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Case No: HT-2020-000454

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 22 March 2023

Before :

Mrs Justice O'Farrell DBE

- -

Between :

SHEFFIELD TEACHING HOSPITAL FOUNDATION TRUST	**Claimant**
- and -	
HADFIELD HEALTHCARE PARTNERSHIPS LIMITED	**Defendant/Part 20 Claimant**
- and -	
KAJIMA CONSTRUCTION EUROPE (UK) LIMITED	**First Part 20 Defendant**
- and -	
VEOLIA ENERGY & UTILITY SERVICES UK PLC	**Second Part 20 Defendant**

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- -

Fiona Sinclair KC and Simon Hale (instructed by Clyde & Co LLP) for the Defendant / Part 20 Claimant
Samar Abbas Kazmi (instructed by Addleshaw Goddard LLP) for the First Part 20 Defendant
Crispin Winser KC (instructed by Pinsent Masons LLP) for the Second Part 20 Claimant

Hearing dates: 7th & 8th March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 22nd March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice O'Farrell DBE

Mrs Justice O'Farrell:

1. There are two matters before the Court:

   i) an application by the First Part 20 Defendant ("Kajima") for summary judgment in respect of parts of the Part 20 Claim, and/or to strike out those parts, on the basis that the Particulars of Additional Claim disclose no reasonable grounds for bringing those parts of the claim and they have no real prospect of success;

   ii) an application by the Second Part 20 Defendant ("Veolia") against the Defendant ("Hadfield"), seeking security for costs.

Background facts

2. The Claimant ("the Trust") is an NHS hospital foundation trust, comprising five teaching hospitals, including the Northern General Hospital in Sheffield. Hadfield is a special purpose limited company, incorporated in 2004 for the purpose of developing and operating a new ward block at the Northern General Hospital ("the Hadfield Wing") as a PFI project. Kajima is the design and construct contractor and Veolia provides facilities management services in respect of the project.

3. By an agreement dated 20 December 2004, made as a deed between the Trust and Hadfield, Hadfield agreed (as Project Co) to design, build, commission and operate the Hadfield Wing ("the Project Agreement"). The Hadfield Wing is a three-storey building, comprising three separate blocks built around a central atrium, connected to a pre-existing hospital building by an enclosed bridge at the second storey level. It contains acute medical wards, intended primarily for the care of elderly patients.

4. By a further agreement on 20 December 2004, Hadfield entered into a contract, executed as a deed, with Kajima, under which Kajima agreed to carry out the design, construction and commissioning of the Hadfield Wing ("the Construction Contract").

5. Clause 9.7 of the Construction Contract contains a limitation clause as follows:

> "Notwithstanding any other provision of this Agreement which for the avoidance of doubt shall include any indemnity or any of the other Ancillary Documents, no claim, action or proceedings shall be commenced against the Contractor after the expiry of twelve (12) years from the Actual Completion Date."

6. On the same date, Barclay's Bank plc, the Trust, Hadfield and Kajima entered into an agreement ("the Contractor's Collateral Agreement"), whereby Kajima warranted that it had and would continue to comply with its obligations under the Construction Contract.

7. Clause 13.4 of the Contractor's Collateral Agreement also contains a limitation clause as follows:

> "The Contractor shall not be liable to the Trust for any breach or breaches of this Agreement more than 12 (twelve) years after the Completion Date (or termination of the Construction Contract if earlier) provided that this clause shall not apply to any

> proceedings commenced against the Contractor prior to expiry of such 12 (twelve) years."

8. By an agreement dated 20 December 2004 between Hadfield and Dalkia Utilities Services plc (now Veolia), Veolia agreed to provide facilities management services from the completion of the construction works at the Hadfield Wing ("the Hard Services Agreement"). Barclays Bank plc, The Trust, Hadfield and Veolia entered into a collateral agreement, whereby Veolia warranted that it had and would continue to comply with its obligations under the Hard Services Agreement ("the Hard Service Provider's Collateral Agreement").

9. Further, on 20 December 2004 Hadfield, Kajima and Veolia entered into an agreement governing the interface between Kajima's design and construction work and Veolia's service management work ("the Interface Agreement").

10. By a certificate dated 28 March 2007, practical completion of the Hadfield Wing was certified as achieved on 26 March 2007.

11. In 2017 and 2018, the Trust identified potential defects in the fire compartmentation and other fire protection works in the Hadfield Wing.

12. On 30 January 2018 the Trust, Hadfield, Veolia and Kajima entered into a standstill agreement ("the First Standstill Agreement"), under which the parties agreed at clause 2.1 that:

> "(a) for all purposes of any defence or argument based on limitation, time bar, laches, delay or related issue in connection with the Dispute (a Limitation Defence), time will be suspended during the Standstill Period.
>
> (b) no party shall raise any Limitation Defence that relies on time running during the Standstill Period… "

13. On 14 November 2018 South Yorkshire Fire & Rescue Service issued a prohibition notice under Article 31 of the Regulatory Reform (Fire Safety) Order 2005, informing the Trust that, in its opinion, the Hadfield Wing constituted an excessive risk to persons in case of fire.

14. By letter dated 29 November 2018, the Trust notified Hadfield that in accordance with paragraph 2.2(a) of the First Standstill Agreement, the Standstill Period would terminate seven days after the service of the letter.

15. On 3 December 2018 the Trust vacated the Hadfield Wing (save for the administrative offices).

16. On 25 March 2019 the Trust, Hadfield and Kajima entered into a further standstill agreement ("the Second Standstill Agreement").

17. Between 2019 and 2021 various remedial works were carried out by Kajima and by Hadfield.

Proceedings

18. On 9 December 2020 the Trust commenced proceedings against Hadfield, seeking damages of £13 million approximately. The Trust's case is that there are design and construction defects throughout the Hadfield Wing, including fire compartmentation and fire protection issues, as a result of which the Trust was forced to vacate the Hadfield Wing and relocate its services to temporary modular accommodation during remedial works.

19. Initially, the Trust also commenced proceedings against Kajima but on 22 July 2022 it discontinued that claim.

20. On 16 August 2021 Hadfield commenced Part 20 proceedings against Kajima. The basis of claim is summarised in paragraph 3:

> If and to the extent that Project Co is found liable to the Trust as alleged in the Trust's Particulars of Claim, then as set out below that liability was caused by Kajima's failure to design and/or construct the Facilities in compliance with the Construction Contract. In the event that it is found liable to the Trust Project Co will be entitled to and claims from Kajima indemnity or damages in respect of all sums which Project Co may be held liable to pay to the Trust (whether as damages, interest or costs), as well as damages in respect of Project Co's own losses caused by Kajima's breach of the Construction Contract.

