

ENGLAND AND WALES / JUDGMENT

Cadent Gas Limited v CityFibre Limited

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2026] EWCA Civ 46 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES LONDON CIRCUIT COMMERCIAL COURT (KBD) HH Judge Hodge KC (sitting as a Judge of the High Court)

[2025] EWHC 910 (Comm) Case No: CA-2025-001224 Royal Courts of Justice Strand, London, WC2A 2LL Date: 05/02/2026 Before : LORD JUSTICE POPPLEWELL LORD JUSTICE PHILLIPS and LORD JUSTICE MILES

- ----- Between : CADENT GAS LIMITED
- and - CITYFIBRE LIMITED
- -----
- ----- Claimant/ Respondent Defendant/ Appellant Simon Croall KC (instructed by Bristows LLP) for the Appellant Richard Liddell KC and Alessandro Forzani (instructed by DWF Law LLP) for the Respondent Hearing date : 22 January 2026
- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 5 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Judgment Approved by the court for handing down. Cadent Gas v CityFibre Lord Justice Miles :

Introduction

1. 2. This appeal raises a short point of statutory construction. It concerns the forum for resolving a dispute between a person owning apparatus in a street for alleged damage caused by a statutory undertaker working on the street. Under the New Roads and Street Works Act 1991 (“the 1991 Act”) some disputes are required to be referred to arbitration, others not. The question is whether the mandatory arbitration provisions apply to the underlying dispute in this case. The appellant (“CityFibre”), an internet provider, says that the respondent (“Cadent”), a gas distribution company, damaged its apparatus when carrying out street works as a statutory undertaker. It sought recovery of its costs and expenses under certain provisions of the 1991 Act. When these were not paid, it referred the claims to arbitration. Cadent contested the substantive jurisdiction of the arbitrator. The arbitrator made a partial award confirming his jurisdiction. Cadent challenged the partial award in the current court proceedings. The judge, HH Judge Hodge KC (sitting as a judge of

the High Court), held that the dispute was not required to be arbitrated under the 1991 Act, so that the arbitrator lacked jurisdiction. The judge set aside the partial award. He granted permission to appeal to this court under section 67(4) of the Arbitration Act 1996. 3. The current claim is for about £7,000 including costs and interest. However, we were told that the issue raised by the appeal has wider importance because there are many low-value claims of this kind. The facts 4. 5. 6. Cadent is a statutory undertaker for the purposes of the 1991 Act. It has a general licence to carry out development works on and under streets. CityFibre owns infrastructure across the United Kingdom, including network cables in Bracknell, the subject of the present dispute. It too is a statutory undertaker under the 1991 Act. In the underlying arbitration CityFibre sought to recover the costs and expenses of making good damage allegedly caused by Cadent, in December 2022, to its network cables and apparatus in Bracknell together with administrative expenses, general staff costs and overheads pursuant to sections 82 and 96(1) of the 1991 Act. On 23 April 2024 CityFibre applied to the President of the Institution of Civil Engineers for the appointment of an arbitrator. A sole arbitrator was appointed that day. He issued a partial award on 2 July 2024 stating that he had the necessary jurisdiction to determine the dispute. Cadent brought these proceedings and in them the judge set aside the partial award. The statutory provisions 7. 8. Part III of the 1991 Act is entitled “Street Works in England and Wales”. Section 82 provides: “Liability for damage or loss Judgment Approved by the court for handing down. Cadent Gas v CityFibre (1) An undertaker shall compensate —

