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Supreme Court: collateral warranties are not (generally) construction contracts

In the case of *Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP* (formerly Simply Construct (UK) LLP), the Supreme Court has unanimously found that (most) collateral warranties are not construction contracts within the meaning of the Housing Grants, Construction and Regeneration Act 1996 (the 'Construction Act').

For more information about collateral warranties, read our Back-to-basics article.

The question of whether collateral warranties are construction contracts under the Construction Act was first substantially raised in the 2013 case of *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd*, where the Technology and Construction Court found that a collateral warranty could be subject to the Construction Act – and therefore the parties to the collateral warranty had the statutory right to refer disputes to adjudication at any point.

Under the Construction Act, a construction contract is an agreement with a person for any of the following:

1. the carrying out of construction operations;
2. arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
3. providing his own labour, or the labour of others, for the carrying out of construction operations.

The Supreme Court has now found that a typical collateral warranty does not fulfil these criteria; a typical collateral warranty is simply a promise on the part of the warrantor (such as a contractor or professional

consultant) for the benefit of a third party who has an interest in the construction project such as a purchaser, funder or tenant that they have performed, and will continue to perform, obligations owed to another under the underlying agreement (eg. a building contract or professional appointment).

In this recent case, the contractor had not promised to do anything in the collateral warranty that they had not already promised to do for the employer under the building contract. The Supreme Court ruled that unless the collateral warranty contains a separate obligation to perform a further obligation that is not contained within the underlying agreement, the collateral warranty is not an agreement for the carrying out of construction operations.

So, what does this mean in practice?

One of the key provisions that the Construction Act introduced was the statutory right for either party to a construction contract to refer disputes to adjudication at any point. Adjudication is a popular, quick and (relatively) cheap form of alternative dispute resolution which parties to a collateral warranty will no longer be entitled to initiate. The exception to this is if the collateral warranty contains an express provision allowing the parties to refer disputes to adjudication.

The Supreme Court ruling is significant and will have broad implications for the construction industry. It draws a distinction between collateral warranties which do not expand upon obligations in the underlying agreement and those that include additional obligations owed to the beneficiary under the collateral warranty. What the ruling means in practice is that most collateral warranties will not be considered to be construction contracts and there will not therefore be a statutory right to adjudicate a dispute. The other side of the coin is that if a beneficiary wishes to benefit from a right to refer disputes to adjudication, then this must be expressly set out in the collateral warranty.

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