21. In its Part 20 Defence, Kajima denied liability and asserted that certain of the losses alleged by the Trust against Hadfield, and in turn by Hadfield against Kajima, arose in whole or in part from maintenance failures which amounted to breaches of the Project Agreement by Hadfield and/or breaches of the Hard Services Agreement by Veolia.

22. On 13 May 2022 Hadfield commenced Part 20 proceedings against Veolia, stating that its primary case was a denial of any liability to the Trust and its secondary case was that Kajima was responsible for the defects alleged by the Trust but if, and to the extent that, Kajima established that the defects and/or remedial works were Veolia's responsibility under the Hard Services Agreement, Hadfield claimed an indemnity or damages against Veolia.

23. The trial has been listed to start on 9 October 2023 with an estimate of six weeks.

<u>The summary judgment / strike out application</u>

24. On 13 January 2023, Kajima issued an application, seeking summary judgment pursuant to CPR 24.2 on parts of the Additional Claim on the grounds that Hadfield has no real prospect of succeeding on:

    i) paragraph 50.1 of the Particulars of Additional Claim (Issue 1);

    ii) paragraph 29 of the Particulars of Additional Claim and paragraph 36.1 of the Re-Amended Reply and Defence to Counterclaim (Issue 2);

    iii) paragraph 44 of the Particulars of Additional Claim (Issue 3); and

iv) parts of paragraphs 28, 29 and 43 of the Particulars of Additional Claim (Issue 4);

further or alternatively, that those parts of the claim be struck out pursuant to CPR 3.4(2)(a) because they disclose no reasonable grounds for bringing the claim.

25. The application is supported by:

i) the third witness statement of Jonathan Tattersall, solicitor of Addleshaw Goddard LLP, dated 13 January 2023;

ii) Mr Tattersall's fourth witness statement dated 27 February 2023;

iii) Mr Tattersall's fifth witness statement dated 6 March 2023.

26. The application is opposed by Hadfield as set out in:

i) the witness statement of Lucy Frith, solicitor of Clyde & Co LLP, dated 20 February 2023;

The applicable test

27. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

28. The principles to be applied on such applications are well-established and can be summarised as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [95]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [110].

iv) The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can

reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Okpabi* at [127]-[128].

v) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

vi) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at [11]-[14]; *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

29. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

30. The principles to be applied are as follows:

i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.

ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557; *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318 per Birss LJ at [20].

iii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hamida Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 per Coulson LJ at [22]-[24]; *Rushbond v JS Design Partnership* [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].

Issue 1 - Limitation

31. Kajima's case is that there is no real prospect of success in respect of the plea at paragraph 50.1 of Hadfield's Particulars of Additional Claim because Hadfield's claims in the proceedings are not within the definition of "Dispute" in the First Standstill Agreement.

32. The recitals to the First Standstill Agreement state as follows:

> "(A) The Trust entered into a Project Agreement with Project Co for the development of a new ward block and provision of hard services at the Northern General Hospital, Sheffield.
>
> (B) Without prejudice to the provisions of clause 4 of this Agreement, the Parties have become aware of certain defects relating to the inadequate fire stopping at the Premises of which the Trust has been advised compromises patient and staff safety at the Premises.
>
> (C) The Trust has intimated its claim in relation to the defects in the inadequate fire stopping at the Premises to each of the other Parties and the parties respectively reserve their position in relation thereto under the relevant Project Documentation.
>
> (D) The Parties have agreed to work together in the spirit of co-operation to investigate and identify the scope and extent of the defects and the scope and programme of remedial works to deal with the same.
>
> (E) The Parties acknowledge that it is crucial that the Trust continues to carry out and provide its Clinical Services from the Premises with the minimum of interruption.
>
> (F) The Parties wish to enter into this Agreement to set out the parties' agreement in relation to the Defects, the Remedial Works, the Remedial Works Programme and the Standstill Period.
>
> (G) Subject to the terms of this Agreement, no party shall issue proceedings against another in respect of the Dispute during the Standstill Period (as defined in clause 2.2 below)."

33. The First Standstill Agreement includes the following provisions:

> "1.4 The "Defects" means the deficiencies and or defects in the fire stopping in the Premises.
>
> 1.5 The "Dispute" means the exercise by any party of its contractual rights under the Project Documentation or any legal right such party may otherwise have (including the reservation of such rights) arising out of or connected with the Defects, including but not limited to the Trust's entitlement to levy Deductions and/or award Service Failure Points in respect of the same, (excluding, for the avoidance of doubt, any disputes in

relation to the meaning or effect of this Standstill Agreement).

1.8 The Project Documentation means:

1.8.1 Project Agreement dated 20 December 2004 made between the Trust and Project Co as may have been amended;

1.8.2 Hard Service Provider's Collateral Agreement dated 20 December 2004 made amongst the Trust, Barclays Bank Plc, the Service Provider and Project Co as may have been amended;

1.8.3 Contractor's Collateral Agreement made amongst the Trust, Barclays Bank PLC, the Contractor and Project Co dated 20 December 2004 as may have been amended;

1.8.4 Hard Services Agreement dated 20 December 2004 made amongst Project Co and the Service Provider as may have been amended;

1.8.5 Interface Agreement dated 20 December 2004 made amongst Project Co. the Service Provider, the Contractor and Kajima Europe BV.

1.9 The "Remedial Works" means the scope of works for the remedying of the Defects set out in the Schedule of Defects to be approved by the Trust and to be carried out by or on behalf of Project Co.

2.1 The parties hereby agree that:

(a) for all purposes of any defence or argument based on limitation, time bar, laches, delay or related issue in connection with the Dispute (a Limitation Defence), time will be suspended during the Standstill Period.

(b) no party shall raise any Limitation Defence that relies on time running during the Standstill Period.

(c) nothing in this Agreement shall be construed as an acknowledgment by any party that, in the absence of this Agreement, a Limitation Defence would be available to any other party.

2.2 The Standstill Period means the period starting on the Effective Date and which shall continue in force until the earlier of:

(a) 7 days after the service by any Party of a notice stating that the Standstill Period is no longer to apply, provided that the Trust have indicated their intention to service a notice in accordance with this clause (a)2.2(a) not later than 3 Business Days prior to service; or

(b) Twelve months from the date of this Agreement or such other date the parties may agree, acting reasonably in the context of the Remedial Works Programme;

or (c) The completion of the Remedial Works so as to meet the requirements of the Project Agreement referred to in the Project Documentation.

3.1 In consideration for entering into this Agreement, each Party agrees and undertakes to work together in good faith with the objective of rectifying the Defects identified in the Schedule of Defects and agrees …

…

3.1.4 That in relation to the Defects, until after expiry of the Standstill Period (as exercised in accordance with clause 2.2) no party will (i) take any formal step in the Dispute Resolution Procedure (set out in Schedule 26 of the Project Agreement) in the case of the Trust and Project Co and as set out in the Interface Agreement in the case of Project Co, the Service Provider and the Contractor) in relation to the Defects; or (ii) take any step to pursue any claim in relation to Defects (other than set out in this Agreement) provided that nothing in this clause shall prevent the Parties from informally exploring opportunities to settle any Dispute if and when such opportunities may arise.

