Neutral Citation Number: [2024] EWHC 750 (TCC)

Case No: HT-2023-000291

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

Rolls Building
Fetter Lane,
London, EC4Y 1NL

Date: 04/04/2024

Before :

MR JUSTICE KERR

- -

Between :

SHAYLOR GROUP LIMITED (in administration)	**Claimant**
- and -	
VALESCURE PROPERTY LIMITED (in liquidation)	**Defendant**

- -
- -

Ms Sahana Jayakumar (instructed by **Circle Law LLP**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing date (held remotely): 20 February 2024
Further written submissions: 5 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10am on Thursday, 4 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE KERR

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down remotely by email at 10am on 4 April 2024 may be treated as authentic.

Mr Justice Kerr:

Introduction

1. This is a claim under Part 8 of the Civil Procedure Rules (**CPR**) for declarations that an adjudicator erred in his decision made in September 2022 in calculating the amount due from the defendant to the claimant on the termination of a contract to build 157 apartments in the Jewellery Quarter of Birmingham (**the contract**). The defendant was the employer and the claimant was the contractor.

2. The relief sought is a declaration that the adjudicator should have found the amount due to the claimant was £20,277,563.57 rather than £9,369,927; a difference of £10,907,636.57. The claimant says the adjudicator miscalculated the amount due because he misinterpreted certain provisions dealing with sums payable on termination where the contract terminates, as it did, before completion of the works.

3. The defendant went into liquidation on 21 December 2022, before the claim was brought. On 12 July 2023, Insolvency and Companies Judge Greenwood granted the claimant permission under section 130 of the Insolvency Act 1986 to bring the claim. The liquidator, the Official Receiver, is without funds to defend the claim and is not aware of any assets available to meet either the existing or any revised award. The claimant wishes, notwithstanding, to prove the debt owed to it in the liquidation.

Facts

Works done and payment requests

4. The contract was entered into on 16 November 2017 and work began. The original contract sum was £18,796,450 exclusive of VAT (all sums below are exclusive of VAT unless otherwise indicated). There were agreed variations which added £645,329.45 to that sum. In an interim payment application (no. 18), the claimant included those sums in its calculation and the defendant does not appear to have disputed them, nor a further £16,500 incurred by the claimant as "loss and expense".

5. The sum of those three amounts comes to £19,458,279.45. The defendant (until 8 June 2021 called Blackswan Development Finance Limited, but nothing turns on the change of name) paid the claimant on account £9,013,019. All of that happened before 31 May 2019, when the claimant issued its next interim payment application (no. 19). The figures just mentioned were quoted in it, together with estimated updating figures comprising the claimant's "forecast final account".

6. On 4 June 2019, the defendant's agent issued a payment notice no. 19, agreeing that the value of the work done by the claimant was £9,369,927. However, on 24 July 2019, the defendant's agent wrote to the claimant stating that the correct value of the

work done by the claimant was not £9,013,019 but £8,169,052 and, therefore, the defendant had overpaid the claimant by £844,867. They demanded repayment of the latter sum within 14 days. No repayment was made by the claimant.

7. The works were not close to being complete at this stage. For work done thus far, the claimant claimed in interim payment application (no. 19) that the defendant owed it a further £752,628.80, over and above the £9,013,019 the defendant had already paid. The claimant's estimate of the value of the total contract works was stated, in that interim payment application, to be £20,277,563.57.

The claimant's insolvency

8. The claimant then went into administration on 17 June 2019 and thereby became "Insolvent" within the meaning of that term in the contract. The effect was to activate the financial adjustment provisions applicable where the contract terminates before the works are completed. It appears that the defendant gave notice of termination, as it was entitled to do because of the claimant's insolvency.

Terms of the contract

9. At this point, I should refer to the relevant terms of the contract. Where the contract terminates by reason of (among other things) the contractor's insolvency, the employer can take reasonable measures to protect the site, which the contractor must not hinder or delay (clause 8.5.3.3). The employer then has a choice. It can either decide to complete the works, employing and paying "other persons" to that end (clause 8.7, at 8.7.1); or it can decide not to complete the works (clause 8.8).

10. In this case, the defendant decided to complete the works. The parties were in agreement (in the later adjudication proceedings) that the operative financial adjustment provisions were those set out in clause 8.7 and not the different ones set out in clause 8.8. The contractor must (clause 8.7.2) vacate the site, removing its plant, tools and equipment etc, to make way for the replacement contractor or contractors and must assign any relevant rights to supply of materials, etc.