- (a) the street authority or any other relevant authority in respect of any damage or loss suffered by the authority in their capacity as such, and (b) any other person having apparatus in the street in respect of any expense reasonably incurred in making good damage to that apparatus, as a result of the execution by the undertaker of street works or any event of a kind mentioned in subsection (2). (2) The events referred to in subsection (1) are any explosion, ignition, discharge or other event occurring to gas, electricity, water or any other thing required for the purposes of a supply or service afforded by an undertaker which— (a) at the time of or immediately before the event in question was in apparatus of the undertaker in the street, or had been in such apparatus before that event and (b) had escaped therefrom in circumstances which contributed to its occurrence. The liability of an undertaker under this section arises
- (a) whether or not the damage or loss is attributable to negligence on his part or on the part of any person for whom he is responsible, and notwithstanding that he is acting in pursuance of (b) a statutory duty. (3) — (4) However, his liability under this section does not extend to damage or loss which is attributable to misconduct or negligence on the part of— the person suffering the damage or loss, or any (a) person for whom he is responsible, or (b) a third party, that is, a person for whom neither the undertaker nor the person suffering the damage or loss is responsible. (5) For the purposes of this section the persons for whom a person is responsible are his contractors and any person in his employ or that of his contractors. Judgment Approved by the court for handing down. Cadent Gas v CityFibre Nothing in this section shall be taken as exonerating an (6) undertaker from any liability to

which he would otherwise be subject.” 9. Section 96 provides: “Recovery of costs or expenses. Any provision of this Part enabling an authority, body (1) or person to recover the costs or expenses of taking any action shall be taken to include the relevant administrative expenses of that authority, body or person including an appropriate sum in respect of general staff costs and overheads. The Secretary of State may prescribe the basis on which such amounts are to be calculated; and different provision may be made for different cases or descriptions of case. (2) person is conferred in respect of the same matter— Where a right to payment enuring for the benefit of a (a) both under this Part and under any enactment or agreement passed or made before the commencement of this Part, or (b) by two or more provisions of this Part, a payment made in discharge of any of those rights shall be treated as being made in or towards satisfaction of the other or others. (3) Where under any provision of this Part a person is entitled in certain circumstances to recover costs or expenses incurred by him in executing works or taking other steps, any dispute as to the existence of those circumstances or as to the amount recoverable shall be determined by arbitration. This applies whether the provision is expressed as conferring a right to recover, or as imposing a liability to reimburse or indemnify or to bear the cost, but does not apply in relation to a provision expressed as providing for the charging of a fee or conferring a right to compensation or in relation to section 78 (contributions to cost of making good long-term damage to the street).” 10. 11. Section 96(3) consists of two sentences which, for ease of exposition, I shall call “s96(3)[1]” and “s96(3)[2]”. S96(3)[2] has two limbs separated by a comma: the first ending with the words “the cost”; and the second beginning with “but does not apply”. By section 99 any matter which under Part III is to be settled by arbitration shall be referred to a single arbitrator appointed by agreement between the parties concerned or, in default of agreement, by the President of the Institution of Civil Engineers. Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* 12. 13. 14. Part III of the 1991 Act does not elsewhere use the precise phrase “right to compensation” but does use phrases including the cognate word “compensate” on three occasions. The first is in section 82(1) which has already been quoted. The second is in section 79, which requires a statutory undertaker to keep a record of the location of each item of apparatus. If it fails to do so, by section 79(4)(b) that undertaker is “liable to compensate any person in respect of damage or loss incurred by him in consequence of the failure”. The third is in section 84, which requires an undertaker to take certain steps where its own apparatus is, or may be, affected by certain major works. These include the steps reasonably required to identify any measures needed to be taken in relation to the apparatus, settling a specification for such measures, and co-ordinating them with the authority’s works. Any dispute between that undertaker and the relevant authority (such as a highway authority) is to be settled by arbitration (in default of agreement). If one of the parties fails to comply with any agreement between them as to such matters, or the decision of the relevant arbitrator, then, by section 84(4), it is “liable to compensate the other in respect of any loss or damage resulting from the failure”. 15. Section 96(3) expressly refers to section 78, which provides materially as follows: “Contributions to costs of making good long-term damage. (1) The Secretary of State may make provision by regulations requiring an undertaker executing