3.5 Without prejudice to the provisions of clause 3.1.4, the Trust, Project Co and the Service Provider each reserves its rights to refer any Dispute to the Dispute Resolution Procedure in accordance with, in the case of the Trust and Project Co, under Schedule 26 to the Project Agreement and, in the case of Project Co, the Service Provider and the Contractor, under the Interface Agreement referred to in the Project Documentation, following the expiry of the Standstill Period.

4 Nothing in this Agreement shall constitute any admission by any Party and is subject always to the rights of the Parties to exercise their other rights or pursue any other claim of any nature unrelated to the

> Dispute arising under the Project Documentation, or otherwise."

34. At paragraphs 45 to 52 of Hadfield's Particulars of Additional Claim against Kajima, it is pleaded that Hadfield's claims are not time-barred, notwithstanding the expiry of 12 years from the date of Practical Completion, by reason of clause 2.1 of the First Standstill Agreement.

35. Paragraph 50 states as follows:

> For the avoidance of doubt the "Dispute" as defined included Project Co's claims against Kajima as set out in these Particulars, notwithstanding that "Project Documentation" as defined in the Standstill Agreement does not include the Construction Contract:
>
> 50.1 Project Co's claims against Kajima are "the exercise by any party of … any legal right such party may … have … arising out of or connected with the Defects" and so are within the scope of the "Dispute" as defined.
>
> 50.2 Alternatively, to the extent that Kajima denies that Project Co's claims fall within the scope of the Standstill Agreement, Project Co will say as follows:
>
> (a) As evidenced by an exchange of emails between Project Co and Kajima around 25 January 2018 it was the expressed intention of the parties to include Project Co's claims against Kajima within the scope of the Standstill Agreement.
>
> (b) To the extent that the parties did not achieve that result by the express wording of the Standstill Agreement that was a mistake by the parties which did not reflect their continuing intent as to the effect of the Standstill Agreement.
>
> (c) The Standstill Agreement therefore falls to be rectified by amendment of the definition of "Project Documentation" to include the Construction Contract.

36. Mr Kazmi, counsel for Kajima, submits that it is clear from the drafting of the First Standstill Agreement that the Construction Contract is excluded from the exhaustive definition of the term Project Documentation. Therefore, Hadfield's exercise of any contractual rights under the Construction Contract is not included in the definition of "Dispute" for the purpose of the suspension of time for limitation in clause 2.1.

37. Mr Kazmi contends that Hadfield's pleaded case, namely, that its claims fall within the definition of "Dispute" because they constitute the exercise of legal rights arising out of or connected with the Defects, is contrary to the express terms of the First Standstill Agreement. Recital C refers to the claims intimated by the Trust in relation to the fire

stopping defects and the parties' reservation of their positions under the relevant Project Documentation. Clause 3.1.4, which prohibits the parties from taking any formal step in the dispute resolution procedures in relation to the Defects is expressly tied to the Project Agreement and the Interface Agreement, both falling within the Project Documentation as defined; it does not make any reference to any rights in relation to the Defects arising out of the Construction Contract. Such omission was deliberate as is evident from the terms of clause 3.5, which expressly reserves the right of the Trust, Hadfield and Veolia to refer any Dispute to the dispute resolution procedures under the Project Agreement and Interface Agreement, but does not contain a similar reservation in respect of any dispute under the Construction Contract, following expiry of the standstill period.

38. Further, Mr Kazmi submits that Hadfield's position is not assisted by reference to the factual matrix. In the period leading up to the First Standstill Agreement, as evidenced by clauses 3.2 to 3.7 of the same, the focus of the Trust and Hadfield was on any entitlement to deductions and/or service failure points under the Project Agreement, which might be passed on by Hadfield to Veolia under the Hard Services Agreement. Any residual matters affecting Kajima could be addressed under the Interface Agreement, which was included within the definition of Project Documentation. Commercially, there was no need to stop time under the Construction Contract because in January 2018 there remained a period of 14 months before expiry of any limitation period. In those circumstances, there was no commercial imperative for Kajima to agree any extension to its potential liability under the Construction Contract.

39. Ms Sinclair KC, leading counsel for Hadfield, submits that the definition of "Dispute" in clause 1.5 of the First Standstill Agreement identifies two categories of claims: (i) the exercise by any party of its contractual rights under the Project Documentation arising out of or connected with the Defects; and (ii) the exercise by any party of any legal right it may otherwise have arising out of or connected with the Defects. Although there is a pleaded issue as to the meaning of "Defects" that is outside the scope of Kajima's application. Therefore, it must be assumed in Hadfield's favour that "Defects" include the matters of which it complains against Kajima. On that basis, Hadfield's Part 20 claims against Kajima fall within category (ii), as constituting the exercise by Hadfield of legal rights which arise out of or are connected with the Defects.

40. In response to the arguments made by Kajima, Ms Sinclair submits that Recital C should not be read in isolation. The First Standstill Agreement was entered into by all the parties and recitals B and D refer to the agreement by the parties to work together to identify the scope and extent of the defects and necessary remedial works. Clause 3.1.4 contains two categories of prohibition: (i) prohibition on the parties from taking any formal step in the dispute resolution procedures in relation to the Defects under the identified Project Documentation; and (ii) prohibition on the parties from taking any steps to pursue any claim in relation to the Defects. Hadfield's Part 20 claims against Kajima fall within category (ii).

41. Further, Ms Sinclair relies on the factual matrix evidence set out in the witness statement served in opposition to the application, which shows that by the start of December 2017 Hadfield had given notice to Veolia and Kajima of its intention to hold both those parties liable for the fire protection defects and consequential deductions under the Project Agreement. In those circumstances, there was a mutual intention by all parties to the First Standstill Agreement to preserve all parties' rights in respect of

all their respective contractual entitlements, pending investigations to identify all defects and determine the necessary remedial works.

Discussion and disposal on Issue 1

42. The court's approach to contractual interpretation is not in dispute. When interpreting a written contract, the Court is concerned to ascertain the intentions of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at [15]-[23]; *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [11]-[15]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 per Lord Clarke at [21]-[30]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffmann at [14]-[15], [20]-[25].

43. "Dispute" is defined in clause 1.5 as:

> "the exercise by any party of its contractual rights under the Project Documentation or any legal right such party may otherwise have (including the reservation of such rights) arising out of or connected with the Defects ..."

