Collateral Warranties - Liability, loss and procedure

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LIABILITY

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The purpose of collateral warranties

- The reasons for collateral warranties – the decisions in *D&F Estates* and *Murphy v Brentwood*.
- They limited the circumstances in which a purchaser, funder or other third party would have a claim in tort against the contractor or a member of the professional team.
- They also limited the circumstances in which the employer could sue subcontractors.

The purpose of collateral warranties

- The aim of a collateral warranty is to provide a remedy in contract to a purchaser of property [and others] against a builder or designer for bad design or construction in order to compensate for the lack of a remedy in tort: *British Overseas Bank Nominees Ltd v Stewart Milne Group* [2019] CSIH 47; [2020] PNLR 2 at [9]-[14].
- The promisor will typically be the contractor, a subcontractor or a member of the professional team.
- The beneficiary will typically be a funder or a purchaser or a tenant or, in the case of warranties given by subcontractors, the employer.

The purpose of collateral warranties – *British Overseas* (cont.)

The court decided that when applying the usual rules of contractual interpretation "*… the underlying commercial purpose of the collateral warranty is of importance … The fundamental purpose of the collateral warranty is to place the beneficiary and the contractor in an equivalent position to the original developer and the contractor, not to extend the obligations of the contractor to the beneficiary of the warranty beyond those undertaken in favour of the original developer. Details of the wording used should not obscure that basic objective*".

The purpose of collateral warranties – *British Overseas* (cont.)

The court held that even if a collateral warranty was granted considerably after construction had finished, it was normally to be inferred that the beneficiary of the warranty was intended to be in the same position as if it had appointed the contractor, but not in any better position. This included questions of prescription (limitation). It followed that presumptively the same period of prescription should apply to claims under the collateral warranty. The terms of the collateral warranty in the present case supported such an interpretation.

The purpose of collateral warranties – *Swansea Stadium Management Limited v City & County of Swansea and Another* [2018] EWHC 2192 (TCC), [2018] BLR 652

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- Collateral warranties are often agreed after work has started or even after it has finished.
- O'Farrell J found that the collateral warranty in question was intended to have retrospective effect:
- "56. In conclusion on this issue, the clear intention of the parties was that the Collateral Warranty should have retrospective effect. The Second Defendant's liability to the Claimant was deemed to be coterminous with its liability to the First Defendant under the Building Contract. Any breach of contract created by the Collateral Warranty would be regarded as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty".
- The judge explained that a cause of action under a building contract and a collateral warranty in respect of defective work accrued on practical completion. So far as the collateral warranty was concerned, the cause of action accrued at practical completion even if, at that date, the collateral warranty had not been executed.

The purpose of collateral warranties – *Abbey Healthcare v Simply Construct*

- At [71] Coulson LJ referred with apparent approval to O'Farrell J's decision.
- Stuart-Smith LJ said at [88]:

  "I understand [O'Farrell J's] reference to "the effective date of the Collateral Warranty" to be a reference to the date upon which it was executed. The Judge's reasoning led to the conclusion that it was to have effect before that date and was, in that sense retrospective. If I am right in this understanding, the case is on all fours with *Northern & Shell*, from which the Judge cited extensively and upon which she evidently relied. I understand Coulson LJ to be in agreement with this interpretation: see [71] of his judgment. If, however, my understanding is incorrect, and although it does not in my view affect the outcome of the issue for determination on this appeal, I do not accept that a cause of action under a collateral warranty (or any other contract) can come into existence before the date the agreement is effective As is clear from *Northern & Shell* a contract is not necessarily effective on or from the date upon which it is concluded. Once again, the proper meaning of the agreement in question will depend on its terms."

Trying to make sure the collateral warranty does not displace any duty of care in tort which there might otherwise be

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- The existence of a collateral warranty may negative a duty of care which the promisor would otherwise owe.
- This is why collateral warranties usually include a term along the lines of clause 12 in the JCT collateral warranties: “This Agreement shall not negate or diminish any duty or liability otherwise owed by [the promisor] to the [beneficiary].

