk & Son Limited* [2019] EWHC 495 (TCC) at paragraphs [39] to [41] Stuart-Smith J considered a case with some similarities to this, where in an earlier adjudication the adjudicator had declined to reach a decision. The learned judge said:

> "39. Hitachi submits that, in deciding the sum to which he considered Sisk to be entitled to payment in respect of Event 1176 and directing payment of that sum the adjudicator in the eighth adjudication decided the same claim that he had considered and decided in the second adjudication (in the sum of £nil).
>
> "40. I disagree. The referred dispute in the eighth adjudication was the valuation of Event 1176. That was precisely what the adjudicator declined to decide in the second adjudication, for want of substantiating evidence at that time. The dispute referred to in the eighth adjudication was therefore not the same as the dispute in the second adjudication.
>
> "41. In my judgment the dispute referred to in the eighth adjudication was also not "substantially the same" as the dispute decided in the second. It is important to bear in mind that the comparison to be made is between what was *referred* in the eighth adjudication and what was *decided* in the second. Once it is recognised that there was no valuation decision at all in the second adjudication, it become clear that, in the matter of the value to be attributed to and recovered for Event 1176, there is no overlap at all …."

63. Having heard able argument on both sides, I have no doubt that this case is in principle indistinguishable from *Hitachi*. Here there were two issues before the Adjudicator: (1) did the Acceptance Agreement mean that he could not enter upon the merits of the Clause 8.7.4 assessment? (2) If not, what decision should be reach in respect of that assessment?

64. Because of the decision which he reached on issue (1), he did not make any decision on issue (2). On the authorities cited above, that means that now his decision on issue (1) has been held to be wrong, a second adjudicator is free to decide issue (2) on its merits.

65. Accordingly I hold that Hart is entitled to the third declaration sought as well as the first two.