11. By clause 8.7.3 (so far as relevant here):

> "no further sum shall become due to the Contractor under this Contract other than any amount that may become due to him under clause 8.7.5 … ."

12. By clause 8.7.4:

> "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;"

13. And by clause 8.7.5:

> "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."

14. It is not necessarily straightforward to ascertain the date when the three month period starts to run, by the end of which the employer must have prepared a statement of the figures under clause 8.7.4.1, 8.7.4.2 and 8.7.4.3, which go to make up the amount payable to the contractor by the employer, or vice versa, under clause 8.7.5. That date is linked to practical completion, governed by clause 2.27. It is for the employer to issue a statement that practical completion has taken place and (paraphrasing clause 2.27) that statement is deemed conclusive of the date of practical completion.

15. Clause 2.35 (mentioned in the opening words of clause 8.7.4) then refers to defects due to any failure by the contractor to carry out the works properly. There is a "Rectification Period" of 12 months from the date of practical completion, for the contractor to make good defects. The employer then has until 14 days after the end of the rectification period to serve a notice of continuing defects on the contractor and this can lead to a reduction in the amount due under the contract.

Assignment of the defendant's rights and obligations under the contract

16. Returning to the narrative, the defendant pressed on with the works until 27 April 2020 when it assigned its rights and obligations under the contract to Grainger plc (**Grainger**). According to the defendant's solicitors in the later adjudication proceedings, Grainger and its subsidiaries were the intended beneficiaries of the project and the claimant was aware of this from the outset.

17. I have seen an extract from the deed of assignment (produced to the second appointed adjudicator in this case), which is in conventional form. The defendant has not suggested that notice of the assignment was given to the claimant, still less that the claimant consented to the transfer of the defendant's rights and obligations to Grainger. This point had significant consequences later in the history of the dispute.

The first adjudication

18. By about 3 May 2022 (as found in the first adjudication but later disputed by the defendant) the works were apparently complete, including rectification of defects. This was inferred by the first appointed adjudicator, Mr John Redmond (**the first adjudicator**) from evidence that some of the apartments were being marketed for rental three months later, on 3 August 2022. He must have inferred that practical completion had occurred at least three months earlier, because he found the defendant in breach of its obligation to produce a statement of account under clause 8.7.4.

19. The first adjudicator received the referral on 12 July 2022. In his later decision he noted that the defendant "has not been represented", though it was aware of the adjudication and was sent messages about it. The first adjudicator decided to proceed, as he put it, "on the basis that [the defendant] does not wish to respond to the claim".

I was not shown any evidence that Grainger took any part in the first adjudication or was made aware of it.

20. In the first adjudication, the claimant claimed £11,264,544.57 against the defendant under clause 8.7 of the contract. The claimant's case was that the defendant had failed to provide a statement of account as required under clause 8.7.4 and that it was liable to the claimant for £11,264,544.57, which would and should have been the figure shows as due to the claimant under clause 8.7.5.

21. To show that practical completion had occurred and defects had been remedied, the claimant's agent referred the first adjudicator on 3 August 2022 to a website showing that some of the properties were being marketed for rental. The first adjudicator accepted that evidence, as noted in his decision dated 8 August 2022. He also noted that the defendant had responded to queries about what costs it had incurred in securing completion of the works by others. The defendant had responded with a witness statement (in June 2022) saying it had no documents relating to the project.

22. The first adjudicator accepted that it was for the defendant to show that it had incurred expenses or suffered loss and damage falling within clause 8.7.4.1 and that it had not done so; however, he added: "I cannot assume that it did not incur any such cost". He accepted that the defendant had paid the claimant only the sum of £9,013,019 (the clause 8.7.4.2 figure) referred to in the claimant's interim payment application (no. 19) and had not paid the claimant any other sums.

23. Based on the same interim payment application (no. 19), the claimant asserted in the first adjudication that the amount which "would have been payable for the Works in accordance with this Contract" under clause 8.7.4.3 was its "Forecast Final Account" figure, which was £20,277,563.57. The first adjudicator did not accept that reasoning. He addressed the matter at paragraphs 37 to 45 of his decision. He noted the absence of contemporaneous documents from the defendant.

24. He was unwilling to accept that "the Works were completed to an anticipated value of £20 million without any expenditure beyond the £9 million that had been paid to [the claimant] before it ceased work". He was not willing to "assume that the total amount payable would in fact have been £20 million". The first adjudicator thought that on the balance of probabilities, the amount due from one party to the other would be "significantly less than £11 million".