Standard forms

- JCT 2016 7C and 7D provide for the contractor to give collateral warranties to a purchaser, a tenant and a funder.
- JCT 2016 7E provides for sub-contractors to give collateral warranties to a purchaser, a tenant and a funder and to the employer.

The nature of the promise

- The words making the promise can vary.
- The form of the promise will usually be along the lines that the promisor warrants and/or undertakes and/or acknowledges etc.
- The substantive promise will be intended to achieve the objective in the ***British Overseas*** case. However, the warranty may limit the beneficiary's remedies in the event of a breach.

JCT CWa/P&T 2016 – Contractor Collateral Warranty for a Purchaser or Tenant

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- By clause 1.1 the Contractor warrants as at and with effect from practical completion of the Works that he has carried out the Works in accordance with the Building Contract. Clause 1.1 goes on to say that in the event of any breach of the warranty and subject to clauses 1.2, 1.3 and 1.4:

  the Contractor shall be liable for the reasonable costs of repair, renewal and/or reinstatement of any part or parts of the Works to the extent that the Purchaser or Tenant incurs such costs and/or the Purchaser or Tenant is or becomes liable either directly or by way of financial contribution for such costs.

  where the Warranty Particulars state that clause 1.1.2 applies, the Contractor shall in addition to the costs referred to in clause 1.1.1 be liable for any other losses incurred by the Purchaser or Tenant up to the maximum liability stated in the Warranty Particulars.

- Clause 1.2 says that where clause 1.1.2 does not apply, the Contractor shall not be liable for any losses incurred by the Purchaser or Tenant other than the costs referred to in clause 1.1.
- Clause 1.3 limits the Contractor's liability to the proportion of the losses which it would be just and equitable for the Contractor to pay having regard to the Sub-Contractor's responsibility for the same and on the assumptions set out in clauses 1.3.1 and 1.3.2.
- Clause 1.4 permits the Contractor to rely on any defence he would have against the Employer.

JCT CWa/F 2016 – Contractor Collateral Warranty for a Funder

- By clause 1.1 the Contractor warrants that he has complied and will continue to comply with the Building Contract and that in the event of any breach of the warranty the Contractor's liability to the Funder for costs under this Agreement shall be limited to what it would be just and equitable to require the Contractor to pay having regard to the Sub-Contractor's responsibility for the same and on the assumptions set out in clauses 1.1.1 and 1.1.2.
- Clause 1.2 permits the Contractor to rely on any defence he would have against the Employer.
- Clauses 6 and 7 include step-in rights for the Funder.

JCT SCWa/E 2016 – Sub-Contractor Collateral Warranty for the Employer

- By clause 1.1 the Sub-Contractor warrants and undertakes to the Employer that he has complied and will continue to comply with the Sub-Contract. Clause 1.1 continues in similar terms to clause 1.1 of JCT CWa/P&T 2016.
- Clauses 1.2 and 1.4 are in similar terms to the equivalent clauses in JCT CWa/P&T 2016.
- Clause 1.3 says that where the Warranty Particulars state that clause 1.3 applies, the Sub-Contractor's liability to the Employer under the warranty shall be limited to the proportion of the Employer's losses which it would be just and equitable to require the Sub-Contractor to pay having regard to the Sub-Contractor's responsibility for the same and on the assumptions set out in 1.3.1 to 1.3.3.

Collateral warranties and NEC4

- Option X8 (new to NEC4) provides for a scheme for collateral warranties.

CIC/ConsWa/E 3rd ed 2018 - Collateral Warranty Consultant-Employer

- By clause 1 the Consultant confirms to the Employer that it has exercised and will continue to exercise reasonable skill, care and diligence in the performance of its services to the Contractor under the Appointment.
- In the event of any breach of the agreement, clause 2 provides that the Consultant shall be liable for the reasonable costs of repair etc limited to the proportion it would be just and reasonable to require the Consultant to pay having regard to the extent of the Consultant's responsibility and on the assumptions in clause 2(b)(i)-(iii). Liability for all other losses incurred by the Employer is excluded.

