

BRIEF UPDATE

FROM THE CONSTRUCTION DIVISION



Collateral warranties – an essential addition?

Once in a while a court case is reported which, although not ground-breaking, confirms the rationale for what clients are doing or, at least are advised to do.

One such case is *Scottish Widows Services Limited v. Kershaw Mechanical Services Limited and Building Design Partnership* (May 2011). This case arose out of the construction of the new corporate head office for the Scottish Widows Fund and Life Assurance Society (the Society) in Edinburgh.

In a complex contractual structure dating back to 1994 there was a developer ECSL who procured the design and construction of the building with provision for collateral warranties to be granted to the owner, purchaser, funder and tenants, as is normal.

The pursuer in the case, Scottish Widows Services Limited (SWS), eventually became the tenant under a sub-lease which had been granted to the Society. There was also a collateral warranty from the architect BDP to the Society which was assigned to SWS.

Defects in the building prevented it from being wind and watertight and SWS as occupier carried out remedial works. The Society then assigned the benefit of the collateral warranty to SWS who sought to recover the costs of the remedial works from the architect BDP (it was not decided whether BDP was in fact negligent and therefore liable for these costs).

The court agreed that such costs were in principle recoverable, but what was interesting in this case was that under the sub-lease neither the Society nor their assignee SWS had any contractual obligation to carry out repairs. Despite this the court ruled that in practical terms they needed to remedy the defects so they could occupy the building and that the lack of an obligation to repair vis-à-vis its landlord was not fatal to its right to SWS' right to recover against the architect.

What is clear is that if SWS had not had the benefit of a collateral warranty it would have had great difficulty in recovering any sums from the architect or other parties who were responsible for the defects.

Whilst some parties to a construction project may see collateral warranties as an unnecessary inconvenience and expense, this case shows that several years down the line from the original design and construction a properly drafted warranty will come into its own and prove to be a vital link in the contractual chain.

Further advice

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