25. He accepted that the defendant was in breach of its obligation to draw up a statement of account under clause 8.7. That entails the conclusion that practical completion and remedying of defects must have been complete by three months before the properties were being marketed, as explained above. He stated that he did not have enough information to carry out the required calculations under clause 8.7.4 or to award any sum under clause 8.7.5. That figure "can only be calculated on the basis of credible information", which he did not have.

26. At paragraph 42, he said that on the balance of probabilities, "it would be reasonable for me to conclude that the Employer … would have incurred some expense in completing the Works and that such expense probably was greater than would have been payable to [the claimant]. That would result in a nil payment to [the claimant]."

The claimant had been partially successful but was, nonetheless, ordered to pay the first adjudicator's fee.

The second adjudication

27. After the first adjudication, the claimant's agent (Mr Greg McMahon, who also made a witness statement in this application) emailed the defendant's solicitors on 16 August 2022 asking that the defendant should agree that it is liable for "at least £752,628.80 exclusive of VAT", failing which the claimant would assume that a further dispute had arisen under the contract. The defendants did not pay that or any sum beyond the £9,013,019 it had (as everyone agrees) already paid.

28. According to the defendant's written case in the second adjudication (to which I am coming), the next chronological event in the history is that – contrary to the first adjudicator's finding - practical completion in fact occurred the same day, 16 August 2022; and no notice requiring rectification of defects had been served at that stage: see footnotes 9 and 10 and paragraph 2.3.1 of the defendant's written case in the second adjudication. The source of that information cited in those footnotes is an email of 12 September 2022 from a Mr Josh Barker of Grainger.

29. At paragraph 3.15 in the same document, "[t]he Works were certified as practically complete on 22 August 2022". That may be an error, since Mr Barker's email supports the earlier date, 16 August 2022. Mr Suryen Nullatamby (**the second adjudicator**) had that email available to him (though I do not) and quoted from it at paragraph 67 of his decision, attributing to Mr Barker the words "PC was certified on 16th August 2022 – no end of defects has yet occurred".

30. Unfortunately, paragraph 67 of the second adjudicator's decision records the defendant's position as being that "the Works were certified as practically complete on 16 August 2021 – a year earlier than apparently stated by Mr Barker in his email. The second adjudicator also refers to Mr Barker's email as dated 12 September 2021, a year earlier than the defendant was contending. So there is some uncertainty in the evidence before me about the date of practical completion, which must occur before the three month period in clause 8.7.4 starts to run.

31. Returning to the chronological narrative, on 29 August 2022, the claimant served notice on the defendant of its intention to commence a further adjudication. The claimant sought a decision that the clause 8.7.4.1 figure was nil; that the clause 8.7.4.3 figure was £20,277,563.57, or £19,458, 279.45; and that under clause 8.7.5, the claimant was owed £11,264,544.57 or such other sum as the adjudicator may award. Alternatively, the claimant sought a decision that it was entitled to at least £752,628.80 or such other sum as the adjudicator may decide.

32. The second adjudicator was appointed on 31 August 2022 and the claimant's referral documents sent to him the next day, whereupon he gave directions. On 1 September 2022 Mills & Reeve LLP, solicitors, confirmed that they were representing the defendant and it soon became clear there was a dispute about jurisdiction. The defendant put in its main response on 13 September 2022, without prejudice to its challenge to jurisdiction and in addition to its contention that the claimant had "commenced a claim against the wrong party".

33. Without prejudice to those two preliminary points, the defendant's solicitors addressed the merits. The claim was misconceived, the defendant argued. The works were only completed on 16 August 2022. No obligation to produce a statement of account had arisen. The claim was premature. Even if an account was due, the result would be a debt payable to the defendant employer by the insolvent contractor, the claimant, not the other way round.

34. The claim was brought against the wrong party, the defendant argued, because of the assignment of its rights and obligations under the contract to Grainger. The employer is not the defendant but Grainger. In its footnote 13, the defendant said that after the assignment "it would be a legal and contractual impossibility for [the defendant] to perform the substituted clause 8.7 regime – lex non cognit [sic] ad impossibilia."

35. In another footnote, numbered 17, the defendant said it understood Grainger's expenses incurred in completing the works were in the region of £18 million. The claimant's suggested clause 8.7.4.1 figure of "nil" was "an unrealistic approach to have taken, particularly when [the claimant] knew the Project was completed by another contractor, at cost". If it were accepted that Grainger's incurred expenses in completing the works were £12 million, that would be sufficient to defeat the claim and indeed produce a debt payable the other way, to "the employer".