CIC/ConsWa/F 2nd ed 2018 – Collateral Warranty Consultant-Funder

- By clause 1 the Consultant confirms to the Funder that it has exercised and will continue to exercise reasonable skill, care and diligence in the performance of its services to the Client under the Appointment.
- In the event of any breach of the agreement, clause 2 provides that the Consultant's liability shall be limited to the proportion it would be just and reasonable to require the Consultant to pay having regard to the extent of the Consultant's responsibility and on the assumptions in clause 2(b)(i)-(iii).

4. SKILL AND CARE

4.1 The Contractor warrants that:

(a) the Contractor has performed and will continue to perform diligently its obligations under the Contract;

(b) in carrying out and completing the Works the Contractor has exercised and will continue to exercise all reasonable skill and care and diligence to be expected of a properly qualified competent and experienced contractor …

(c) in carrying out and completing the Works the Contractor has exercised and will continue to exercise all reasonable skill and care and diligence to be expected of a prudent, experienced and qualified architect …

The collateral warranty in *Abbey Healthcare v Simply Construct* (cont)

4.2 Insofar as the Contractor has performed a part of its obligations under the Contract before the date of the Contract the obligations and liabilities of the Contractor under this agreement shall take effect in all respects as if the Contract had been dated prior to the performance of that part of its obligations by the Contractor.

4.3 The Contractor shall owe no greater duties to the Beneficiary under the terms of this agreement than it would have owed to the Beneficiary had the Beneficiary been named as the employer under the Contract save that this agreement shall continue in full force and effect notwithstanding the determination of the Contract for any reason.

The collateral warranty in *Abbey Healthcare v Simply Construct* (cont.)

4.4 The obligations of the Contractor shall not be released or diminished by the appointment of any person by the Beneficiary to carry out any independent enquiry into any relevant matter.

4.5 The Contractor further warrants that unless required by the Contract or unless otherwise authorised in writing by the Developer or the Developer's representative named in or appointed pursuant to the Contract … it has not and will not use materials in the Works other than in accordance with the guidelines contained in the edition of the publication "Good Practice in Selection of Construction Materials" (published by the British Council for Offices) current at the date of the Building Contract."

1. The Contractor warrants, acknowledges and undertakes that:

    1. it has carried out and shall carry out and complete the Works in accordance with the Contract;

    2. subject to this Deed, it owes a duty of care to the Beneficiary in the carrying out of its duties and responsibilities in respect of the Works;

    3. in the design of the Works or any part of the Works, in so far as the Contractor is responsible for such design under the Contract, it has exercised and will continue to exercise all reasonable skill and care …

    4. all materials and goods supplied or to be supplied … shall be of a quality, kind and standard which complies with the express and implied terms of the Contract;

    5. ….

    6. all workmanship, manufacture and fabrication shall be in accordance with the Contract;

    7. it has complied and will continue to comply with the terms of regularly and diligently carry out its obligations under the Contract.

3. Warranty of performance

….

3.2 The Contractor further warrants and undertakes to the Funder that:

(a) it has performed and will continue to perform its obligations under the contract;

(b) it has carried out and completed and will carry out and complete the Contract Works in accordance with the Contract Works and in a timely and workmanlike manner using up to date building practices and good quality materials

...

RECOVERABLE LOSSES

Recoverable losses

- The default position is that the scope of the losses which can be recovered for a breach of contract is set by the law on causation and remoteness – and particularly the latter.
- In theory the parties can amend the terms of any contract to broaden the scope of the losses which are recoverable.
- In practice, it is more likely that they will amend the terms of their contract to limit the scope of the recoverable losses by incorporating exclusion clauses or limitation clauses: see e.g. the JCT collateral warranties.

