FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Bonds and Guarantees

CR Construction (UK) Company Ltd v Barclays Bank PLC

[2026] EWHC 202 (TCC)

The contractor, CR, sought an interim injunction against the bank, which would restrain it from making any payment to the employer, Northern Gateway, pursuant to a demand made by Northern Gateway under a performance bond in the sum of £2,475,441.02 being liquidated damages due to the employer.

CR said that it was strongly arguable that the demand was not made in accordance with the requirements of the bond. Further, CR asserted that, before the demand was served, the bond had already been discharged due to the repudiatory breach of the underlying construction contract. As a final point, CR said that there was nothing due under the bond because, as contractor, CR was entitled either: (i) to dispute the quantum of the sum claimed under the demand; or (ii) to set off the retention monies currently withheld by the employer under the contract, which exceeded the amount of the liquidated damages.

As a starting point, the bank said that the only basis on which an injunction could be granted against it, as the bank issuing the bond, would be a case of fraud which would require prior notice. This was confirmed by Akenhead J in *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC). His comments included:

> *"(a) Unless material fraud is established at a final trial, or there is clear evidence of fraud at the without notice or interim injunction stage, the Court will not act to prevent a bank from paying out on an on-demand bond, provided that the conditions of the bond itself have been complied with (such as formal notice in writing). However, fraud is not the only ground upon which a call on the bond can be restrained by injunction..."*

and

> *"(d) In principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the Court from making a demand under the bond."*

HHJ Davies noted that this statement of principle clearly distinguished between an application for an interim injunction against a bank, where clear evidence of fraud is required, and an application for an interim injunction against the beneficiary, where it is also sufficient to establish a strong case that the beneficiary was clearly and expressly prevented under the underlying contract from making a demand under the bond.

Here, the CR did not, and could not on the evidence, make an allegation of fraud against the bank, and CR had not made the Northern Gateway a party to the claim or to its interim injunction application. The application against the bank could not succeed and was dismissed. However, recognising that CR might go on to simply apply for an injunction against the Northern Gateway on the same grounds, the judge went on to consider the merits of the case.

Here, the judge was of the firm view that the balance of convenience favoured refusing an injunction.

This was not, on any view, a fraud case, which was the only case on the authorities where injunctions against banks to restrain their performance of their obligations against banks would normally be granted. Even if the injunction was to be treated in some way as, in substance, an injunction against the employer as the beneficiary, it was neither a strong case nor an unusual case. Instead, it was a fairly typical case where an employer under a construction contract had the benefit of a certificate entitling it to payment, which was the only pre-condition to its being able to make a claim on the bond freely given by the contractor, and where the contractor was seeking to avoid being required to pay on the basis of raising substantial arguments as to the true position. That would involve either serial adjudications, or one very heavy substantive adjudication to resolve even temporarily, and even heavier litigation to resolve them permanently.

Further: CR was in a position to have challenged Northern Gateway's conduct and the issue of the certificates back in February 2025 but did nothing until beginning adjudication proceedings some 11 months later. CR also did not act speedily in early December 2025 when it first became aware that Northern Gateway was intending to make a demand on the bond.

There was no credible evidence of any irreparable damage to CR if an injunction was refused, where the starting point is that a contractor who has given a bond should either pay the employer voluntarily before the bond needs to be called, or honour its obligations under the bond as soon as possible once the demand is made.

In reality, on the current evidence, the only party out of pocket if the injunction were refused was CR Group (the contractor's parent company) which, if CR's position was as precarious as it said it was, and if the consequences of being required to transfer the funds to CR Group were as serious as it said, ought to lead to CR Group not requiring repayment pending the final resolution of these disputes if it genuinely believed the contractor was a company worth saving.

Finally, the judge considered the wider reputational damage to the performance bond market, especially in the construction sector and the UK. This was a very significant reason in itself and justified the refusal of the injunction.

Clause 2.2 of the bond provided that: *"No termination of the Construction Contract, and no termination of the Contractor's employment under the Construction Contract, shall reduce the liability of the Surety under this Deed"*.

CR submitted that this only applied to a termination under and pursuant to the terms of the contract, and did not apply to a case where one party's repudiatory breach of the contract was accepted by the other as discharging the contract (which is what the contractor alleged had happened here). CR said that the bond had

been discharged by its acceptance of the employer's repudiatory breach of contract. The judge was *"wholly unpersuaded"* that clause 2.2 must be read in this limited sense. *"Termination"* was an ordinary word which was just as apt to cover the discharge of a contract by one party accepting the repudiatory breach of the other as it is to cover the exercise of a contractual right of termination for convenience or for cause, whether breach by the other, insolvency, or otherwise. There was no obvious reason why it should be construed as having the limited meaning of the exercise of a contractual right of termination, and every reason why it should bear its ordinary wider meaning. It would be surprising if it had been intended that the bond should survive a contractual termination, lawful or otherwise, but should not survive the acceptance of a repudiatory termination as discharging the contract.