36. The defendant contended that the claimant was liable to "the employer" to the tune of "not less than £5.732m"; a calculation based on a document provided by Grainger to Birmingham City Council. The "employer" was Grainger, not the defendant. The latter proposed that the claim be dismissed and that once defects in the works had been made good, Grainger could issue a clause 8.7.4 statement of account which would show a debt due from the claimant to Grainger. The defendant had "dropped out of the picture" since the assignment in April 2020.

37. The next day the defendant's solicitors sent the second adjudicator a copy of the deed of assignment (of which I have only an extract). I pause in the narrative to note that assignment of rights under the contract is governed by clause 7. Clause 7.1 forbids assignment of the contract or rights under it without the other party's consent. That is subject to clause 7.2 which creates rights to assign only "[w]here clause 7.2 is stated in the Contract Particulars to apply …". Here, the Contract Particulars stated that "[c]lause 7.2 does not apply". The claimant's consent to the assignment was therefore required and it is not suggested that it was sought or granted.

38. Returning to the narrative, the second adjudicator issued his 33 page decision on 29 September 2022. He began with the jurisdiction challenge. He accepted that he could not decide again decisions taken by the first adjudicator in a dispute that was the same or substantially the same. He set out what the first adjudicator had decided which was (apart from as to costs) that the defendant was in breach of contract by failing to issue a statement of account under clause 8.7.4.

39. The first adjudicator had not, he noted, decided on any amounts due. But he had decided that the defendant had paid the claimant £9,013,019 which was the clause 8.7.4.2 figure. The claimant had not sought in the first adjudication a decision, advanced in the alternative in the second adjudication, that it was entitled to at least £752,628.80 or such other sum as the adjudicator may decide. On that basis, the second adjudicator set out six issues for his decision.

40. The first was the effect, if any, of the assignment. He dismissed the contention that he lacked jurisdiction over the claim because it had been brought against the wrong party. He held that it is "trite law that it is impossible to assign a contract as a whole (including both burden and benefit), unless there has been a novation of the contract" (citing Chitty on Contracts, 34th edition at 22-081). The assignment could not absolve the defendant from its obligations.

41. The second issue was "[w]hat is the date of completion of the Works within the meaning of clause 8.7.4?" The second adjudicator accepted that he was bound by the first adjudicator's decision and that he could "reasonably infer that the First Adjudicator reached the conclusion that practical completion of the works and the making good of defects occurred more than 3 months before the dispute was referred to him …".

42. The third issue was, what was the clause 8.7.4.1 figure, i.e. the amount of expenses properly incurred and direct loss or damage suffered by the employer. The second adjudicator rejected the defendant's contention that the amount was in excess of £12 million. Among the reasons given was that the defendant could not assert that it could defer the issuing of a statement of account until after practical completion and remedying of defects.

43. That would be contrary to the first adjudicator's decision, by which the second adjudicator was bound. The second adjudicator went on to decide that the clause 8.7.4.1 figure was, as the claimant submitted, nil. The costs incurred in completing the works and any associated loss or damage, were incurred by or suffered by Grainger, not the defendant. The defendant was not entitled to any credit for expenses it had not incurred or damage it had not suffered.

44. The fourth issue was what was the correct figure under clause 8.7.4.2, i.e. the actual amount paid by the employer to the contractor. As already mentioned, the first adjudicator had decided that the defendant had paid the claimant £9,013,019 which was the clause 8.7.4.2 figure. The second adjudicator held that he was bound by that decision and adopted the same figure.[1]

45. The fifth issue was: "[w]hat is the value of the works pursuant to clause 8.7.4.3 of the Contract". The issue is expressed as the *value* of the works rather than the price for doing them. Clause 8.7.4.3 refers to "the total amount which would have been payable for the Works in accordance with this Contract". The claimant submits, as we shall see, that clause 8.7.4.3 does not refer to the value of the works but to the contract price, i.e. the initial contract sum, as adjusted by any variations. That is the amount the contractor would have been paid if the contract had been fully performed.

46. The claimant relied on the sums set out in its interim payment application (no. 19) of either just over £20 million (the estimated final account figure); or just under £20 million (the amount sought as payment under that payment application). In the alternative, the claimant contended for a figure of £752,628.80 or such other sum as the adjudicator may decide; or in the further alternative (by way of reply), the sum of

[1] A £900 discrepancy appears to have crept in, probably through typographical error; the figure is £9,013,919 in the original interim payment application (no. 19); cf. £9,013,019 at paragraph 95 of the second adjudicator's decision; but £9,013,919 at paragraph 96; cf. £9,013,019 at paragraph 36 of the first adjudicator's decision.