Remoteness of damage

- The general principles on remoteness of damage in contract are set out in the classic cases of
- *Hadley v Baxendale* (1854) 9 Exch 341
- *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528
- *The Heron II* [1969] 1 AC 350.
- In some cases it is also necessary to consider the concept of assumption of responsibility as a further limitation on contractual damages: *The Achilleas* [2009] AC 61.
- It is important to note that the concept of assumption of responsibility can also operate to broaden the contractual damages recoverable: *Siemens v Supershield* [2010] EWCA Civ 7, [2010] BLR 145.

Lord Hodge

30. From this brief review of the main authorities, the position may be summarised as follows.

31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.

32. But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.

33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.

35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one.

Damages recoverable for breach of collateral warranty *Orchard Plaza Management Co Ltd v Balfour Beatty Regional Construction Ltd* [2022] EWHC 1490 (TCC); [2022] PNLR 24.

- CO was the freehold owner of a former office block.
- CO as employer engaged MCS as contractor to convert it into residential and commercial units.
- MCS gave a collateral warranty to AIB, the funder. Clause 12 permitted AIB to assign the collateral warranty.
- CO granted a lease of the property as a whole to OPMC, a management company in which each of the long lessees of the residential units was a member.
- OPMC discovered that the rainscreen cladding installed during the conversion was defective.

Orchard Plaza (cont.)

- AIB (the funder) assigned its rights under the collateral warranty to CO (the employer). CO assigned its rights under the collateral warranty to OPMC (the management company).
- OPMC remedied the defects. It claimed the cost from MCS, who by this time had changed its name to BBRC.
- BBRC's defence alleged that OPMC's claim for the remedial costs was too remote. BBRC alleged that the warranty was given to AIB as a funder and that the only losses recoverable under it were those which foreseeably might be suffered by someone in the position of a funder and that this did not include remedial costs.

Orchard Plaza (cont.)

Clause 12.3 of the collateral warranty:

The Contractor agrees with the Beneficiary not to contend or argue that any person to whom the benefit of this Deed is assigned shall be precluded or prevented from recovering under this Deed any loss or damage resulting from any breach of this Deed by the Contractor by reason of the fact that such person is an assignee only or otherwise is not the original beneficiary or because the loss or damage suffered has been suffered by such person only and not by the original beneficiary, or because such loss is different to that which would have been suffered by the original beneficiary.

Orchard Plaza (cont.)

The defendant's Defence among other things alleged:

…. At the time of entry into that warranty, the losses claimed … are not a likely or foreseeable consequence of breaches of that warranty of the nature alleged in this case. Accordingly the losses claimed are too remote … The warranty was issued in favour of a funder and the Claimant can only recover losses of the sort which would ordinarily flow from a warranty provided to a funder in this factual scenario … Further and in any event the Claimant brings this action as assignee of a collateral warranty issued in favour of a funder of the works. At the time of entering into that warranty, the losses claimed by the Defendant are not a natural, likely and/or foreseeable consequence of breaches of that warranty of the nature alleged in this case. Accordingly the losses claimed are too remote … For the avoidance of doubt, such a defence does not fall within Clause 12.3 of the Performance Warranty which does not displace the usual rules on remoteness …

Orchard Plaza (cont.)

The Defendant argued that the type of loss within the original parties reasonable contemplation was diminution in value of the funder's security in the property, not cost of repairs; and that clause 12.3 was intended to preclude a defence based on the rule that an assignee can recover no more than an assignor. In this case a "no loss" argument would be available to the Defendant because the assignor was a funder, not a building owner, so the principle in *Larkstore* did not apply. The effect of Clause 12.3 was to avoid a "no loss" argument by making it clear that the assignee could recover for its own loss but Clause 12.3 did not displace any other rules which might limit damages recovery, such as the rules of remoteness.

