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Back to the Future: Construction Operations and Collateral Warranties Update

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Introduction

This article is concerned with the question whether a collateral warranty is a construction contract, under which a dispute may be referred to adjudication. That question is answered by an analysis of the terms of the collateral warranty to ascertain whether it is a contract for construction operations.

The writer considered this question previously in relation to the *Parkwood* case,[1] in a previous edition of this journal.[2] After a brief reminder of the *Parkwood* case, in which a collateral warranty was found to be a construction contract, the article proceeds to a consideration of the recent *Toppan Holdings* case,[3] which illustrates the importance of the timing of the execution of collateral warranties.

The *Parkwood* case

The *Parkwood* case concerned a swimming pool and "leisure facility", owned by Cardiff City Council and leased to Orion. Orion engaged Laing O'Rourke Wales and West (LORWW) to design and build the facility. Orion sub-let to Parkwood, a facilities management provider who operated the facility. LORWW provided a collateral warranty by deed to Parkwood.

The question arose whether Parkwood could adjudicate against LORWW in respect of various complaints it had, which in turn raised the question whether the collateral warranty was a construction contract for the carrying out of construction operations.

The collateral warranty included the following provisions.

> "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;
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> 3. in the design of Works or any part of the Works, in so far as the Contractor is responsible for such design under the Contract, it has

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[1] *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC).

[2]

[3] *Toppan Holdings Ltd v Simply Construct (UK) LLP* [2021] WLR(D) 436, [2021] EWHC 2110 (TCC), 197 Con LR 241, [2021] Bus LR 1357.

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exercised and will continue to exercise all reasonable skill and care to be expected of an architect or, as the case may be, other appropriate professional designer…

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

5. all materials and goods recommended or selected or used by or on behalf of the Contractor shall be in accordance with good building practice and the relevant provisions of British Standard documents to the extent required by the Contract;

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."

The relevant provision of the Housing Grants, Construction and Regeneration Act 1996 ("the HGCR Act") is s. 104(1), which states:

"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…"

Akenhead J found that this collateral warranty was a construction contract for the carrying out of construction operations, citing reasons including the following.

"(b) The Recital itself sets out that the underlying construction contract (the "Contract") was 'for the design, carrying out and completion of the construction of a pool development'. There can be little or no dispute that the Contract was a construction contract for the purposes of the HGCRA.

(c) That wording is replicated in clause 1 of the collateral warranty which relates expressly to carrying out and completing the Works.

(d) Clause 1 contains express wording whereby LORWW 'warrants, acknowledges and undertakes'. One would assume that the parties understood that these three verbs, whilst intended to be mutually complementary, have different meanings. A warranty often relates to a state of affairs (past or future); a warranty relating to a motor car will often be to the effect that it is fit for purpose. An acknowledgment usually seeks to confirm something. An undertaking often involves an obligation to do something. It is

difficult to say that the parties simply meant that these three words were absolutely synonymous.

(e) This is reflected in the following sub-paragraphs which relate to the past as well as to the future. This recognised the fact that the Works most obviously relates to the fact that the Contractor had already carried out a significant part of the Works and the design. The undertaking primarily goes to the execution and completion of the remaining works. The warranty goes to the work and design both already carried out or provided and yet to be carried out and provided.

(f) LORWW is clearly in clause 1 (and in particular sub-clause 1) undertaking that it will carry out and complete the Works in accordance with the contract between Orion and LORWW. That undertaking however is being given by LORWW to Parkwood. Thus, LORWW is undertaking to Parkwood that, in the execution and completion of the Works, it will comply with that Contract. Most obviously, that relates to the quality and completeness of the Works…

(g) The collateral warranty, being contractual in effect, will give rise to the ordinary contractual remedies. Thus, if LORWW completes the Works but not in compliance with, say, the Employer's Requirements or the standards therein specified, there will be an entitlement for Parkwood to claim for damages because there will be a breach of contract. Similarly, there could be remedies if LORWW had repudiated the contract [with Orion] because it will then have failed to complete the Works at all…

(h) Although clause 10 expressly excludes liability for delay in progress and completion, it does not exclude liability otherwise for non-completion…This is not a contract which is simply limited to the quality of work, design and materials.