£356,908, the amount of certified works, the doing of which the defendant's agents had accepted in a payment notice on 4 June 2019.

47. The second adjudicator's approach was that "[i]n relation to the valuation of [the claimant's] work at termination, the legal burden of proof falls on [the claimant] to prove the value of any work which it had carried out but for which it had yet to be paid". The second adjudicator found that the best evidence of the value of the works done was that accepted by the defendant's agents in their payment notice of 4 June 2019, namely £9,369,927. That, he decided, was the clause 8.7.4.3 figure.

48. The sixth and final issue was whether either party was entitled to any payment and, if so, how much. The second adjudicator decided that, since the value of the work done was £9,369,927 and the claimant had been paid £9,013,919 [sic], the claimant was entitled to be paid the difference, which comes to, he said, £356,008.

Subsequent history

49. Some solicitors' correspondence ensued. Mills & Reeve LLP for the defendant reiterated the overpayment claim in a letter of 10 October 2022, which the claimant's solicitors, Circle Law LLP, rejected in a response dated 12 October 2022. On 4 November 2022, the claimant petitioned for the winding up of the defendant, on the basis of the debt of £356,008 awarded by the second adjudicator. The largest creditor of the defendant is a former director, who was made aware of the present proceedings but has taken no part in them, nor provided funding for the defendant to resist them.

50. On 21 December 2022, the defendant was wound up and went into liquidation. The Official Receiver was appointed as the liquidator. As explained above, on 12 July 2023, Insolvency and Companies Judge Greenwood granted the claimant permission under section 130 of the Insolvency Act 1986 to bring the claim. The liquidator appeared by counsel at the hearing of that application and did not actively oppose the grant of permission, opting to take a neutral stance. The present Part 8 claim was then brought on 7 August 2023.

Submissions

51. As the claim is for declaratory relief only and the defendant is in liquidation and was not present at court, I have to consider what could have been said on its behalf if it had attended. I therefore take account of the defendant's written submissions in the second adjudication. I also invited further written submissions after the oral hearing from both sides, though only Ms Sahana Jayakumar for the claimant responded; the Official Receiver did not, presumably for lack of funds.

52. Ms Jayakumar's further written submissions responded to text book references (and cases cited in them) which I drew to her attention from my own researches done after the oral hearing. Those references were: Chitty 35th edition, vol. 1, at 16-096, 16-097, 16-103 and 16-104; Snell's Equity, 34th edition, 3-028 and 14-008; Zamir and Woolf, The Declaratory Judgment, 4th edition (2011), chapter 4, *passim*; and White Book 2023 vol. 1 at 40.20 to 40.20.3 (the commentary on CPR rule 40.20).

53. Ms Jayakumar's clear and eloquent submissions were, therefore, made in her initial skeleton argument, orally at the hearing and in further written submissions after the

hearing. In summary, she said it was plain and obvious that the second adjudicator had misinterpreted clause 8.7.4.3 of the contract; that the court should declare the error; and that the court should declare that the correct figure was £20,277,563.57 rather than £9,369,927; a difference of £10,907,636.57.

54. Should those submissions succeed, the claimant would be a creditor of the defendant in the liquidation owed £11,264,544.57 rather than £356,008. That would improve the claimant's negotiating position as a creditor. The claim was therefore far from academic, Ms Jayakumar explained, even though the defendant is insolvent. It was in the interests of justice that the claimant's position as a creditor is properly recorded. I paraphrase Ms Jayakumar's further submissions as follows.

55. As to the contract she says, first, that the language of clause 8.7.4.3 is abundantly clear. The words used are: "the total amount which would have been payable for the Works in accordance with this Contract". The value of the work actually done is plainly not the same as that "total amount". The words mean simply the overall contract price for the contracted works, which would have been payable to the contractor if the contract had been fully performed.

56. Second, consideration of applicable principles of contractual interpretation (derived from seminal cases such as Lord Hodge JSC's judgment in *Wood v. Capita Insurance Services Ltd* [2017] AC 1173, at [8]-[13]; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffmann at 912H-913F; and *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] 1 AC 1101, per Lord Hoffmann at [15] and [25]) does not lead to a different interpretation of clause 8.7.4.3.

57. Third, the court has no evidence about the factual background against which the contract was entered into, that might point in the direction of an unusual or specific meaning being given to the words of clause 8.7.4.3. On the contrary, the evidence is that the contract was on terms standard in the construction industry, expressed in sophisticated and detailed language and therefore appropriate to be interpreted principally by textual analysis.