Orchard Plaza (cont.)

- In response the Claimant contended that (1) it was foreseeable that if a funder made a claim, it would be for the cost of repairing the defects because the funder might want to take possession of the building and repair it; (2) under clause 12.1 there was no restriction on the persons to whom the collateral warranty might be transferred and so the Defendant knew losses might be claimed by an assignee who was not a funder and who had suffered different types of loss than a funder might suffer; and (3) clause 12.3 was intended to prevent the Defendant from raising its remoteness defence that the Claimant's loss was different to the kind of loss that would have been suffered by AIB.
- The Claimant also argued that the Defendant's argument would create a legal "black hole".

Morris J:

(1) To be recoverable as damages for breach of contract the loss has to be of a type or kind which at the time of contracting was foreseeable as a serious possibility: *Hadley v Baxendale* and *AG of the Virgin Islands v Global Water Associates Ltd*. See [42]-[44].

(2) An assignee cannot recover more from the debtor than the assignor could have done had there been no assignment: *Dawson v Great Northern & City Ry Co* [1905] 1 KB 206 and *Chitty* 22-077 to 22-078. In cases involving an assignment of rights under a building contract and transfer of the building, one asks what damages the assignor could itself have recovered had there been no assignment of the rights and no transfer of the building: *Offer-Hoar v Larkstore Ltd* [2006] 1 WLR 2926. Morris J referred to the underlined words as the "Larkstore gloss". The judgments in *Larkstore* were not concerned with causation and remoteness and the application of the "Larkstore gloss" does not exclude the application of the rules of remoteness. The "Larkstore gloss" did not in terms apply to AIB as AIB never owned the building and did not transfer it to the Claimant. See [46]-[55] and [73].

(3) The mere fact that a contract is capable of assignment is not sufficient to bring within the defendant's contemplation the kind of loss which might be sustained by an assignee. However, in this case the collateral warranty expressly contemplated assignment and there was no restriction on the persons to whom it could be assigned. The Defendant knew that losses might be claimed by an assignee who was not a substitute funder and/or who has suffered types of loss other than those which a substitute funder might suffer. This meant that it was withing the reasonable contemplation of the Defendant when entering into the collateral warranty that loss might be suffered by an assignee. See [74]-[75].

(4) It was within the defendant's reasonable contemplation as a serious possibility at the time of entering into the collateral warranty that the funder might transfer the building and assign the collateral warranty to an assignee who could carry out the repairs and/or that the funder would release the security and assign the warranty to the borrower who would carry out the repairs. At the time of making the collateral warranty it was therefore within the reasonable contemplation of the Defendant as a serious possibility that an assignee of the collateral warranty would incur the cost of repairs arising from the Defendant's breach of its terms. See [76]-[77].

(5) Even if the test of foreseeability had to be applied to the original beneficiary (AIB), it would have been within the reasonable contemplation of the Defendant as a serious possibility that the borrower would default and that AIB would take possession and incur the repair costs itself: see paras 78 and 79.

(6) Accordingly loss in the form of the cost of repairs incurred by the Claimant was within the reasonable contemplation of the Defendant as being a serious possibility at the time that the collateral warranty was concluded.

(7) On its proper interpretation, Clause 12.3 also prevented BBRC arguing that the loss suffered was too remote in the sense of being different in kind from the loss foreseeable to AIB:

"82. Assuming that loss in the form of the cost of repairs were otherwise too remote, the question then is whether in any event the Defendant is precluded from relying upon such a contention by reason of … Clause 12.3 …

85. … Clause 12.3 … addresses the position where an assignee of the Collateral Warranty is making a claim against the Defendant e.g. in the present case, the Claimant. Secondly, Clause 12.3 is dealing only with loss or damage resulting from breach of the Deed i.e. it assumes that the breach of the Warranty has caused the loss claimed.