street works to contribute to the costs incurred or likely to be incurred by the street authority or, in the case of a road subject to a concession within the meaning of Part I of this Act, by the concessionaire, in works of reconstruction or re-surfacing of the street. (2) The regulations may provide— for a contribution to the cost of particular (a) remedial works, or for a general contribution calculated in such (b) manner as may be prescribed. (3) In the former case the regulations may contain provision for apportioning the liability where the need for the remedial works is attributable to works executed by more than one person. (4) In the latter case the regulations may provide for the amount of the contribution to vary according to the nature of the street, the description and extent of the works and such other factors as appear to the Secretary of State to be relevant.” 16. Section 96(3) also refers to provisions “expressed as providing for the charging of a fee”. As to this, section 75 provides that an undertaker executing street works shall, subject to the provisions of any scheme under the section, pay to the street authority Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* the prescribed fee in respect of each inspection of the works carried out by the authority. 17. There are numerous provisions in Part III which provide for a street authority to recover costs from a statutory undertaker. These include: i) ii) iii) iv) v) section 66(4), which applies where an undertaker creates an obstruction in a street to a greater extent, or for a longer period, than is reasonably necessary, and provides a regime whereby the authority “may recover” the reasonable costs of taking any necessary steps to mitigate the obstruction; section 72(4), which applies where an undertaker has failed to comply with its duties to reinstate a street to appropriate standards, and provides a regime whereby the authority “may recover” the reasonable costs of investigatory and reinstatement works; sections 76 and 77, which enable the authority to “recover” the costs of temporary traffic regulation, or require the undertaker to “indemnify” the authority for the reasonable costs of diverting traffic via an alternative route; section 85 which, in certain circumstances, governs how the costs of measures required by major works are to be shared between the authority and the undertaker, and confers a right “to recover” any unpaid costs; and section 90(2) and (3) which, in certain circumstances, enable the authority “to recover” from an undertaker the reasonable costs of steps taken by the authority to remedy the undertaker’s failure to comply with its obligations to reinstate sewers, drains or tunnels. The judgment 18. The judge set out his reasoning in detail. Since the legal arguments were renewed before this court it is sufficient to summarise the judge’s essential reasoning. The judge referred to certain external aids to construction which had been relied on by Cadent in support of its preferred construction but decided that they did not assist. The judge described the second limb of s96(3)[2] as a “carve-out” from s96(3)[1]. He rejected CityFibre’s argument that a claim could not be within both s96(3)[1] and the second limb of s96(3)[2], since this did not accord with the language and structure of the two parts. He accepted that the current claims fell within s96(3)[1] as claims for expenses incurred by another person, but the question was whether they were nonetheless excluded by s96(3)[2]. He held that the carve-out provides relevantly for a dispute concerning a provision “expressed as ... conferring a right to compensation” to be excluded from mandatory arbitration. The opening words of section 82(1) (“an undertaker shall compensate ...”) covers both limbs (a)