44. It is common ground that the Project Documentation as defined in the First Standstill Agreement does not include the Construction Contract. However, on a plain and natural reading of the words in clause 1.5, I consider that it is arguable that a claim by Hadfield for breach of the Construction Contract in respect of the fire protection issues falls within the words: *"any legal right such party may otherwise have … arising out of or connected with the Defects."* Those words are in wide terms and not limited to claims under, or between the parties to, the defined Project Documentation.

45. A broad interpretation of the scope of the standstill agreement is supported by the provision in clause 3.1.4:

> That in relation to the Defects, until after expiry of the Standstill Period … no party will
>
> (i) take any formal step in the Dispute Resolution Procedure set out in Schedule 26 of the Project Agreement … and as set out in the Interface Agreement … in relation to the Defects; or
>
> (ii) take any step to pursue any claim in relation to Defects …

46. Although the first part of the clause 3.1.4 prohibition against any formal dispute resolution procedure under the specified Project Documentation does not, on its face, include Hadfield's claims against Kajima under the Construction Contract, I consider

that it is arguable that such claims would fall within the second part of the clause, as claims in relation to the fire protection defects.

47. Having formed the view that Hadfield's construction of the language used in the First Standstill Agreement is arguable, with more than a fanciful prospect of success, it would be necessary for the court to ascertain the intention of the parties by reference to the factors identified in *Arnold v Britton* and the other authorities referred to above, including consideration of the factual matrix evidence. It is notable that both parties rely on such evidence.

48. Mr Tattersall refers to the background facts against which the First Standstill Agreement and the Second Standstill Agreement were entered into, together with the parties' understanding of the term "Defects" within the context of those agreements and the strategic benefit or disadvantage to Kajima of the standstill agreement. Ms Frith refer to the discussions and investigations of the alleged fire safety defects carried out prior to the First Standstill Agreement, and the further investigations and surveys agreed as necessary to identify the nature and scope of the defects and remedial works. In the absence of full documentation and cross-examination on these topics, the court is unable to reach a concluded view as to any common intention of the parties in respect of the scope of the First Standstill Agreement. Certainly, it could not be said that Hadfield's claim in respect of this issue is bound to fail.

49. In any event, as Ms Sinclair submits, even if Kajima were to succeed on the issue of construction, the court would be required to consider all the above matters in addressing the alternative rectification case. Kajima does not, in its skeleton, contend that the rectification argument is bound to fail and there is no current application before the court to strike out paragraph 50.2 of the Particulars of Additional Claim. It is noted that a further application to strike out has now been issued (after this hearing) but the parties have not had any opportunity to adduce evidence or address those matters in argument.

50. The court will not be in a position to determine whether or not any of the claims are barred for limitation until both the construction issue and the rectification issue are resolved. Therefore, there would be no material saving of time or costs by the court determining this issue of construction in isolation or in advance of the full trial.

Issues 2 and 3 – clause 9.7 of the Construction Contract

51. Kajima's case is that there is no real prospect of success in respect of paragraph 29 of the Particulars of Additional Claim and paragraph 36.1 of the Re-Amended Reply and Defence to Counterclaim (Hadfield's claim for negligence against Kajima) or paragraph 44 of the Particulars of Additional Claim (Hadfield's claim for specific performance, and its claim for damages in lieu of specific performance, against Kajima) because they are time-barred by reason of clause 9.7 of the Construction Contract.

52. Mr Kazmi submits that on a proper construction of clause 9.7 of the Construction Contract, it is sufficiently broad in scope to encompass all claims, actions or proceedings against Kajima, including the claims in negligence and for specific performance.

53. The court can deal with these issues shortly. As submitted by Ms Sinclair, findings on these issues would not resolve the question of limitation in respect of the claims for

negligence or specific performance. Even if such claims fell within the ambit of clause 9.7, they would not necessarily be time-barred because they could fall within the scope of the First Standstill Agreement. Given that Hadfield's case on the scope of the First Standstill Agreement is arguable with a real prospect of success, and there is a further arguable dispute based on rectification, the court is not in a position to determine whether such claims are barred for limitation. No benefit to the parties would be gained by adjudicating on the meaning and scope of clause 9.7 of the Construction Contract in isolation or in advance of the full trial. On that basis, issues 2 and 3 are not suitable for disposal by way of summary judgment or striking out.

Issue 4 – concurrent duty of care

54. Kajima's case is that Hadfield's claim for negligence is not sustainable insofar as the defects are the result of workmanship or materials breaches (as opposed to design breaches) because no common law duty of care could arise in respect of the same.

55. Paragraphs 28 and 29 of the Particulars of Additional Claim state:

> 28 Further and alternatively, by entering into the Construction Contract in circumstances where it was aware that Project Co fully relied on Kajima for the effective design and construction of the Facilities, and where Kajima was aware that Project Co relied on Kajima's performance of the Construction Contract in order to perform Project Co's corresponding obligations under the Project Agreement:
>
> 28.1 Kajima owed Project Co a duty of care at common law to take reasonable care in the performance of its obligations under the Construction Contract.
>
> 28.2 Kajima assumed responsibility to Project Co for losses including pure economic losses arising out of the negligent performance of Kajima's obligations under the Construction Contract.
>
> 29 The defects identified at paragraph 24 above, insofar as they are admitted by Project Co or found in due course to have been defects in the design or construction of the Facilities, were caused by negligence in the performance of Kajima's design and/or workmanship obligations. Kajima is therefore in breach of its common law duty of care.

56. Paragraph 43 includes, as part of the remedy claimed by Hadfield, damages for breaches of Kajima's common law duty of care.

57. Kajima's Defence to the Additional Claim is as follows:

> 26. Paragraph 28 is denied:

26.1 Kajima did not owe Project Co the duty of care alleged. Project Co is put to strict proof of the alleged duty of care. Kajima avers that, in circumstances where the parties made arrangements among themselves by a sophisticated set of contractual documents, all executed at the same time, allocating risks and responsibilities *inter se* with considerable care, and in contract, a duty of care at common law does not arise.

26.2 Alternatively, if, which for the avoidance of doubt is denied, Kajima did owe the duty of care alleged, such duty did not extend to liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss.

26.3 In the further alternative, if, which for the avoidance of doubt is denied, Kajima did owe the duty of care alleged, such duty did not extend to liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss caused by defective workmanship or materials.

26.4 Yet further, Kajima discharged any duty of care alleged by engaging independent and apparently competent sub-contractors to carry out its works and/or Kajima is not liable to Project Co in tort for any negligence on the part of those independent and apparently competent sub-contractors.

58. Paragraphs 29 and 43 of the Particulars of Additional Claim are denied.

59. Mr Kazmi submits that it is now settled law that a party in Kajima's position does not owe a duty of care at common law in respect of the works carried out under the Construction Contract: *Robinson v PE Jones (Contractors) Ltd* [2012] QB 44 (CA) per Jackson LJ at [67]-[68], [81]-[84], [88], [92], [94] & [95]; *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 (TCC) per Akenhead J at [21]. As a matter of law, a contract for construction works does not amount to an assumption of responsibility so as to give rise to a common law duty of care to avoid pure economic loss.