(i) Clause 1(1) is not merely warranting or guaranteeing a past state of affairs. It is providing an undertaking that LORWW will actually carry out and complete the Works. Completion of the Works is not only important so far as time is concerned; it is also important because LORWW is undertaking that the Works will be completed to a standard, quality and state of completeness called for by the Contract.

(j) Thus, the collateral warranty is clearly one 'for the carrying out of construction operations by others', namely by LORWW.

(k) The remainder of clause 1 is consistent with and complementary of this view. Sub-clause 3 contains an important prospective element (LORWW 'will continue to exercise' care and skill). Similarly sub-clauses 4, 5, 6 and 7 have such an element.

(l) The fact that proviso to clause 1 makes it clear that Parkwood is not a joint employer under the Contract is not to the point because the purpose of the

> proviso is to provide LORWW with all the defences which would be available to LORWW under the Contract. That simply relates to the 'deal' which was done. It is in any event partly balanced by clause 3."

The primary finding was that the warranty contained LORWW's express agreement with Parkwood to carry out construction work; therefore it would seem that s.104(1)(a) of the HGCR Act was engaged. Of central importance to that finding, as the writer noted in the previous article on this topic, was the futurity of the performance obligations at sub-paragraphs 1, 3, 4 5, 6 and 7 of paragraph 1 of the collateral warranty. LORWW was undertaking to Parkwood that it would in the future carry out and complete the works, or such of them not already carried out. The position would have been different if LORWW were merely warranting work already undertaken (as with a car warranty); the warranty would not then have been a construction contract.

The judge reverted to the future performance point after his points (a) to (l), quoted from above, stating:

> "It does not follow from the above that all collateral warranties given in connection with all construction developments will be construction contracts under the Act. One needs primarily to determine in the light of the wording and of the relevant factual background each such warranty to see whether, properly construed, it is such a construction contract for the carrying out of construction operations. A very strong pointer to that end will be whether or not the relevant contractor is undertaking to the beneficiary of the warranty to carry out such operations. A pointer against may be that all the works are completed and that the contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard."[4]

The *Toppan* case

The futurity of the performance obligations in the collateral warranty in the *Parkwood* case was an important factor distinguishing the collateral warranty from a product warranty such as is provided with a new car. That factor was also significant in the recent *Toppan* case.

Sapphire Building Services Limited ("Sapphire") was the Employer and freehold owner of a care home and Toppan Holdings Limited ("Toppan") the Contractor under a JCT contract. Sapphire novated the building contract to Toppan. Abbey Healthcare (Mill Hill) Limited ("Abbey") was the tenant and operator of the care home pursuant to a lease from Toppan to Abbey. There was also a collateral warranty from Simply to Toppan and Abbey.

Toppan and Abbey were successful claimants against Simply in two separate adjudications before the same adjudicator, proceeding in parallel (the "Toppan adjudication" and the "Abbey adjudication"). The disputes concerned fire safety defects at the care home. Toppan and Abbey were then the claimants in court seeking to enforce the two decisions of the adjudicator against Simply. Of relevance to this article was Abbey's claim based on the collateral warranty.

[4] *Parkwood*, above, at [28].

In the Abbey adjudication, Simply took the jurisdictional objection, which it maintained in court, that the collateral warranty was not a construction contract.

The relevant factual background to the collateral warranty identified by Judge Bowdery QC was that it was entered into in October 2020, which was some four years after practical completion of the original works. It was also more than three years after a settlement agreement between Sapphire and Simply, which settled matters between them other than Simply's liability for latent defects. It was also some eight months after remedial works by another contractor to the fire safety defects, the only latent defects discovered after the settlement agreement, had achieved practical completion.