and (b) of that subsection. He concluded that both limbs of section 82(1) expressly “confer a right to compensation” and disputes about them therefore fall within the carve-out in s96(3) [2]. The judge held that all instances of the term “compensate” and its derivatives in Part III of the Act fall within s96(3)[2]. He noted the use of the phrase “expressed as” to qualify the phrase “a provision conferring a right to compensation” and concluded that this was intentional and precise. It dictates that any provision “expressed” in that way was contained in the proviso. CityFibre’s argument wrongly stopped at s96(3)[1] and Judgment Approved by the court for handing down. Cadent Gas v CityFibre effectively ignored s96(3)[2]. The judge specifically rejected CityFibre’s argument that a claim under section 82(1)(a) could not fall within s96(3)[1]. The judge concluded that little assistance could be gleaned from consideration of the legislative purpose because Parliament had decided that some disputes had to be arbitrated but others did not, and the division between the two classes depended on the words used in s96(3). The ground of appeal and submissions of the parties 19. 20. 21. 22. The single ground of appeal is that the judge was wrong to conclude that the claim made in the arbitration was not subject to statutory arbitration pursuant to the 1991 Act because it was a claim under a provision expressed as conferring a right to compensation. The submissions of Mr Croall KC, on behalf of CityFibre, may be summarised as follows. In relation to dispute resolution arising out of Part III of the 1991 Act, Parliament has articulated a clear intention and purpose. Claims brought to recover costs and expenses in executing works are to be determined by arbitration (see s96(3) [1]). The first limb of s96(3) [2] shows that this regime applies where the claim arises out of a provision “...expressed as conferring a right to recover, or as imposing a liability to reimburse or indemnify or to bear the cost...”. The present claim was brought under a provision conferring a right to recover costs and expenses in executing works. Being a claim under section 82(1)(b) it is, as a matter of substance, a claim made under a provision expressed as conferring only a limited right to the recovery of expenses incurred and/or a statutory liability of the undertaker to reimburse expenses. The proviso contained in the second limb of s96(3)[2] identifies types of claims which are not within the first part of that sub-section, so as to make clear that they are not subject to arbitration. The purpose of the drafting is to distinguish certain types of claim in order to make clear that they are not claims for the recovery of expenses and hence that they fall outside the section 96 regime. Claims arising out of provisions allowing the charging of a fee or requiring contributions to make good long-term damage to the street are specifically identified. Neither could sensibly be characterised as a claim for the recovery of expenses. This is also true of disputes relating to “...a provision expressed as ...conferring a right to compensation.” A provision conferring such a right is to be contrasted with the more limited right to recover expenses incurred i.e. of the type identified in section 96(1). That distinction is supported by the ordinary meaning of this language: compensation refers to something wider than the recovery of expenses incurred (the ambit of sections 96(1) and (3)). It includes sums awarded or paid to make up for a loss resulting from some act/ omission: see e.g., *Tramtrack Croydon Ltd v London Bus Services Ltd* [2007] EWHC 107 (Comm) at para 132, *Great Western Railway Co v Helps* [1918] AC 141 at 144-145 and *Lancashire CC v Municipal Mutual Insurance Ltd* [1997] QB 897 at 909-910. 23. The question

is to be tested by asking whether as a matter of substance the provision which gives the right to recovery creates a “right to compensation” or whether, conversely, it gives only a right to recover costs and expenses. Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* 24. 25. 26. Thus, the language and structure of section 96 make clear that a claim under a provision which only allows the recovery of expenses (i.e. section 82(1)(b)) is not a claim under a provision expressed as conferring a right to compensation. The use of the verbal phrase “shall compensate” in section 82(1) does not change the meaning of the language of section 82(1)(b). The use of the verb “compensate” does not change section 82(1)(b) from a provision allowing recovery of expenses to one which confers a right to compensation. Such an approach is consistent with the underlying purpose of section 96(3) and is to be preferred to a construction which requires claims for the recovery of expenses to be litigated in court. On behalf of Cadent, Mr Liddell KC, leading Mr Forzani, supported the judge’s reasoning. We did not require oral submissions from them but had the benefit of their skeleton argument in which they submitted that the second limb of s96(3)[2] contains a carve-out, the purpose of which is to qualify the default arbitration regime under Part III of the 1991 Act such that statutory arbitration specifically does not apply to those claims where the relevant (and enabling) provision in Part III is “expressed as providing for the charging of a fee or conferring a right to compensation or in relation to section 78”. Accordingly, it is evident from the wording of section 96(3), when read as a whole and in conjunction with section 82(1), that Parliament did not intend that each and every claim for (or including) the recovery of costs and expenses would fall to be arbitrated. The opening words of section 82(1) are expressed as conferring a right to compensation. This language conditions both section 82(1)(a) and (b). Accordingly, Parliament intended those sections to be expressed so as to confer a right to compensation. As section 82(1)(b) is expressed to confer such a right, it falls squarely within the carve-out and (absent ad hoc agreement) is to be determined by court litigation. Analysis and conclusions 27. The approach to the interpretation of statutes has been authoritatively explained in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, and *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2023] 3 WLR 963. A statutory provision is to be interpreted by identifying the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words under consideration. The words and passages used in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections, and the statute as a whole. The words chosen by Parliament are the primary source by which meaning is ascertained. Citizens, with the assistance of their advisers, should be able to understand parliamentary enactments, so that they can regulate their conduct. They should be able to rely upon what they read in an Act of Parliament. 28. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 at para 8, Lord Bingham stated that: “The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* the historical context of the situation which led to its enactment.” 29.

