Reports from the courts

Our regular round up of the court cases of most interest to construction from Andrew Croft and Jennifer Webb of Beale & Company focuses on two appeal court rulings; one reversing a decision concerning whether certificates should be regarded as providing warranties; and another underlining the importance of careful drafting of indemnity clauses.

Hunt v Optima (Cambridge) Ltd
[2014] EWCA Civ 714; CA; Maurice Kay, Tomlinson and Christopher Clarke LJJ

This case concerned an appeal of the TCC decision reported in CL vol 24, issue 8.

Optima (Cambridge) Ltd (Optima) was the developer of two blocks of flats in Peterborough. Optima appointed Strutt & Parker (S&P) to carry out inspections and produce certificates to confirm that the work had been constructed to a satisfactory standard (the Certificates). S&P provided the Certificates to the purchasers of the flats, but some of those flats were defective and the inspections had been negligently carried out.

The purchasers brought claims against Optima and S&P. The claims against S&P included tortious claims for negligent misstatement and contractual claims for breach of collateral warranty, as the purchasers argued that the Certificates amounted to contractual warranties.

At first instance S&P argued that a claim for negligent misstatement must necessarily fail as the Certificates were not provided until after the purchasers were bound under a sale agreement (save for two purchasers who were not party to this appeal). As the purchasers had not received the Certificates before they had committed themselves under the sales agreement, there was no reliance by the purchasers on the Certificates, which would be essential for a finding of negligent misstatement. S&P further claimed that the Certificates did not constitute collateral warranties. Akenhead J found S&P liable for negligent misstatement.

The Court of Appeal reversed the TCC decision, holding that S&P was not liable for negligent misstatement as:

‘the claimants cannot have relied on such statements in committing themselves to the agreements to purchase because those statements were not then in existence.’

The purchasers’ argument that reliance was present and that there was an expectation that the purchasers would receive a certificate on completion was not upheld. This argument was not based on anything said by or on behalf of S&P and could only be founded on what the purchasers were told by their own solicitors.

The Court of Appeal further held that the Certificates did not constitute collateral warranties. As the parties to property transactions are normally legally represented, it was not appropriate to look at the terms from a ‘non-legal’ perspective, but from the perspective of someone who understood the difference between representations and warranties: ‘If [S&P] had intended [for the Certificate to be a warranty] it would have been very easy to say so’.

Significance
Consultants issuing certificates can find some comfort in the Court of Appeal’s finding that purchasers who had already bound themselves to the sales agreement before receipt of a certificate could not be found to have relied upon the certificate. Nevertheless, those granting certificates to third parties should take care and avoid express warranty provisions or contractual drafting within the certificates; the risk being that a contractual relationship will be found between the certifier and the third party, in addition to any tortious duty that may

Certificates by the purchasers and the Certificates were not enforceable warranties.

Decision
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exist. The drafting of any such certificate should be carefully reviewed by your legal advisers if necessary.

**Greenwich Millennium Village Ltd v Essex Services Group Plc [2014] EWCA Civ 960; CA; Jackson, Beatson and Gloster LJJ**

This case concerned the appeal by a sub-sub-sub contractor of the first instance decision of the TCC, reported in *CL* vol 25, issue 1. The original claim was brought by Greenwich Millenium Village Ltd (GMVL), the owner of two blocks of flats in Greenwich, against both the designer and installer of the M&E works, Essex Services Group Plc (Essex), and the M&E consulting engineer, Hoare Lea (HL). The claim arose out of a major flood at the flats caused by a ‘water hammer’ in the cold water system resulting in £4.75m damage. There then followed a number of CPR Pt 20 proceedings. This included a claim by Essex against HS Environmental Services Ltd (HSE), the sub-sub-contractor appointed by Essex for the design and installation of the mechanical works. HSE then brought a claim against DG Robson Mechanical Services Ltd (Robson), the labour only sub-sub-sub-contractor and appellant in these appeal proceedings.

Amongst his findings, Coulson J found at first instance that Essex could pass on its full liability to HSE, who could pass on that liability to Robson, relying on the following indemnity clause in Robson’s appointment:

‘The Sub-contractor hereby agrees to indemnify [sic] [HSE] against each and every liability which [HSE] may incur to any other person or persons and further to indemnify [HSE] in respect of any liability, loss, claim or proceedings of whatsoever nature such as shall arise by virtue of the breach or breaches of this Subcontract Agreement . . .’

The judge also made a factual finding:

‘[t]here were workmanship failures on the part of Robson, namely (a) installing the [non-return valve] which ought not have been there and (b) closing the [isolation valve], alternatively failing to open it . . .’

Robson appealed the decision on the basis that, amongst other things, on its true construction and in light of a line of authorities on the interpretation of indemnity clauses, the indemnity clause ‘did not permit recovery [from Robson to HSE] where HSE was itself at fault’; HSE did not detect the workmanship breaches on its inspection. Robson relied upon the ‘Canada Steamship principle’ arising out of *Canada Steamship Lines v King* [1952] AC 192.

**Decision**

The Court of Appeal held that HSE could rely on the indemnity clause, even though ‘Robson’s workmanship breaches were such that HSE ought to have detected them upon making a reasonable inspection.’ The court considered the *Canada Steamship* principle, explained by Devlin LJ in *Walters v Whessoe Ltd* [1968] 2 All ER 816n as follows: ‘It is thought to be so unlikely that one man would agree to indemnify another man for the consequence of that other’s own negligence that he is presumed not to intend to do so unless it is done by express words or by necessary implications.’ As the *Canada Steamship* principle is based on the party’s intentions, Jackson LJ considered the commercial context, including liability provisions in building contracts and insurance cover for building project participants, and found:

‘In the case of a construction contract a failure by the indemnitee to spot defects perpetrated by its contractor or sub-contractor should not ordinarily defeat the operation of an indemnity clause, even if that clause fails expressly to encompass damage caused by the negligence of the indemnitee.’

Whilst HSE ought to have detected Robson’s workmanship breaches on reasonable inspection, HSE was not precluded from recovering under the indemnity in those circumstances, on the basis that parties to building contracts expect indemnities to cover all manner of shortcomings.

**Significance**

This case is significant for those drafting and entering into construction contracts containing indemnities. If the parties to a construction contract intend an indemnity clause to exclude losses where the person to whom it is given has been negligent, this should be expressly stated and should not be assumed. This case suggests that construction related indemnities will be interpreted widely – any intended restrictions should be clearly stated. Providing an indemnity without appropriate exclusions and caveats is a significant risk.

*CL*