



LEGAL BRIEFING

Scottish Widows Services Ltd v Building Design Partnership

[2011] ScotCS CSIH 35, 20 May 2011, Lord Eassie

The Facts

This is a decision of the Scottish courts. In 1994 Scottish Widows Property Management Ltd granted a lease for a plot of land to a developer. A further company, Edinburgh Construction Services Ltd ("ECSL"), appointed an architect, BDP. The terms of the appointment obliged BDP to give collateral warranties to various third parties.

The developer assigned the benefit of the lease to another Scottish Widows company, Port Hamilton. Port Hamilton later granted a sub-lease to a further Scottish Widows company, who at the same time assigned their right in the sub-lease to Scottish Widows Services Ltd ("Scottish Services"), who occupied the building. Scottish Services was also assigned the benefit of a collateral warranty that BDP had given.

Defects were found in the completed building. Scottish Services carried out the necessary remedial works, and they attempted to claim its losses back from BDP under the collateral warranty. BDP had submitted in the lower court that as Scottish Services did not have a repairing obligation under the sub-lease, BDP could not be liable for the costs incurred by Scottish Services. Only the building owner could recover such losses. Further, BDP submitted that the collateral warranty itself restricted recoverability to the building owner, and to limited third parties who sustained injury from a defect. The lower court Judge held that Scottish Services had, in fact, incurred a loss through a practical need to remedy the defects, and had a contractual right to recover this loss under the assigned benefit of the contractual warranty.

BDP appealed this finding, based on the same arguments submitted in the lower court.

The Issues

- (i) Was Scottish Services able to recover even though it did not have a contractual duty to remedy the defects? and
- (ii) Did the terms of the collateral warranty preclude Scottish Services from recovering for the cost of remedying defects in the building itself?

The Decision

Whether there was a contractual right or not, Scottish Services had a practical need to remedy the defects to the building, and it incurred a loss in doing so.

The collateral warranty, which had been assigned to Scottish Services, gave a straightforward contractual right that in the event that BDP breached its terms, then it would be liable for certain losses, of which the cost of repair was one. The terms of the warranty expressly envisaged that Scottish Services, as occupier of the building, could incur financial liabilities as a consequence of the need to rectify defects caused by failures in the design and/or construction of the building.

Comment

This is another case from the Scottish courts regarding collateral warranties (see also *Langstane Housing Association Ltd v Riverside Construction Aberdeen Ltd* [2009] ScotCS CSOH 52). Cases on collateral warranties are extremely rare and, whilst this is a Scottish case and not binding on the English courts, it provides helpful guidance on the enforcement of the commercial intention behind collateral warranties, and, implicitly, third party rights. It also demonstrates the importance of securing collateral warranties or third party rights in commercial developments, as it is common that the party who commissions the development of a building, and engages the construction team, will never occupy it.

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