Lords Reed and Hodge, giving the leading judgment in *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47, [2022] AC 1 at para 155, stated that: “It is the duty of the court, in accordance with ordinary principles of statutory interpretation, to favour an interpretation of legislation which gives effect to its purpose rather than defeating it.” The essential issue between the parties is this. CityFibre argues that the right it relies on, arising under section 82(1)(b), falls within s96(3)[1] as it entitles it to recover costs or expenses incurred by it in executing works or taking other steps. CityFibre contends that s96(3)[2] has no application to a claim brought under section 82(a)(b). For its part, Cadent accepts that a claim under section 82(1)(a) falls within s96(3)[1] but it says that [2] operates to disapply the requirement for arbitration under [1] for claims under section 82(1)(b) because that provision is expressed as conferring a right to compensation. The first step is to analyse the relationship between the two parts of s96(3) by examining the language and syntax used. S96(3)[2] refers back to [1] (its opening word “this” refers to [1]) and stipulates when [1] does or does not apply. It does so by reference to the manner of expression of the relevant provisions under which the relevant entitlement to recover arises. S96(3)[2] starts by stipulating that [1] applies whether the provision is expressed as conferring a right to recover or as imposing a liability to reimburse or indemnify or to bear the cost. S96(3)[2] then stipulates that

- [1] does not apply in relation to rights or liabilities arising under certain provisions. The first and second exclusions in s96(3)[2] are defined by reference to the way in which the relevant right or liability creating provision is expressed: either as “providing for the charging of a fee” or as “conferring a right to compensation”. The third exclusion is defined by reference to a particular provision, section 78. The second limb of s96(3)[2] operates as a proviso to [1]. Both parts of s96(3) operate by identifying certain provisions as the source of the right or liability. S96(3)[1] imposes mandatory arbitration for disputes about the recovery of costs or expenses “under any provision of this Part”. The first limb of s96(3)[2] clarifies the scope of the relevant provisions falling within [1], by including provisions “expressed” in a variety of ways. The first limb of [2] therefore works by identifying certain provisions of Part III. The second limb of [2] then stipulates that “this” (i.e. [1]) does not apply in relation to a provision expressed in certain ways or in relation to section 78. Hence the second limb of s96(3)[2], like the first, works by identifying certain provisions and, again like the first, does so (for the first two cases) by referring to the way the provision is expressed. Section 96(3) as a whole is therefore drafted by reference to the way that the provision of Part III under which a relevant right or liability arises is expressed. It follows that the statutory concept in issue in this case is not the abstract one whether a given claim arises from “a right to compensation”, but the narrower one whether the 30. 31. 32. 33. 34. 35. Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* 36. 37. provision containing the right or liability is “expressed as conferring a right to compensation”. CityFibre’s claims in the arbitration were made under section 82(1)(b). The opening words of section 82(1) (covering both (a) and (b)) are that “an undertaker shall compensate”. It is instructive in this context to consider claims under section 82(1)(a). In my view there could be a claim by a street or other authority under

section 82(1)(a) which would fall within s96(3)[1], being a claim in respect of costs and expenses incurred in repairing the road. While the loss and damage recoverable by the authority under section 82(1)(a) is not restricted to such costs and expenses, a dispute over a claim for compensation in respect of costs and expenses incurred by the authority would fall within s96(3)[1]. The dispute would also fall within s96(3)[2] as arising under a provision (section 82(1)(a)) expressed as conferring a right to compensation and would therefore be excluded from mandatory arbitration.