In addition to considering the *Parkwood* case, Judge Bowdery QC quoted the following passage from Coulson on Construction Adjudication relating to that case:

> "…Parkwood issued a Part 8 claim seeking a declaration that the collateral warranty provided by the contractor was a construction contract for the purposes of the 1996 Act. Akenhead J noted at paragraph 20 of his judgment that there no authority for the proposition that contracts such as the collateral warranty in that case were construction contracts for the purposes of Part II of the 1996 Act. He warned against adopting a peculiarly syntactical analysis of what the Act meant when it was clear that parliament intended a wide definition by using the expression 'an agreement for…the carrying out of construction operations.' He had little hesitation in concluding that the collateral warranty in that case was a construction contract for the purposes of the 1996 Act. That was particularly because the underlying construction contract was 'for the design, carrying out and completion of the construction of a pool development'; that wording was replicated expressly in the collateral warranty; and the words that the contractor 'warrants, acknowledges and undertakes' in respect of the works, both carried out and to be carried out, plainly related to the carrying out of construction operations. Although at paragraph 28 of his judgment, the judge noted that it did not follow from his conclusion that all collateral warranties given in connection with all construction developments would be construction contracts under the 1996 Act, it is safe to assume that, on this analysis, because the provision noted above is commonly found in such warranties, they will be so regarded. From a broader perspective, if the underlying contract was a construction contract, it makes commercial common sense for any parasitic warranties to be treated in the same way."[5]

This passage stresses the likelihood of collateral warranties being construction contracts, because of the wording commonly used in warranties. However, it does not identify from the *Parkwood* case the importance of the futurity of the obligations to the judge's analysis that the collateral warranty in that case was a construction contract. This was again a point of significance in the *Toppan* case.

The wording in the *Toppan* case, although not the same as in the *Parkwood* case, was not a problem for Abbey, the tenant asserting the collateral warranty was a construction contract.

[5] Paragraph 2.21, 4th edition, Coulson on Construction Adjudication.

Simply warranted that it had performed and would continue to perform its obligations under the building contract, that in carrying out and completing the works, it had exercised and would continue to exercise reasonable skill, care and diligence and that in carrying out and completing any design, it had exercised and would continue to exercise reasonable skill, care and diligence. These provisions referred to both a past state of affairs and future performance.

The problem for Abbey was the factual background referred to above. Akenhead J had stated in *Parkwood* that a pointer against a collateral warranty being a construction contract "may be that all the works were completed and that the contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard."[6]

Judge Bowdery QC noted that Akenhead J in the *Parkwood* case had seemed much exercised by the timing of the warranty being executed before practical completion so that it partly related to future works.

Judge Bowdery QC accordingly considered that:

(a) where a contractor agrees to carry out uncompleted work in the future that will be a very strong pointer that the collateral warranty is a construction contract and the parties will have a right to adjudicate; and conversely

(b) where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate.[7]

Disassociating himself from the last sentence of the passage quoted above from Coulson on Construction Adjudication, Judge Bowdery QC noted that a "collateral warranty might be parasitic upon a building contract but so would a parent company guarantee. No one would construe a parent company guarantee as a construction contract."[8]

By the time the collateral warranty was executed, it was a warranty of a past state of affairs akin to a manufacturer's product warranty.[9] It would seem the position would have been different if the warranty had been executed at the outset of the construction works or while they were in progress, as it may be thought would have been better practice. There would then have been works remaining to be carried out and the collateral warranty would have been not just as to a past state of affairs but would also have been as to future works.

Judge Bowdery QC found that the collateral warranty was not a construction contract, there was accordingly no right to adjudicate and Abbey's claim for summary judgment failed.[10]

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[6] *Parkwood*, above, at [28].
[7] *Toppan*, above, at [26].
[8] *Toppan*, above, at [28].
[9] See *Toppan* at [30].
[10] Toppan did not have these difficulties and obtained summary judgment. Toppan did not have to rely on the collateral warranty and did not face the jurisdictional objection relevant to this article.

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