58. Fourth, the defendant did not in the second adjudication support the second adjudicator's construction of clause 8.7.4.3. In its written response to the referral for adjudication, the defendant's solicitors advanced the argument (see paragraph 3.18 of the written response) not that the value of the works should be measured under clause 8.7.4.3 but, rather, that the expenses incurred and losses suffered by the assignee, Grainger, should be brought into account under clause 8.7.4.1.

59. Fifth, Ms Jayakumar submits, the words of clause 8.7.4.3 contrast with those used in clause 8.8.1.1 which applies where the employer decides not to complete the contracted works. The employer must produce a statement setting out (with emphasis supplied) "the *total value* of work properly executed at the date of termination or date on which the Contractor became insolvent … ."

60. Sixth, the second adjudicator's construction of clause 8.7.4.3 does not make commercial sense because if it were correct, there would never be a situation in which an insolvent contractor would be owed any money and the wording in clause 8.7.5 ("a debt payable… if that sum is less, by the Employer to the Contractor") would be redundant and of no effect. The parties cannot be taken to have intended that result.

61. Seventh, there is no absurdity in the claimant's interpretation of clause 8.7.4.3. Clause 8.7.4 creates a simple obligation on the employer to produce a statement of account and sets out clearly the relevant amounts to be included in the statement, so as to produce a debt payable under clause 8.7.5 from one party to the other. While it was imprudent of the defendant not to have considered the consequences of an assignment, the court cannot rewrite the bargain to favour an unwise party.

62. On the appropriateness of declaratory relief, Ms Jayakumar submitted, first, that the court had jurisdiction under section 19 of the Senior Courts Act 1981 and under CPR rule 40.20 to grant declarations without any other relief being sought; and that jurisdiction is now well established.

63. The remedy is *sui generis* and not equitable (*Chapman v Michaelson* [1909] 1 Ch 238 per Farwell LJ at 243; *Gray v Spyer* [1921] 2 Ch 549, per Younger LJ at 557 (appealed on other grounds, [1922] 2 Ch 22)). Citing the passage I had in mind, Ms Jayakumar pointed out that the authors of the 4th and latest edition of Zamir & Woolf, The Declaratory Judgment (2011), opine at 4-32 (without citing authority) that:

> "… while declarations are for the most part statutory in origin, they have throughout their history had a close affinity with equitable remedies which has left its mark upon them. This is especially evident in the discretionary nature of the declaration. This discretion is employed, as it was originally employed with regard to all equitable remedies, primarily to do justice in the particular case before the court. It is wide enough to allow the court to take into account most objections and defences available in equitable proceedings."

64. The discretion to grant or withhold declaratory relief is a broad one, to be exercised in accordance with the seven principles and propositions set out in Aikens LJ's celebrated dissenting judgment in *Rolls-Royce plc v. Unite the Union* [2010] 1 WLR 318, at [120]. Applying the propositions there set out, the present case was one where it was appropriate to grant the declarations sought.

65. In particular, the court can be satisfied that "all sides of the argument will be fully and properly put" and "must therefore ensure that all those affected are either before it or will have their arguments put before the court" (the sixth proposition). No objection to the declaration has been advanced by the defendant, though it has full knowledge of the claim and did not actively oppose permission to bring it. The defendant's main director, also aware of these proceedings, has not sought to oppose the claim.

66. Furthermore, the remedy of a declaration has a particular significance in construction litigation, as is now recognised in the Technology and Construction Court Guide at paragraphs 9.4.5 and 9.1.2, in the section dealing with adjudication business. The development of declaratory relief in Part 8 proceedings to challenge adjudication decisions in the construction industry postdated the 4th edition (2011) of Zamir & Woolf and was therefore not considered by the authors.

67. An example of a case where declaratory relief was sought in TCC proceedings is O'Farrell J's decision in *Office Depot International (UK) Ltd v UBS Asset Management (UK) Ltd* [2018] EWHC 1494, where relief was refused on the facts; and (outside the TCC context) Marcus Smith J's decision in *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch). In the latter case,

though he refused relief, the judge said at [22] that it would be "invidious and wrong to allow a defendant's non-participation to prevent the making of declarations."