86. Clause 12.3 … provides that the Defendant is precluded from relying on any one of three distinct reasons for contending that the assignee cannot recover, namely:

(1) because the claimant/assignee is an assignee only and not the original party/the funder (i.e. the wording from "*by reason of the fact that …*") (part one);

(2) because the funder/assignor did not suffer that loss, and only the assignee has suffered the loss (i.e. the wording from the first "*or because …*) (part two);

(3) because the loss suffered by the assignee is "different" to the loss which would have been suffered by the funder/assignor (i.e. the wording from the second "*or because*") (part three).

Orchard Plaza (cont.)

- 87. I approach this issue as a matter of construction … Part (1) posits a situation where the loss resulting from breach has been suffered by the assignor/original party but not by the assignee e.g. where perhaps the assignment takes place after the loss has been suffered by the assignor or the assignment of the right of action under the Collateral Warranty. Part (2) covers the situation where the loss in question is suffered only by the assignee and not by the funder/assignor.
- 88. Part (3) addresses the comparative position as between the assignee's loss and the (hypothetical loss) which the assignor *would have* suffered, had there been no assignment. The question is whether the loss claimed by the assignee is "different" to that which would have been suffered by the assignee absent the assignment.

89. … The loss suffered by the assignee may be "different" to the assignor's "hypothetical" loss in "amount" or it may be "different" in "kind or type". As a matter of construction, there is no reason why part (3) should be limited to "difference in amount".

90. I turn to the Defendant's contention that the effect and purpose of Clause 12.3 is to prevent the Defendant from relying on the "no loss" principle, in factual circumstances where (and because) *the Larkstore gloss* cannot apply. The Defendant contends that, as made clear in *Larkstore* itself, the principle there set out does not exclude the application of the rules of remoteness and so, Clause 12.3 itself, is not intended to exclude the application of those rules of remoteness.

96. In my judgment, the true analysis of Clause 12.3 is as follows:

(1) *Dawson* establishes the rule that an assignee cannot recover loss of a kind which the assignor could not have suffered (had there been no assignment).

(2) But, in this case, Clause 12.3 expressly reverses that rule and says that the assignee *can* recover loss of a kind which the assignor could or would not have suffered. Indeed the Defendant positively asserts that this is the effect and purpose of Clause 12.3.

(3) Can it then be said that, although the assignor could or would not have suffered that kind of loss and, by reason of Clause 12.3, that is not a bar to the assignee's claim, nevertheless the assignee still cannot recover that loss because at the time of the Warranty that kind of loss suffered by the assignor was *not in the reasonable contemplation* of the Defendant?

(4) In my judgment, the answer to this question is No. If remoteness (i.e. reasonable contemplation of the kind of loss) survived Clause 12.3, it would wholly undermine part (3) of the clause. It would apply in every case where the assignee's loss was "different in kind". That is because, if the kind of loss suffered by the assignee would never have been suffered by the assignor (being the underlying factual basis for the application of part (3)), then surely it would or could not have been within the reasonable contemplation of the defendant that it might be suffered.

PROCEDURE - ADJUDICATION

Abbey Healthcare v Simply Construct [2022] EWCA Civ 823, [2022] BLR 433

- By a JCT DB contract dated 29 June 2015 Sapphire engaged Simply to build a care home. The contract provided for Sapphire to novate the contract by way of an agreed form to Toppan, the freeholder. The contract made provision for the grant of collateral warranties to the Purchaser and the Tenant. Toppan became the Purchaser and Abbey became the Tenant.
- On 11 May 2015 Simply commenced the works. On 15 October 2015 Simply executed a collateral warranty in favour of Toppan. On 10 October 2016 practical completion was achieved. On 13 June 2017 Sapphire and Simply entered into a settlement agreement which required Simply, Sapphire and Toppan to execute a deed of novation in an agreed form.
- By the novation agreement dated 14 June 2017 Toppan became the "substitute employer". On 12 August 2017 Toppan granted a 21 year lease of the care home to Abbey.

