

## **Collateral Warranties: Net contribution Clauses**

***By Peter Sheridan***

A net contribution clause applies where the party providing the collateral warranty (the warrantor) is not the only party liable to the party benefiting from the warranty (the beneficiary). Where there are other parties who are also liable to the beneficiary, the net contribution clause limits the liability of the warrantor to paying its share of the loss suffered by the beneficiary, on the assumption that the other parties who are liable to the beneficiary have also paid their share. For example, where a main contractor and a sub-contractor are liable to a beneficiary, the main contractor may be 70% responsible and the sub-contractor 30% responsible for the beneficiary's loss; the sub-contractor providing a collateral warranty with a net contribution clause would pay only 30% of the loss.

A net contribution clause reverses the position at law, which is that the beneficiary may claim the whole of its loss from any party who is liable to the beneficiary; that party may then seek a contribution from other parties who are also liable to the beneficiary.

A net contribution clause places risk and the costs burden of pursuing multiple parties on the beneficiary. In addition the beneficiary carries the risk of the insolvency of any party who is liable in law but unable to pay. From the point of view of the warrantor, the net contribution clause is welcome as it transfers these risks to the beneficiary.

A relevant consideration is insurance; a consultant with professional indemnity insurance is on the face of it well placed to shoulder the burden of paying the beneficiary in full and then recovering a contribution from others. In addition, the consultant is, in the circumstances under discussion, to blame at least in part for the loss, whereas the beneficiary is an innocent party.

When considering the effect of a net contribution, it is advisable to be clear and precise on the question of what parties have joint responsibility to the beneficiary in respect of what obligations. The case law indicates that disputes could be avoided by spelling this out. Particular care is needed where there are consultants or a mixture of consultants and contractors with potential shared responsibility.

In *West v Ian Finlay & Associates* (2014), the architect's liability was limited to that which was reasonable in relation to the responsibility of other consultants, contractors and specialists appointed by the beneficiary. The parties litigated over whether the reference to "other contractors" included the main contractor (the Court of Appeal finding it did).

In *Royal Bank of Scotland v Halcrow Waterman* (2013), the net contribution clause provided that a consultant's liability was limited to that proportion of the beneficiary's losses that it was just and equitable for the consultant to pay, on the basis that all other consultants were deemed to have provided undertakings to the beneficiary on no less onerous terms. The parties litigated over whether



the term “other consultants” included the design and build contractor (the court, in Scotland, finding that it did not).

**Peter Sheridan**

psheridan@sheridangold.co.uk

**Sheridan Gold LLP**

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[E info@sheridangold.co.uk](mailto:info@sheridangold.co.uk) | [W www.sheridangold.co.uk](http://www.sheridangold.co.uk)