68. Finally, Ms Jayakumar submitted that it was not too late for the defendant to argue in separate Part 8 proceedings, should it choose to bring them, that the expenses incurred and damage suffered by Grainger should be brought into account as if Grainger and not the defendant were the employer for the purposes of carrying out the accounting exercise under clause 8.7.4 of the contract. That should allay any concern the court may have that the declaration sought would provide a "windfall" for the claimant, creating a right to payment to the claimant for work not done by it.

Reasoning and Conclusions

69. I consider the contractual position first. I accept Ms Jayakumar's submission that the natural and ordinary meaning of clause 8.7.4.3 is that it refers to the contract price and not, as clause 8.8.1.1 does, to the value of the work actually performed. In a normal case, that interpretation causes no injustice. The employer can bring into account its expenses and losses under clause 8.7.4.1. The contractor is entitled to be paid the contract price (clause 8.7.4.3), subject to deduction of the employer's expenses and losses (clause 8.7.4.1) and any part payment (clause 8.7.4.2).

70. I also agree with the claimant that applying ordinary principles of interpretation alluded to by Ms Jayakumar, derived from the House of Lords and Supreme Court authorities mentioned, leads to the same conclusion. The interpretation for which Ms Jayakumar contends is correct and, it follows, the second adjudicator was wrong to measure the amount payable under clause 8.7.4.3 by reference to the value of the work actually performed.

71. For completeness, I agree in particular that there are no background facts before the court as context which would point to a different conclusion. The contract terms are, as the claimant submits, carefully and expertly crafted standard industry terms. I would add that those terms have also been adjusted in the "Contract Particulars", fine tuning them to reflect the wishes of the parties (providing, for example, for a prohibition against assignment without consent, disapplying clause 7.2).

72. I accept the claimant's contention that the structure and commercial logic of the termination regime in clause 8.7 and 8.8 supports the claimant's interpretation of clause 8.7.4.3 and the distinction between value and price. If the employer decides not to complete the works, the contractor receives a payment based on *quantum meruit*. If the employer decides to complete the works, the payment regime is governed by the contract price but adjusted to take account of the cost of completing the works and any part payment made.

73. As Ms Jayakumar correctly pointed out, the defendant did not in the second adjudication argue in support of the valuation approach adopted by the second adjudicator. However, the defendant did argue for credit to be given to it for the expenses and losses of the assignee, Grainger. Indeed, the defendant argued in the second adjudication that it was Grainger who *was* the "Employer", with the duty to produce the statement of account within three months of practical completion and remedying of defects, which had not yet occurred.

74. Pausing there for a moment, I infer from the above account that the defendant and the second adjudicator both instinctively recoiled from the claimant's proposition that it was entitled to a substantial windfall, i.e. to be paid a sum in the region of £10 million for notional work which it had not done and would never do. However, the defendant and the second adjudicator resisted that proposition in different ways.

75. For the defendant, the solution was to treat Grainger as the employer and measure the claimant's entitlement by reference to expenses incurred and losses suffered by Grainger. For the second adjudicator, the solution was to treat the claimant's entitlement as a *quantum meruit* as if the exercise were being done under the clause 8.8 regime rather than the clause 8.7 regime, substituting value for price.

76. Neither solution is obviously correct and satisfactory; but no more is the claimant's solution that it should receive a windfall of millions of pounds. I have already explained why I think the second adjudicator's approach was wrong, because it was inconsistent with the correct interpretation of clause 8.7.4.3, both as a matter of ordinary language and read in its commercial context.

77. For completeness, I do not accept the submission that on the second adjudicator's interpretation a debt could never be payable to an insolvent contractor under clause 8.7.5. If the contractor became insolvent late in the process, having nearly completed the works and earned nearly the whole contract price; if the employer were far behind with payments to the contractor, with a substantial amount outstanding; and if the employer were able to complete the (already nearly complete) works at a low price using a different contractor, there could well be a debt due to the insolvent contractor, adopting the (in my view erroneous) second adjudicator's interpretation.

78. I must consider, next, the suggestion of the defendant in the second adjudication that the solution is to treat Grainger as the "Employer" under clause 8.7.4.1. In my judgment, that interpretation is not obviously untenable. It involves reading the word "Employer" in clause 8.7.4.1 as including any assignee of the employer, whether or not the assignment of the employer's rights has been authorised and consented to by the contractor.

79. The disadvantage of that interpretation is that it might be thought to confer some degree of legitimacy on an unauthorised assignment. As against that, it has several virtues which the claimant's solution patently lacks.