60. It is said by Mr Kazmi that even if there could be any doubt about the design aspects of Kajima's work, the position in respect of workmanship or materials is settled beyond doubt. Therefore, insofar as Kajima has raised a plea of workmanship or materials in its Defence, to which Hadfield has not pleaded any positive case (beyond non-admission), Kajima is entitled to summary judgment in respect of those issues because a duty of care to avoid economic loss arising out of workmanship or materials issues cannot be owed in the present circumstances.

61. Ms Sinclair submits that the issue whether a concurrent duty of care at common law not to cause pure economic loss by virtue of defective workmanship or the use of defective materials can arise in circumstances such as the Construction Contract is unsettled and controversial. Therefore, Hadfield's claim has a real prospect of success.

62. Ms Sinclair submits that the *ratio decidendi* in *Robinson v Jones* is very narrow. The Court of Appeal upheld the Judge's decision that the particular terms of the contract before them were not apt to give rise to a concurrent duty of care in tort because they excluded liability: *Robinson v Jones* at [84]. In contrast, the Construction Contract does not include a sole remedy clause and, although it expressly excludes Hadfield's liability in tort to Kajima, it does not exclude Kajima's liability in tort to Hadfield. Accordingly, on the facts of this case, *Robinson v Jones* can be distinguished.

63. It is said that the wider issues of principle were considered *obiter* on the basis that the contract between the parties was a traditional contract for the performance of works only, under which the contractor accepted no responsibility for the design of the building. In contrast, the Construction Contract imposes workmanship, materials and design responsibilities on Kajima. Further, it is said that the *obiter* remarks in *Robinson* are problematic in the light of earlier authority which the court did not address, namely, *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554 and *Barclays v Fairclough (No 2)* (1995) 76 BLR 1.

64. Unconstrained by the *obiter* remarks in *Robinson* there is no justification for not extending to a design and build contract the principle established in *Henderson v Merrett* [1995] 2 AC 45, that a concurrent and co-extensive duty of care to prevent economic loss would arise where A exercises a special skill for B, and B relies upon A doing so, unless the terms of any contact between A and B were inconsistent with that concurrent liability. The distinction between matters of design and workmanship is often difficult to draw in practice and is a matter best left to the trial: *Bellefield Computer Services v E Turner & Sons Ltd* [2002] EWCA Civ 1823 per May LJ at [76].

Discussion and disposal on Issue 4

65. *Robinson v Jones* concerned a claim for damages in respect of defective work brought by a claimant who entered into a contract with the defendant building contractor to purchase a house under construction. The contract provided for the parties to enter into the National House Building Council ("NHBC") standard form of agreement. Clauses 8 and 10 of the contract provided that the claimant's remedy for any defects would be limited to the terms of the NHBC agreement and that the extent and period of the defendant's liability to the claimant would be so limited. Latent defects were discovered in the house after expiry of the NHBC guarantee period and the claimant sought recovery of the remedial costs from the defendant.

66. The Court of Appeal upheld the decision of the judge at first instance that clause 10 satisfied the requirement of reasonableness under the Unfair Contract Terms Act 1977 and on a proper construction excluded any concurrent liability in tort.

67. That would have been sufficient to dispose of the appeal but Jackson LJ went on to carry out a careful and extensive review of the authorities on concurrent duties of care in contract and tort after *Murphy v Brentwood District Council* [1991] 1 AC 398 and *Department of Environment v Thomas Bates* [1991] 1 AC 499, from which he drew the following conclusions:

> "[67] Having reviewed the two streams of authority set out in Part 5 above, my conclusion is that the relationship between (a) the manufacturer of a product or the builder of a building and (b)

> the immediate client is primarily governed by the contract between those two parties. Long established principles of freedom of contract enable those parties to allocate risk between themselves as they see fit…
>
> [68] Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property. The law of tort imposes this duty, not only towards the first person to acquire the chattel or the building, but also towards others who foreseeably own or use it."

68. Jackson LJ expressly considered the ambit of *Hedley Byrne* duty and the circumstances in which an assumption of responsibility could be imposed as a matter of law by reference to the decision in *Henderson v Merrett* [1995] 2 AC 145:

> "[74] *Henderson's* case is now taken as the leading authority on concurrent liability in professional negligence. In my view, the conceptual basis upon which the concurrent liability of professional persons in tort to their clients now rests is assumption of responsibility …"
>
> …
>
> [80] The essential points which Lord Goff is making in his detailed discussion, at pp. 184 - 194, of *Henderson's* case may be distilled: (i) When A assumes responsibility to B in the *Hedley Byrne* sense, A comes under a tortious duty to B, which may extend to protecting B against economic loss. (ii) The existence of a contract between A and B does not prevent such a duty from arising. (iii) In contracts of professional retainer, there is commonly an assumption of responsibility which generates a duty of care to protect the client against economic loss."

69. Having identified the applicable test, Jackson LJ considered whether any assumption of responsibility could be said to give rise to a tortious duty of care on the facts of the case before the court:

> "[81] Building contracts come in all shapes and sizes from the simple house building contract to the suite of JCT, NEC or FIDIC contracts. The law does not automatically impose upon every contractor or subcontractor tortious duties of care co-extensive with the contractual terms and carrying liability for economic loss. Such an approach would involve wholesale subordination of the law of tort to the law of contract."
>
> [82] If the matter were free from authority, I would incline to the view that the only tortious obligations imposed by law in the

> context of a building contract are those referred to in para 68 above. I accept, however, that such an approach is too restrictive. It is also necessary to look at the relationship and the dealings between the parties, in order to ascertain whether the contractor or subcontractor "assumed responsibility" to its counter-parties, so as to give rise to Hedley Byrne duties.
>
> [83] In the present case I see nothing to suggest that the defendant "assumed responsibility" to the claimant in the *Hedley Byrne* sense. The parties entered into a normal contract whereby the defendant would complete the construction of a house for the claimant to an agreed specification and the claimant would pay the purchase price. The defendant's warranties of quality were set out and the claimant's remedies in the event of breach of warranty were also set out. The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act.
>
> [84] Even if the agreement did not contain clauses 8 and 10 of the building conditions, I would be disinclined to find that the defendant owed to the claimant the duty of care which is alleged in this case. To my mind, however, clauses 8 and 10 of the building conditions put the matter beyond doubt. Those clauses limit the defendant's liability for building defects to the first two years, after which different provision is made for dealing with defects. For the reasons set out in Part 6 above, those two clauses satisfy the test of reasonableness in the 1977 Act. It would be inconsistent with the whole scheme of this contract, if the law were to impose upon the defendant duties of care in tort far exceeding the defendant's contractual liabilities. Finally, clause 10 of the building conditions is relevant in another way. The parties expressly agreed that the defendant's only liability to the claimant should be that arising from the NHBC agreement. The parties were thereby expressly agreeing to exclude any liability in negligence which might otherwise arise.