38. Moreover it would not be sensible to require that a dispute over the recovery of one head of loss and damage (recovery of costs and expenses incurred) should have to be arbitrated while other heads of loss and damage would not be. Hence, the obvious Parliamentary intention is that claims under section 82(1)(a) are excluded from s96(3) [1]. This is achieved by the use of the clause “provision expressed as... conferring a right to compensation” in s96(3)[2] and the use of the words “an undertaker shall compensate” (using a cognate phrase) in section 82(1)(a).
39. 40. If a claim under section 82(1)(a) is excluded by section 96(3)[2] (being one arising under a provision expressed as conferring a right to compensation), I find it very hard indeed to conclude that a claim under section 82(1)(b), which is introduced by the same words “an undertaker shall compensate”, would not also be excluded. I can see no reason to suppose that the drafter decided to provide for both forms of liability in the same subsection - and indeed use the same introductory phrase for both - but at the same time intend one to confer a right to compensation and the other not. Counsel for CityFibre sought to meet this argument by contending that a claim brought under section 82(1)(a) is incapable of falling within s96(3)[1] at all. He argued, first, that section 96(3)[1] is concerned with the recovery of costs and expenses. Section 82(1)(a) allows the relevant authority to recover compensation at large (damage and loss), whereas section 82(1)(b) is concerned with expenses reasonably incurred in making good damage to apparatus.
41. While it is correct that the two subsections of section 82(1) give rise to liabilities of different scopes, in my view the conclusion for which CityFibre contends does not follow. A claim by an authority under section 82(1)(a) for compensation in respect of the costs and expenses incurred by it (in, say, repairing the street) would fall within the words of s96(3)[1]. But, as already noted, I consider that it would also fall within the second limb of s96(3)[2]. 42. Counsel for CityFibre argued, second, that in order to fall within s96(3)[1] the provision had to be one restricted solely to the recovery of costs and expenses. Where the relevant provision went further and allowed for the recovery of other forms of loss and damage, s96(3)[1] was not engaged. I do not see any warrant for reading down Judgment Approved by the court for handing down. Cadent Gas v CityFibre 43. 44. 45. 46. 47. 48. s96(3)[1] in this way. In my judgment if the provision gives a person an entitlement to recover costs and expenses of the kind described, s96(3)[1] is engaged, even if the provision also allows for the recovery of other amounts. CityFibre argued more generally that a dispute that falls within s96(3)[1] cannot also fall within the second limb of [2]. I am unable to accept this for the following reasons (some of this ground has already been covered, but there are further reasons too). First, as explained above, the structure and language of s96(3) read as a whole

show that it operates by reference to the mode of expression of the provision under which the right or liability is asserted. The relevant question is not the abstract one whether a claim does or does not involve “a right to compensation”; it is whether the provision relied on is expressed as conferring such a right. The focus is on the provision under which the claim is brought and the way it is expressed. Second, on a straightforward reading of s96(3) there is no reason to suppose that a dispute that falls within [1] should not also be capable of falling within the second limb of [2]. On the contrary, the second limb of [2] on a natural reading qualifies [1] by saying that it shall not apply in respect of rights or liabilities arising under certain provisions. Third, as already explained, in my judgment there can be claims for compensation by a street or other authority under section 82(1)(a) in respect of costs and expenses which would fall within s96(3)[1]. I have already explained why I am unable to accept CityFibre’s submission that such a claim is not capable of coming within s96(3)[1]. It follows that such a claim may fall within both s96(3)[1] and the second limb of [2]. Fourth, a claim under regulations to be made under section 78 for a contribution may in my view include a claim to recover costs or expenses incurred by a street authority or concessionaire, including for the cost of particular remedial works. The words “cost” and “works” (used in s96(3)[1]) are also found in section 78(2)(a). CityFibre submitted that section 78 (or regulations under it) would give rise to a liability to “contribute” (or a right to “a contribution”) and that this could not be a right “to recover costs and expenses incurred by him” in the sense used in s96(3)[1]. In my judgment, there is no basis for reading down the words of s96(3)[1] in this way. On a natural reading, regulations made under section 78(2)(a) could provide for a liability on an undertaker to pay a contribution to a street authority in respect of the cost of remedial works which would fall within s96(3)[1] – this would hence constitute a provision under which a person (the street authority) is entitled (by way of contribution) to recover costs incurred in executing remedial works. The last part of the second limb of s96(3)[2] excludes all claims arising under section 78 from the mandatory arbitration requirements of s96(3)[1], and this applies whether they are restricted to claims to recover costs or they go wider. 49. CityFibre also submitted that the phrase “a right to compensation” within s96(3)[2] refers to something broader than the recovery of costs or expenses incurred (i.e. the ambit of section 96(1) and s96(3)[1]). CityFibre contended that “compensation” refers to all and any sums awarded or paid to make up for a loss resulting from some act/omission (see the passages referred to in para 22 above). CityFibre said that these Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* 50. 51. 52. 53. cases show that compensation includes sums paid to make up for a loss resulting from an act or omission. However, as explained above, the statutory concept in s96(3)[2] is a narrower, less abstract one, namely, whether the provision in Part III under which the right or liability arises is a provision which “is expressed as... conferring a right to compensation”. The question here is whether the enabling provision, section 82(1)(b), is so expressed. In my judgment the use of the verbal phrase “shall compensate” entails that it is so expressed. For this reason, general contentions about the meaning of the concept of “compensation” have no force. But, in any case, in my judgment section 82(1)(b) does create a liability on an undertaker to compensate persons having apparatus in the street in respect of any expense