80. First, the defendant's interpretation does no violence to the language of the clause. Grainger is, in a sense, "the Employer" after the assignment. It is not the employer of the claimant but it has taken up the role of being "the Employer", albeit of a different contractor, under a contract to complete the works. It is true that Grainger has no contractual nexus with the claimant after the assignment; but nor does the defendant, post-termination, apart from in respect of the financial provisions. After termination, the defendant is no longer *employing* the claimant to do building work.

81. Secondly, the defendant's interpretation preserves the integrity and commercial logic of the accounting exercise. The defendant receives no windfall by being permitted to bring into account the assignee's expenses and losses. Being permitted to do so protects the defendant against an unjust and punitive liability to pay for work the benefit of which it will not receive.

82. Third, conferring legitimacy on an unauthorised assignment may be a wrong description of the defendant's interpretation. The assignment, being unauthorised, remains invalid in that the assignee cannot sue the contractor or be sued by the contractor under the contract. Clause 7.1 (and the disapplication of clause 7.2) prevent that. The assignee is merely, as a matter of interpretation, treated as "the Employer" for limited accounting purposes, to avoid injustice. It is the party that has actually incurred relevant costs which in principle should be brought into account.

83. Fourth, to state the obvious, the defendant's interpretation avoids the windfall which is the cause of the injustice. That is another way of putting the same point. The defendant's interpretation prevents the claimant from, some would say unconscionably (though I do not criticise the claimant for pursuing its financial interests) taking commercial advantage of the assignment while at the same time disowning its validity.

84. There is some analogy with the equitable principle that (per Snell's Equity 34th edition at 3-028):

> "where it is a condition of enjoying the benefit that a burden is assumed, the assignee cannot enjoy the benefit without discharging the burden".

Here, it is not the assignee but the other party, the claimant, which is denying the effectiveness of the assignment to transfer the defendant's rights and obligations to the assignee; yet relying on the effectiveness of the assignment to deny the incurring of expenses and the suffering of losses by the defendant.

85. Next, I consider the jurisdiction to make a declaration without any other relief and the discretion whether or not to do so. I agree with the claimant that there is no difficulty about granting a declaration without other relief, under section 19 of the Senior Courts Act 1981 and CPR rule 40.20. However, as Marcus Smith J in the *Bank of New York Mellon* case noted by reference to the commentary on the rule (White Book, vol. 1 at 40.20.2), claims for a declaration alone are unusual.

86. I respectfully agree with the eminent authors of Zamir & Woolf (4th edition) that the discretion is "wide enough to allow the court to take account of most objections and defences available in equitable proceedings." That approach is also, I am satisfied, consistent with the propositions of Aikens LJ in *Rolls-Royce plc v. Unite the Union*, at [120], which was available to the authors of the 4th edition and is cited in it several times. I must take into account justice to the claimant and justice to the defendant.

87. I accept that claims for a declaration alone have a legitimate part to play in TCC proceedings to challenge decisions of adjudicators, as recognised in the guidance given by Coulson J, as he then was, in was in *Hutton Construction Ltd v. Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC), now embodied in paragraph 9.4.5 of the TCC Guide. Not all such claims need to be brought as a pre-emptive response to an application to enforce an adjudicator's decision.

88. I am conscious that in cases where the defendant is absent, whether or not through its own fault, the court must be especially cautious when considering the factors for and against exercise of the discretion; and I agree with the observation of Marcus Smith J

in *Bank of New York Mellon* at [22(1)] that it may be right to approach those factors with "something of a conservative mindset against the granting of a declaration …".

89. In the present case, I do not think the absence from court of this defendant is through its own fault. The Official Receiver has written to the court explaining that the defendant is not in a position to defend the claim and that the reason is absence of funds. The letter stated that no discourtesy to the court was intended and asked that any order for costs be made against the defendant and not against the liquidator.

90. If the defendant had had access to sufficient funds, it would surely have argued vigorously – if necessary, bringing its own proceedings – against the first adjudicator's decision that practical completion occurred more than three months before the referral to him; and, more importantly, against the second adjudicator's decision that the "Employer" in clause 8.7.4.1 was the defendant and not Grainger and that the latter's expenses and losses could not be brought into account.

91. Those challenges would have had, in my judgment, a reasonable chance of success. It is no answer to say, as the claimant does, that the defendant can even now launch those challenges. Aside from any re-litigation argument it might face (based on *Henderson v. Henderson* and *Johnson v. Gore-Wood* principles), the defendant has no funds to bring such a challenge.

92. For those reasons, I do not think this is an appropriate case for the exercise of my discretion to grant the declarations sought. To do so could bestow an unlawful windfall on the claimant. The claim for declaratory relief is therefore dismissed.