70. Stanley Burnton LJ arguably went further in taking a restrictive view of the ambit of any concurrent duty that might arise in the context of a construction contract:

> "[92] In my judgment, it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or to complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss. The same applies to a builder who is not the vendor, and to the seller or manufacturer of a chattel. The decision of the House of Lords in Anns v Merton London Borough Council [1978] AC 728, like its earlier decision in Junior Books Ltd v Veitchi Co Ltd [1983] 1AC 520, must now be regarded as aberrant, indeed as heretical.

> The law is as stated by Lord Bridge of Harwich in D & F Estates Ltd v Church Comrs for England [1989] AC 177, 206…"
>
> [94] It is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party. The duty of care in contract extends to any defect in the building, goods or service supplied under the contract, as well as to loss or damage caused by such a defect to another building or goods. The duty of care in tort, although said to arise from an assumption of liability, is imposed by the law. In cases of purely financial loss, assumption of liability is used both as a means of imposing liability in tort and as a restriction on the persons to whom the duty is owed ...
>
> [95] It follows in my judgment that the first instance decisions to which Jackson LJ refers in para 52 of his judgment in which building contractors were held to have assumed a duty of care in tort in relation to financial loss resulting from defects in the building they constructed, in the absence of damage to other property, were wrongly decided."

71. For the purpose of the current application in this case, the following principles can be derived from the judgment:

    i) When A assumes responsibility to B in the *Hedley Byrne* sense, A comes under a tortious duty to B, which may extend to protecting B against economic loss (Jackson LJ at [74] and [80]).

    ii) The existence of a contract between A and B does not prevent such a duty from arising (Jackson LJ at [80]).

    iii) The existence of a contract between A and B does not automatically give rise to such a duty of care in tort co-extensive with the contractual terms and carrying liability for economic loss (Jackson LJ at [81], Stanley Burnton LJ at [94]).

    iv) It is necessary to consider the relationship between the parties, together with the factual and any contractual matrix, in order to ascertain in any given case whether A assumed responsibility to B in the *Hedley Byrne* sense, so as to give rise to a concurrent duty of care in tort (Jackson LJ at [82]).

    v) The allocation of risk in the contract between A and B, including any exclusion or limitation of liability, on a proper construction, may preclude the imposition of any duty of care in tort (Jackson LJ at [84]).

72. I accept Hadfield's argument that the issue, whether a concurrent duty of care at common law not to cause pure economic loss by virtue of defective workmanship or the use of defective materials can arise in circumstances such as the Construction Contract, remains unsettled and is controversial for the following reasons.

73. First, although the ratio in *Robinson v Jones* is not as narrow as suggested by Hadfield, I consider that it is arguable that it can be distinguished on its facts. In *Robinson*, the Court of Appeal held that a proper construction of the contract and the nature of the relationship between the parties did not give rise to any *Hedley Byrne* assumption of responsibility. The finding that clauses 8 and 10 were effective to limit the defendant's contractual liability simply put the matter beyond doubt that in those circumstances no concurrent duty of care in tort could arise. However, Hadfield's position is that the Construction Contract contains both design and workmanship obligations, does not contain any exclusion of Kajima's liability in tort to Hadfield and must be construed in the context of complex PFI contractual arrangements. These factors give Hadfield a reasonable argument that on the facts of this case, *Robinson* can be distinguished.

74. Second, I reject the criticism that Jackson LJ failed to consider applicable earlier authorities. As explained by Jackson LJ in *Robinson v Jones* at [40]:

> "In *Murphy's* case the House of Lords subjected its earlier decision in *Anns v Merton London Borough Council* [1978] AC 728 to much critical analysis and comprehensively rejected the reasoning upon which it was based. Lord Keith of Kinkel said at p. 472:
>
> > "My Lords, I would hold that *Anns* was wrongly decided as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building byelaws or regulations and should be departed from. It follows that *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 should be overruled, as should all cases subsequent to *Anns* which were decided in reliance on it." "

75. Although it is correct to state that *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554 was not expressly identified as overruled by *Murphy*, it was decided in reliance on *Anns* and was doubted in *D&F Estates v Church Commissioners* [1989] 1 AC 177 by Lord Bridge at p.201 D-F, who described his own judgment in *Batty* as "unsound", and by Lord Oliver at p.215E – 216F.

76. I venture to suggest that Jackson LJ did not address *Batty* in *Robinson v Jones* because its reasoning was founded on the principles in *Anns*, which are no longer applicable. Even if a decision such as *Batty* might be justified on its facts as an assumption of responsibility case on a revisionist analysis, great caution is needed before drawing any applicable principles from the many authorities that relied on the *Anns* test.

77. Third, a more persuasive argument made by Ms Sinclair is that *Robinson v Jones* does not preclude the existence of a concurrent duty of care in tort where the factual circumstances give rise to an assumption of responsibility as explained by Lord Goff in *Henderson v Merrett* [1995] 2 AC 145 at p.180. Having set out the governing principles in *Hedley Byrne* Lord Goff stated:

> "… we can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature.

> All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other. On this point, Lord Devlin spoke in particularly clear terms in both passages from his speech which I have quoted above. Further, Lord Morris spoke of that party being possessed of a "special skill" which he undertakes to apply for the assistance of another who relies upon such "skill". But the facts of *Hedley Byrne* itself, which was concerned with the liability of a banker to the recipient for negligence in the provision of a reference gratuitously supplied, show that the concept of a "special skill" must be understood broadly, certainly broadly enough to include special knowledge. Again, though *Hedley Byrne* was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish the cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle. In particular, as cases concerned with solicitor and client demonstrate, where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, he may be held to have relied on the defendant to exercise due skill and care in such conduct. "

78. Ms Sinclair is right to question, as a matter of law, whether there is any basis on which building contractors should be distinguished from other professionals when ascertaining whether there has been any *Hedley Byrne* assumption of responsibility. The range of recognisable professions generally has expanded since *Hedley Byrne* and *Henderson*, with the introduction of new technologies and industries, greater research and understanding, and improvements in the training and standards of specialist areas of work. In particular, within the construction industry today there are many disciplines of special skill and expertise which could be described as professional.

79. Fourth, although Mr Kazmi threw down a gauntlet, inviting Hadfield to clarify which allegations amounted to workmanship defects, Ms Sinclair declined to accept the challenge on the basis that the distinction between matters of design and workmanship is often very difficult to draw in practice as explained by May LJ in *Bellefield Computer Services* at [76]. I accept that there may be a fine line between design and workmanship responsibility in respect of the fire protection issues. It is likely to be a matter on which factual and expert opinion evidence will be required.