Abbey Healthcare v Simply Construct (cont)

- In August 2018 Toppan discovered fire-safety defects in the care home. Simply did not remedy the defects and so Toppan engaged a third party to do so. The remedial works started in September 2019 and were completed in February 2020. Abbey paid for some of the works.
- On 8 June 2020 Toppan requested Simply to execute the collateral warranty in favour of Abbey. It was executed on 23 October 2020.
- Abbey commenced an adjudication. Simply objected that the collateral warranty was not a construction contract. The adjudicator decided he had jurisdiction. The judge at first instance decided that the collateral warranty was not a construction contract and refused to enforce the adjudicator's decision. Abbey appealed.

Section 104(1) of the 1996 Act

Section 104(1) of the 1996 Act.

(1) In this Part a "construction contract" means an agreement with a person for any of the following –

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

4. SKILL AND CARE

4.1 The Contractor warrants that:

(a) the Contractor has performed and will continue to perform diligently its obligations under the Contract;

(b) in carrying out and completing the Works the Contractor has exercised and will continue to exercise all reasonable skill and care and diligence to be expected of a properly qualified competent and experienced contractor …

(c) in carrying out and completing the Works the Contractor has exercised and will continue to exercise all reasonable skill and care and diligence to be expected of a prudent, experienced and qualified architect …

The promise was therefore framed as a warranty – the contractor “warrants”.

Abbey Healthcare – the decision of Coulson LJ and Peter Jackson LJ

Coulson LJ and Jackson LJ held that an agreement "for" the carrying out of construction operations under section 104(1) of the 1996 Act is one the purpose or object of which is the carrying out of construction operations and that it is not confined to a traditional building contract: a broad definition is to be applied. The Abbey Collateral Warranty related to both past and future performance of the construction operations and was an agreement for the carrying out of construction operations.

The dissenting judgment of Stuart Smith LJ in *Abbey Healthcare v Simply Construct*

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107. The first and most important word to consider is the transitive verb ‘warrants’: the contractor ‘warrants’ that …. . The normal meaning of the verb to warrant is to provide a promise about a fact, circumstance or outcome. This is reflected in dictionary definitions which typically involve a person providing a promise or a guarantee that something is true and making themselves answerable if it is not.

The dissenting judgment of Stuart Smith LJ (cont.)

109. A person could warrant a fact, circumstance or outcome that is already the subject of a direct obligation between them and the person to whom the warranty is given; but typically, and particularly in the context of building operations and cases such as the present, the beneficiary wants the contractor to warrant the fact , circumstance or outcome precisely because the beneficiary is not a party to the building contract and is owed no direct obligations by the contractor. If the warranted fact, circumstance or outcome turns out not to be true or achieved, the person who warranted it will be liable for breach of their promise in warranting it. A liability for breach of the warranty is conceptually different from a liability for breach of direct obligations owed in respect of the underlying state of affairs: it rests simply upon the fact that the warranting person's promise is found to be broken.

The dissenting judgment of Stuart Smith LJ (cont.)

110. Thus it may be said that the object of A warranting to B that they have performed or will perform the obligations that they owe to C is to give B a right of action without making them a party to the direct obligations owed by A to C …

111. That said, I accept that the use of the transitive verb warrant or the noun warranty within a clause or agreement does not preclude the possibility that the overall effect of the clause of agreement is to give rise to direct obligations. It is therefore necessary to focus intently upon the precise terms of what Simply Construct warranted to be true.

The dissenting judgment of Stuart Smith LJ (cont.)

Stuart Smith LJ decided that a contract is only a construction contract if it is one under which one party undertakes a direct contractual obligation to the other party to carry out construction operations.

In his judgment the Abbey collateral warranty was not a construction contract because the contractor Simply did not undertake a direct contractual obligation to the beneficiary Abbey to carry out the construction operations.

The Supreme Court gave Simply permission to appeal. The appeal is due to be heard in January 2024.

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