reasonably incurred in making good damage to that apparatus as a result of the execution by the undertaker of street works or any event of a kind mentioned in section 82(2). The liability created by the section is to pay compensation in respect of the relevant expenses incurred in making good damage to apparatus. The word “compensation” may describe a sum of money paid or payable to someone in recognition of loss, suffering or injury and that is what section 82(1)(b) does. The fact that the statutory liability is limited to the payment of those expenses (rather than for other losses) does not affect its compensatory nature. Counsel for CityFibre said that it was important not to give undue weight to the use of the verb-phrase “shall compensate” in section 82(1). He repeated that the question was one of substance, not of the particular words used. I did not find this persuasive. The question in this case is whether the relevant provision is one “expressed as... conferring a right to compensation”. Parliament plainly must have meant something by that clause. As already mentioned, there is no provision in Part III which is expressed precisely using the words “right to compensation”. As explained above there are only three times where a verb-phrase (“shall compensate” or “liable to compensate”) is used (i.e. in sections 79, 82, and 84). These are cognates of the noun- phrase “right to compensation” and I consider it is highly unrealistic to attribute to Parliament an intention to use the relevant verb-phrase as falling within the exclusion in s96(3)[2] in three of these cases but not the fourth. As already noted, it is still more improbable to suppose that Parliament meant the words “shall compensate” should generate “a right to compensation” when used in section 82(1)(a), but not do so when used in section 82(1)(b). That would amount to a very peculiar, indeed confusing, drafting technique. In my judgment, far from doing that, the drafter used the simple approach of focusing attention on the way in which the relevant provision is expressed: if the wording of the provision uses the language of “compensation” or its verb-phrase cognates, s96(3)

- [2] excludes it from the operation of [1]. It appears to me that the drafting is careful and deliberate. Reading the provision in this straightforward way also allows the audience - the parties to claims under the provisions of Part III and their advisers - to identify the right forum for their disputes, without having to explore potentially complicated debates about the underlying nature or substance of their claims. 54. CityFibre placed much emphasis on various policy reasons for preferring arbitration for claims of the kind made in this case. It said that such claims will often be relatively straightforward. The arbitrators to be appointed will have relevant expertise Judgment Approved by the court for handing down. *Cadent Gas v CityFibre* 55. 56. 57. 58. and experience. It also contended that arbitrations are likely to be faster than court proceedings, which will promote settlements. Costs can be recovered in arbitrations but there are limits on the recovery of costs in small claims in the County Court. There are many such claims and the courts are congested with other cases. Counsel for CityFibre contended that these policy considerations elucidate the purpose of section 96(3), i.e., to mandate arbitration in the kinds of straightforward cases described in s96(3)[1]. Cadent advanced counterpoints in relation to these policy considerations. It submitted that the County Court small claims track deals with low value disputes. If there is a low value claim under section 82(1)(b) it can be resolved on that track. A dispute over whether network

