Introduction

In *British Overseas Bank Nominees Limited v Stewart Milne Group Limited* [2019] CSIH 47 the Scottish Inner House overturned the Outer House’s original ruling and held that the limitation period under an underlying contract also applied to a collateral warranty. This brings the Scottish approach in line with that adopted by the English courts in the earlier case of *Swansea Stadium Management Company Ltd v City & County of Swansea and another* [2018] EWHC 2192 (TCC) which held that the limitation period ran from the date of the original building contract, thus giving clarity and certainty as to the scope of the contractor’s liability. Click here to read our previous article. This case will allay any concerns that may have arisen following the first instance decision for those providing collateral warranties.

Facts

In 2008 Stewart Milne Group Limited (“the Contractor”) entered into a contract with Northburn Developments Ltd (“the Employer”) for the design and development of retail development in Inverurie (“the contract”). The contract required the Contractor to provide a collateral warranty to any person who might later acquire an interest in the development as a purchaser or as a tenant. In 2013 the Employer sold the development to British Overseas Bank Nominees Limited (“the Bank”) to whom the Contractor granted the required collateral warranty. The collateral warranty expressly stated that the Contractor “shall have no greater duty [to the Bank] under this Agreement than it would have had if [the Bank] had been named as the employer under the Building Contract”.

and

“shall be entitled in any action or proceedings by [the Bank] to rely on any limitation in the Building Contract and to raise the equivalent rights in defence of liability as it would have against the Employer under the Building Contract”

It subsequently became apparent that the car park on the development suffered from drainage problems, causing severe flooding. The Bank brought an action against the Contractor in 2018, basing its allegations on an investigative report prepared by a consultancy firm in June 2018.

Issues

The issue in dispute was whether the collateral warranty entered into with the Bank by the Contractor incorporated (a) a prescriptive period equivalent to that which applied to the Contractor’s liabilities to the Bank or (b) a new prescriptive period running from the date on which the collateral warranty was granted. In other words, did the collateral warranty kick start an entirely new prescriptive period based on the new contract?

The Outer House, at first instance, held that the Bank’s argument was correct and that a new prescriptive period began from the date on which the collateral warranty was
entered into. As such, the Bank was not time-barred from bringing the claim. The Contractor appealed the decision.

Findings

The Inner House allowed the Contractor's appeal.

In reaching its decision, the Inner House considered the purpose of a collateral warranty. It took into account the following points:

- Collateral warranties were used following the decision in Murphy v Brentwood DC [1991] 1 A.C as a mechanism to give a third party who had suffered a loss (e.g. a purchaser or tenant) a right of action against the contract/design team on the project.

- It follows that any rights granted by a collateral warranty should be equivalent to the rights enjoyed by the original employer under the contract. The warranty should not grant the purchaser any greater rights.

- The drafting of the collateral warranty, which included a ‘no greater liability’ and ‘equivalent rights of defence’ clauses, referred to above, clearly indicates that the Contractor’s duties to the Bank were to be restricted to the duties incumbent on the Contractor under the original contract with the Employer. There was a clear intention to achieve equivalence.

- The collateral warranty should therefore be subject to the same time bar as applied to the original building contract.

- Accordingly, the effect of the collateral warranty was to incorporate the same prescriptive period to any claim by the Bank as would have applied to the Employer, had it chosen to bring a claim.

Conclusion

Any claim by the Bank became time barred, at the very latest, five years after the consultancy report in which fault for the drainage problem was first attributed to the Contractor. This was in May 2013. As such, the Bank was time barred from claiming against the Contractor.

Comment

This decision by the Scottish Inner House allays concerns for those providing collateral warranties. It clarifies that a no greater liability clause and an equivalent rights of defence clause will prevent a claim being brought outside of the original limitation period under the underlying contract. In reaching this decision, the Inner House took a broader and longer term view of collateral warranties.

Although as a Scottish decision this case is not binding on the English courts, it may be taken into account in English proceedings. The decision suggests that the Scottish position is now similar to the approach adopted by the English courts in the Swansea case and offers certainty to all parties involved in construction projects. Parties are advised to check the terms of collateral warranties and ensure they contain ‘no greater liability’ and ‘equivalent rights of defence’ clauses.

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