



LEGAL BRIEFING

Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd [2013] EWHC 2665 (TCC), Mr Justice Akenhead

The Facts

Parkwood Leisure Ltd ("Parkwood") provides facilities management services in respect of a number of PFI projects, one of which is the Cardiff International Pool, a swimming and leisure facility. Cardiff City Council ("the Council") owns the facility and let it to Orion Land and Leisure (Cardiff) Ltd ("Orion") on a 25 year lease. Orion sub-let the facility to Parkwood on a 10 year lease. Parkwood also operates the facility for Orion and the Council.

By a building contract dated 7 April 2006, Orion engaged Laing O'Rourke Wales and West ("LOR") to design and construct the facility.

On 6 December 2007 and before the works were completed, LOR entered into a collateral warranty in favour of Parkwood.

The works reached practical completion in 2008. Shortly after being opened to the public, the facility suffered a number of problems with the air handling units which led to excessive humidity.

Parkwood then sought to enforce its rights under the collateral warranty to recover the costs of the remedial works and other losses incurred as a result of the problems with the air handling units.

The Issues

Parkwood sought a declaration from the Court that the collateral warranty amounted to a construction contract for the carrying out of construction operations within the meaning of the Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act"). This, in turn, would allow Parkside to refer any dispute under the collateral warranty to adjudication.

The Decision

The collateral warranty contained a number of provisions which many in the industry will be familiar with. These included:

"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;*

...

3 *in the design of the Works or any part of the Works, insofar as the Contractor is responsible for such design under the Contract, it has 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...*

...

6 *all workmanship, manufacture and fabrication shall be in accordance with the Contract;*

7 *it has complied and will continue to comply with [its obligation to carry out the Works regularly and diligently]*

...

10. *The Contractor shall have no liability under this Deed or at all for and in respect of any delay in the progress and/or completion of the Works or any part of them.*"

Mr Justice Akenhead considered section 104 of the Construction Act (which defines a "construction contract") and had little hesitation in finding that the reference to a "contract" means a contract under English law, however formed (for example, simple, in writing, oral or under seal). He then said that reference must be made to the contract to decide whether it is a contract for the carrying out of "construction operations".

Mr Justice Akenhead concluded that the collateral warranty was a construction contract for the carrying out of construction operations, primarily because the collateral warranty included several provisions indicating that the contractor's obligations were continuing, encompassing both work already carried out and work yet to be carried out. For example:

- (i) Clause 1 contains the wording "warrants, acknowledges and undertakes". The word "warrants" often relates to a state of affairs past or future and an "undertaking" often involves an obligation to do something.
- (ii) The wording in the remainder of clause 1 relates to the past, as well as the future, which is also recognised in the fact that at the time the collateral warranty was entered into the works had not been completed. The reference to "undertakes" primarily goes to the carrying out and completion of the remaining works.

Mr Justice Akenhead went on to add that not all collateral warranties given in connection with building projects would be construction contracts under the Construction Act. However, a "very strong pointer" in favour of a collateral warranty being a construction contract would be an undertaking by the contractor to carry out the work. A "pointer against" would be that the works are completed and the contractor has simply warranted that the works have been constructed in accordance with the relevant contract.

Commentary

A typical project can involve numerous collateral warranties being given from both the main contractors and sub-contractors in favour of building owners, funders and occupiers. There can be significant advantages for the beneficiaries if they can refer disputes to adjudication. This decision may lead to contractors and sub-contractors trying to limit the number of warranties being given.

Even if contractors and sub-contractors are unable to limit the number of warranties being given, by careful consideration of the wording in those warranties, they may be able to limit the application of this decision. Contractors may want to see warranties drafted along the lines of the JCT Purchaser/Tenant Warranty which does not contain an undertaking to carry out the work, but instead is limited to the work complying with the main contract "with effect from practical completion".

David Bebb
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