80. The above points lead to the conclusion that this issue is not suitable for determination on a summary basis. As I set out in *RSK Environment v Hexagon* [2020] EWHC at [43]:

> "In a commercial context, the nature and extent of a common law duty of care will be framed by the contractual nexus or lack of

> contractual nexus between the parties, together with the wider factual and contractual arrangements, including any stated limitations or exclusions from liability. The cases all serve to emphasise the importance of the factual matrix when considering whether any common law duty of care arises, including the nature and scope of any such duty."

81. For the above reasons, the application for summary judgment or strike out is dismissed.

Security for costs application

82. On 23 December 2022 Veolia issued an application for Hadfield to provide security for costs in the sum of £2,608,286 in respect of the Additional Claim against Veolia.

83. The application is supported by:

    i) the first witness statement of Richard Ashmore, solicitor of Pinsent Masons, dated 22 December 2022;

    ii) Mr Ashmore's second witness statement dated 10 February 2023;

    iii) the first witness statement of Hayley Boxall, forensic accountant partner at Pinsent Masons, dated 22 December 2022;

    iv) Ms Boxall's second witness statement dated 27 February 2023;

    v) witness statement of Duke Manners, Head of Commercial for Industrial, Waste & Energy South for Veolia, dated 27 February 2023.

84. The application is opposed by Hadfield and reliance is placed on:

    i) first witness statement of Lucy Frith, solicitor of Clyde & Co LLP, dated 20 February 2023;

    ii) Ms Frith's second witness statement dated 2 March 2023;

    iii) witness statement of Christopher Gill, Director of Hadfield, dated 20 February 2023.

Applicable test

85. Veolia seeks an order for security for costs against Hadfield pursuant to CPR 25.12.

86. CPR 25.12 provides that a defendant to any claim may apply for security for his costs of the proceedings. CPR 25.13(1) provides that:

> "The court may make an order for security for costs under rule 25.12 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

> (b)(i) one or more of the conditions in paragraph (2) applies …"

87. The conditions set out in CPR 25.13(2) include:

> "(c) the claimant is a company … and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so …"

88. Thus, in this case the court must consider the following matters:

i) whether there is reason to believe that Hadfield will be unable to pay Veolia's costs if ordered to do so ("threshold test"); and

ii) having regard to all the circumstances of the case, whether it is just to make an order for security for costs ("exercise of discretion").

Threshold

89. As explained in Ms Frith's first witness statement, Hadfield is a special purpose vehicle for the sole purpose of the PFI development the subject of these proceedings, wholly owned by Hadfield HoldCo.

90. Hadfield procured financing for the project pursuant to its obligations under the Project Agreement by entering into a credit agreement with Barclays Bank Plc ("the Credit Agreement"), whereby Barclays advanced the sum of £33,304,918 ("the Senior Debt"). Barclays holds security over the entire issued share capital of Hadfield. Hadfield and Barclays also entered into a hedging agreement dated 20 December 2004, which was subsequently amended and novated to Aviva Life & Pensions UK Limited. Barclays and Aviva are both senior creditors under the terms of the Credit Agreement and an intercreditor deed entered into by Hadfield, Barclays, the shareholders and Hadfield HoldCo. Hadfield is required to repay the Senior Debt in tranches and by 2034, four years prior to expiry of the project term under the Project Agreement. Of the funding advanced by Barclays in 2004, some £21.4 million is outstanding.

91. The shareholders have also advanced finance to Hadfield, by way of a subordinated loan in the sum of £3.42 million. The subordinated loan is Junior Debt under the Credit Agreement.

92. Hadfield's sole entitlement to income is the Service Payment payable by the Trust under the Project Agreement. Deductions levied by the Trust reduced the Service Payment to £NIL from January 2019 until July 2021, when payments resumed under the terms of a further standstill agreement between the Trust and Hadfield.

93. Barclays and Aviva have entered into a series of default waivers and debt deferral consents by way of further support for Hadfield. The unaudited balance sheet for Hadfield as at the end of December 2022 shows a net cash balance of £1.6 million (now £1.28 million), which is required to be applied towards the debt payments due to Barclays and Aviva.

94. On that basis, it is conceded by Hadfield that it would not be able to meet the order for security sought by Veolia if ordered by the Court.

95. However, it is Hadfield's position that the threshold test is not satisfied because although Hadfield would not be able to pay Veolia's costs now, it does not necessarily follow that Hadfield would be unable to meet any adverse costs order following judgment in circumstances where Hadfield's claims against Veolia are entirely pass-through claims.

96. Ms Sinclair submits that the court must consider what funds would be available to Hadfield after final judgment to meet any order for Veolia's costs, taking into account the likely costs orders made at the end of the trial: *SARPD Oil Ltd v Addax Energy* [2016] BLR 301 (CA); *Maroil Trading Inc v Cally Shipholdings Inc & Burford Capital (UK) Ltd* [2020] EWHC 3041 (Comm); *Johnson v Ribbins* [1977] 1 WLR 1458 (CA).

97. Hadfield's position is that the circumstances in which a costs order in favour of Veolia would arise would be where the Trust's claim against Hadfield failed and/or Kajima's allegations against Veolia in its defence to Hadfield's claim failed. The usual order in such a scenario would be that the Trust should bear not only Hadfield's costs of defending the claim, but also Hadfield's costs of pursuing Veolia, including its liability for Veolia's costs. There is no reason to believe that the Trust would be unable to meet such order. Kajima, likewise, could be ordered to pay to Hadfield some or all of Veolia's costs. This is not a case where Hadfield has made any independent claim against Veolia, beyond passing through the Trust's claims and Kajima's counterclaims. It follows that there is no reason to believe that Hadfield would be unable to pay Veolia's costs.

98. Mr Winser KC, leading counsel for Veolia, submits that the general rule is that where a claimant loses against a defendant and the defendant in turn loses against a third party, the defendant will remain liable for the third party's costs, although it may be able to pass such costs on to the claimant. He accepts that the court has power to order the claimant to pay the third party's costs directly but such order is not the norm: *Johnson v Ribbins* [1977] 1 WLR 1458 (CA); *Arkin v Borchard Lines Ltd (Nos.2&3)* [2005] 1 WLR 3055 (CA); *Blackpool BC v Volkerfitzpatrick Ltd* [2020] EWHC 2128 (TCC). It is not open to Veolia to seek security for costs against the Trust or Kajima; in any event, as set out in Ms Boxall's second witness statement, Kajima's financial position is weak from which it appears that it would be unlikely to be able to meet an adverse costs award.

