Good news for consultants and contractors providing collateral warranties to third parties

In *Swansea Stadium Management Company Ltd v City & County of Swansea & Anor [2018] EWHC 2192 (TCC)*, the TCC has enforced the purpose of a “no greater liability” clause in collateral warranties.


On 4 April 2017 the Beneficiary brought proceedings against Swansea Council and Interserve for alleged defects in the Stadium. Interserve contended that the claims were time barred because they were commenced more than 12 years after 31 March 2005, the date of practical completion. Therefore, Interserve sought summary judgment to strike out the claim for breach of the Collateral Warranty.

The court held that in order to grant the relief sought, it must be satisfied that any cause of action under the Collateral Warranty accrued at practical completion, and practical completion occurred on 31 March 2005.

The Beneficiary argued that practical completion was not achieved on 31 March 2005 as the works were incomplete and defective at that date, and even if practical completion was achieved, it was on the basis that Interserve would remedy the patent defects. Therefore, there was an ongoing obligation to perform the Building Contract.

Interserve contended that the proviso to clause 1 of the Collateral Warranty limited its liability, as it was a clear indication that the parties intended the
Beneficiary to be in the same position as the employer under the Building Contract, and this included the period of limitation.

The proviso under clause 1 of the collateral warranty provided that:

“the Contractor shall have no greater liability under this Agreement than it would have had if the Beneficiary had been named as joint employer with the Employer under the Contract.”

The Beneficiary argued that the proviso was concerned with the nature and scope of obligations giving rise to liability but did not extend to cover the duration of any claim.

O’Farrell J rejected the Beneficiary’s argument and held that although the Collateral Warranty had retrospective effect. The words “had been named as joint employer” is a clear indication that the parties intended the Beneficiary to stand in the shoes of the employer.

It was held that practical completion had occurred on 31 March 2015, as clause 16.1 of the Building Contract stated that that where the employer issues a notice that practical completion has been achieved, practical completion is deemed to have been achieved.

Therefore, liability under the Building Contract needed to be looked at in order to determine limits of liability under the Collateral Warranty. The Building Contract contained an express limitation period of 12 years from practical completion. As a result, liability for defects could not be enforced because the remedy was statute barred.

O’Farrell J granted Interserve summary judgment.

Comment

This case is good news for consultants and contractors providing collateral warranties to third parties. Professional indemnity insurance policies typically exclude cover for collateral warranties which expose the insured to greater or longer lasting liability than the underlying contract. The court’s decision suggests that a “no greater liability” clause can achieve back-to-back liability with the underlying contract.
Collateral warranties often also express that there is “no longer lasting liability” than under the building contract or professional appointment. This wording may no longer be necessary. However, we would suggest that such wording is retained as a precaution. We would also recommend drafting an equivalent rights of defence clause.

However, even with a no greater or longer lasting liability clause and an equivalent rights of defence clause, liability under the collateral warranty will be unlimited if there is no limit of liability included in the underlying contract. Therefore, it is important to check the underlying contract for such a clause to be effective.

It is also important to note the court’s emphasis on the use of “joint employer”. This drafting is sometimes omitted from collateral warranties. Therefore, it is important to ensure that such drafting is included in the collateral warranty.

For further insight on collateral warranties see our recent publication [here](#).

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For further information please contact:

**Will Buckby**  
Partner  
T: +44 (0) 20 7469 0411  
E: w.buckby@beale-law.com

**Ahmed Mian**  
Paralegal  
T: +44 (0) 20 7469 0423  
E: a.mian@beale-law.com