cables have been damaged and by whom should (as in this case) be capable of determination in the County Court with limited or no expert evidence, but in an unusual case where expert evidence is required the court may permit it. The costs regime involved in a small claims track may result in lower costs. For claims between £5,000 - £10,000, the issue fee is £455, compared with £420 to appoint the arbitrator in this case. A hearing fee of £346 would also be payable in the County Court but an arbitrator also charges an hourly rate (in this case, £350 per hour). Various costs of litigation are recoverable on this track pursuant to CPR 27.14(2). Cadent accepted that statutory arbitration may mean that a dispute would be determined more quickly than in court and that this would free up court time, but noted that there was no reliable evidence of the number of these cases occupying the courts. In relation to the policy arguments, it is also worth noting that s96(3)[2] excludes the case of provisions providing for the charging of a fee. CityFibre referred us to section 75 which, as already explained, provides that an undertaker executing street works shall, subject to the provisions of any scheme under the section, pay to the street authority a prescribed fee (to be prescribed in regulations) in respect of each inspection of the works carried out by the authority. It is probable that any dispute about such a fee would be simple and self-contained, indeed in all likelihood, simpler than many claims for the recovery of costs and expenses. However, Parliament has decided that disputes over such fees should not be covered by the mandatory provisions of s96(3)[1]. This makes it more difficult still to ascertain the purposes of the division between the classes of dispute that have to be arbitrated and those that do not. For these various reasons the policy considerations appear to me to be inconclusive. But there is a more basic difficulty in assessing them. Parliament has passed legislation which provides both the requirement of arbitration for some disputes, and the exclusion from that requirement for other disputes. It has defined the two classes of disputes in s96(3)[1] and [2]. The two parts of s96(3) are, as explained above, interrelated and in discerning the legislative purpose of the provision, it must be read as a whole; one cannot stop reading at the end of [1] and ignore [2]. For the reasons given above, reading the provision as a whole, at most limited assistance can be drawn from the suggestion that there is a legislative preference for mandatory arbitrations for s96(3)[1] cases, since [2] expressly excludes arbitrations falling within its words. Thus to determine which cases Parliament thought should go to arbitration, one has to determine which cases are intended to be excluded, and so one is driven back to the words actually used. I therefore agree with the judge that this is not a case Judgment Approved by the court for handing down. Cadent Gas v CityFibre in which the potential advantages or disadvantages of arbitration over court proceedings help in construing the statutory language. 59. In support of its arguments about policy or purpose, CityFibre relied on a comment of this court in *Yorkshire Electricity Distribution Plc v Telewest Ltd* [2006] EWCA Civ 1418 at para 47, made in the context of claims under sub-section 82(1)(b) that: "First, recourse to any court must be avoided in future. Second, the process between the parties should not be one of mediation, which carries too much potential for the leisurely ventilation of extensive issues such as has occurred so far in this matter, but one of arbitration or, rather, determination by an expert." 60. This passage does not assist CityFibre's argument for a number of reasons. First, it was

obiter and the court did not refer to section 96(3). Second, as I read the passage the court's guidance was concerned only with the parties before the court. This court was not laying down principles for other cases. Third, the court was suggesting that the parties should appoint an expert, rather than an arbitrator, and it did not refer to compulsory arbitration under the Act. This is clear from the remainder of paragraph 47 where the court urged the parties to appoint an engineer as an expert whose decisions would not be appealable. Fourth, as the court said in paragraph 48, they could not order or require any of this. Fifth, if CityFibre was right in its arguments, it would follow that the claims in the Yorkshire case would have been subject to compulsory arbitration, so that the decision would have been per incuriam. 61. In the end, in my judgment there is no escaping the simple conclusion that the present claims under section 82(1)(b) have arisen under a provision expressed as conferring a right to compensation and are therefore not required to be arbitrated. I would therefore dismiss the appeal. Lord Justice Phillips: 62. I agree. Lord Justice Popplewell: 63. I also agree.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewca/civ/2026/46>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/StatutoryConstruction-court-unknown--6a3ea5083b1caa91298045d8>

Prepared on 26 October 2026 · Esheria