99. In determining this issue, I note that, as observed by Cockerill J in *Maroil* at [19]-[23], each case must be considered on its facts. There will be cases where there is a simple back-to-back claim made by a claimant against a defendant and passed on to a third party, where the likely costs consequences of a failure of the claim are straightforward. At the other extreme will be cases where there are complicated contractual arrangements and inter-dependencies between the parties and multiple variables in the potential outcomes at trial.

100. These proceedings are closer to the latter. There are multiple allegations in respect of numerous defects on various alternative contractual or tortious bases and, as referred to above in relation to the summary judgment application, the division of responsibility for any defects is not clear. It is not obvious that, if the claims failed, the Trust would be automatically responsible for the costs of pursuing Veolia on maintenance allegations not raised by the Trust against Hadfield; or that Kajima would be responsible for Veolia's costs if it successfully defended the claims made by Hadfield.

101. Further, a preliminary perusal of the financial evidence indicates that Kajima would not be able to meet any adverse order for Veolia's costs, although the court is not determining any application for security against Kajima and, for that reason, Kajima has not had an opportunity to respond.

102. The court is not in a position to do more than note that this is a complex case that raises numerous factual, expert and legal issues. The likely costs orders at the end of any trial will turn on a number of variables and the outcome is not predictable.

103. Hadfield has made a Part 20 claim against Veolia. Hadfield is a special purpose vehicle in a financially precarious position, supported by the forbearance of Barclays and Aviva in respect of the Senior Debt. Accordingly, I am satisfied that there is reason to believe that Hadfield will be unable to pay Veolia's costs if ordered to do so.

Discretion

104. I then turn to consider whether it would be just to make an order for security having regard to all circumstances in this case. The issues are whether an order for security would risk stifling the claim; or whether there are any other reasons for refusing to order security for costs.

105. Once the court is satisfied that a company is insolvent, that there is jurisdiction to order security for costs and that ordering security will not stifle the claim, it is normally appropriate to make such order: *Axiom Stone (London) Ltd v Heathfield International LLC* [2021] EWCA Civ 1242 per Nugee LJ at [31]; *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872 per Longmore LJ at [37].

106. However, it is common ground that if Hadfield could establish that an order for security for costs would probably stifle the claim, the court should refuse to order security: *Goldtrail Travel Ltd v Onur Air Tasimacilik AS* [2017] 1 WLR 3014 per Lord Wilson at [12]-[16]. The onus is on Hadfield to show, on the balance of probabilities, that it could not provide any security ordered and could not raise the appropriate sum with assistance: *Goldtrail* at [17] and [23].

107. Ms Sinclair submits that as an SPV, Hadfield does not have cash reserves, assets or resources other than those arising through the operation of the project. Hadfield itself does not have the resources to meet an order for security for costs and neither its lenders nor its shareholders are prepared to provide security.

108. Mr Winser submits that the evidence served by Hadfield falls well short of what would be required to establish that an order for security would stifle its claim. In particular, he points out that no witness statements have been served by the majority shareholder, IIGL, which owns a 75% share in Hadfield, or by the funders.

109. The evidence produced by Hadfield on this issue is as follows:

    i) By letter dated 9 February 2023 from Dentons UK and Middle East LLP, on behalf of Barclays, it stated:

> "Our client declines to give (on behalf of Project Co) the security requested in the Application, or any other form of security. Our client has shown considerable flexibility and support for Project Co to support this project going forward while Project Co deals with the dispute. Accordingly, provision of any "new" funding and increasing its exposure at risk, by way of cash or guarantee, is not an option that our client can entertain in respect of the claim against Veolia.
>
> Our client notes that, in any event, Project Co's shareholders still have the option to provide security to allow the claim against Veolia to proceed."

ii) By email dated 15 February 2023, Aviva stated:

> "I confirm that Aviva does not at this stage agree "to provide the security sought in the Application.""

iii) By letters each dated 15 February 2023, IIGL and Kajima Partnerships Limited stated:

> "We refer to Veolia's application for security for costs. We write to confirm, in our capacity as one of the ultimate shareholders of Project Co, that we decline to give the security requested in Veolia's application."

110. I accept Mr Winser's submission that the evidence served by Hadfield falls far short of what would be required to establish that no security would be provided if ordered.

111. First, the email from Aviva is ambiguous in that it declines to provide any security "at this stage" with no further explanation.

112. Second, Barclays, one of the funders, explains that it has supported Hadfield through continued funding (as evidenced by the agreements to waive defaults and defer payments) but, pointedly, identifies the shareholders as potential sources of additional funding.

113. Third, the letters from the shareholders are short, bare assertions that security would not be paid in identical terms, with no elaboration or any explanation for their position.

114. Fourth, Hadfield has found the means to pay legal fees of £1.6 million to date and anticipates that it will continue to incur fees through to conclusion of the trial, estimated at £2 million but the source of such payments has not been identified. Someone must be directing the litigation and authorising the expenditure of legal fees. In the absence of a cogent explanation from the funders and shareholders as to these matters and their decision not to provide support for the ongoing litigation, the court rejects this evidence as inadequate to establish that the claim would be stifled.

115. Further, Ms Sinclair submits that if security for costs is ordered against Hadfield, it will be unable to meet that order, the claim against Veolia will be struck out and an adverse costs judgment will be made against Hadfield. Hadfield will be unable to satisfy the

costs judgment and, as a consequence, it will become insolvent, thereby entitling the Trust to terminate the Project Agreement. This would disrupt the proceedings, as there would be a moratorium following Hadfield's insolvency, the claims would have to be re-pleaded based on termination rights and the trial date would be lost.

116. I reject the argument that ordering security for costs against Hadfield would probably lead to termination as postulated. For the reasons set out above, although Hadfield could simply refuse to pay the security if ordered, I am not satisfied that it would be forced into that decision, against the very substantial funds that have been provided to date, including ongoing funding for the litigation. Mr Winser confirmed that if security were ordered but not paid, Veolia would not seek to enter judgment for costs against Hadfield until after the trial. In any event, I find that termination is an unlikely scenario on the sole basis of any order for Veolia's costs, given the overall level of debt and the Trust's interest in completing the project and pursuing the litigation to a rational resolution.

117. Having considered all the circumstances of the case, I am satisfied that this would be an appropriate case in which to order Hadfield to provide security for Veolia's costs.

Conclusion

118. For the reasons set out above:

i) Kajima's application for summary judgment and/or to strike out parts of the Additional Claim against Kajima is dismissed.

ii) Hadfield is ordered to provide security for costs in the sum of £2,603,743 in respect of the Additional Claim against Veolia by paying such sum into court by 4pm on 5 April 2023.

iii) Unless security is given as ordered, Hadfield's Additional Claim against Veolia shall be stayed, with liberty for Veolia to apply for judgment.

119. The court will hear the parties on the appropriate terms of the orders and all other consequential matters arising out of this judgment on a date to be fixed following hand down.