The judge said that Clause 5.3 lay at the heart of this case. It provided as follows:

> *"Any demand made by the Employer under this Deed must be accompanied by either:*
>
> *(a) what purports to be a certified copy of (i) a judgment of a court; (ii) an arbitrator's award; or (iii) a decision of an adjudicator, in each case against the Contractor in favour of the Employer under the Construction Contract; or*
>
> *(b) a certificate from the Employer that is purported to be countersigned by the Employer's Agent, purportedly based on the non-performance of the Contractor, to confirm the Contractor's breach."*

The judge said that this imposed an obligation on the employer to provide one or other of the required documents with its demand. Where such a document was provided, it was to be conclusive evidence of the contractor's liability upon which the bank can safely rely.

What was required was something which had some degree of independence from the employer. A court judgment or adjudicator's decision would – in the absence of very compelling evidence to the contrary – be completely impartial of the employer. The judge was also of the view that, whilst a contractor may well not consider that the employer's agent appointed under a construction contract would display quite the same independence, nonetheless it may reasonably be expected that such a person or firm, counter-signing a certificate in their capacity as employer's agent, would not do so unless they were satisfied that the certificate was correct.

It was clear that CR strongly disputed, and continued to dispute, the failure to grant any extensions of time, the levying of liquidated damages and the termination of the contract. However, under the contract the Northern Gateway was entitled to proceed on the basis that it was entitled to levy liquidated damages and to treat the contract as determined under clause 8.4.2 unless and until its actions were the subject of an adverse decision by a duly appointed adjudicator under the dispute resolution provisions of the contract, an adverse determination of the court, or by agreement – none of which had happened. As noted above, CR waited some 11 months before starting an adjudication in January 2026.

Termination

Providence Building Services Ltd v Hexagon Housing Association Ltd

[2026] UKSC 1

We have discussed this case previously in *Dispatch*, Issues 290, 291 and 304. Providence had brought a Part 8 claim seeking a declaration against Hexagon as to the proper construction of clause 8.9 of the 2016 JCT Design and Build Contract between the parties. In the Court of Appeal, Stuart-Smith LJ said that the dispute raised in an issue about the proper construction of the contract that was *"simpler to state than ... resolve: can the Contractor terminate its employment under clause 8.9.4 of the JCT Form in a case where a right to give the further notice referred to in clause 8.9.3 has never previously accrued?"*. In the TCC, the judge had found in favour of the employer, Hexagon, holding that the answer to this question was *"no"*; the CA disagreed. The Supreme Court agreed with the original judge.

Lord Burrows decided that the words, *"If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not)"*, made clear that clause 8.9.3 was a gateway to clause 8.9.4, and it was only if the employer failed to cure an earlier specified default within 28 days that the contractor could terminate for a repetition of the specified default. Providence had not therefore been entitled to terminate its employment under clause 8.9.4.

Lord Burrows also explained that the CA had, in interpreting clause 8.9 of the contract, misplaced its reliance on clause 8.4 of the contract, which addressed the employer's right to terminate. There was no reason why the right to terminate should be symmetrical as between employer and contractor, especially when clause 8.4 and clause 8.9 included different time periods and used different wording.

Lord Burrows, who gave the leading judgment with which the other Supreme Court judges all agreed, said that when interpreting an industry-wide standard form, it should usually be interpreted consistently for all contracting parties using that form and, subject to bespoke amendments, that interpretation is unlikely to be contradicted by the objective intentions of the particular contracting parties. While the guidance notes to a contract may be admissible evidence as an aid to interpretation, the judge did not derive any assistance from the relevant JCT guide. Similarly, Lord Burrows did not derive any assistance from previous versions of the JCT form or past judicial decisions on those previous forms, though they were both admissible as background context. Lord Burrows referred with approval to the commentary in *Chitty on Contracts*, 36th ed (2025), para 16-061, which summarises the position as follows:

> *"In the case of a contract which is intended for standard use throughout a particular industry or market, the court is more likely to focus its attention on the background generally known to participants in the industry or the market and not on the background known to, or the understandings of, the individual parties to the particular transaction."*

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