



Collateral Warranties: Do they work?

The recent court judgement in *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd & Ors* and *Scottish Widows Services Ltd v Kershaw Mechanical Services Ltd & Ors* has highlighted the effectiveness of properly drafted Collateral Warranties.

Why are Collateral Warranties used?

- They are used to give third parties who do not otherwise have a contractual relationship a right to sue a party when loss occurs.

Why is this judgement important?

It is important because it addresses a number of issues on which there has been little previous judicial authority. It provides the following guidance:

- Collateral Warranties must be interpreted having regard to the parties' commercial intentions, namely to allow the party who suffers a loss to have a right of action against any contractor or consultant who has provided defective work.
- A physical defect in a building is itself the primary loss resulting from defective performance by contractors or consultants.
- A physical defect will, however, have economic consequences which may fall on a number of parties, the main one being the cost of repair.
- The liability for repair is also a loss, and a party incurring such a loss can recover the loss through the contractual link created by a Collateral Warranty. The true measure of the loss is the cost of repairs.
- It is not necessary for the party making the claim to have an obligation to carry out the repairs, for example under a lease or sublease - what is necessary is that repairs have been carried out at the expense of the beneficiary of the Collateral Warranty, or their assignee, to give rise to the claim.
- For joint and several liability to be established, the critical issue is whether the breach of contract contributed to a single loss sustained by the Claimant. It is immaterial that each party sued had a separate contract.
- The Judge refers to net contribution clauses in a way which suggests the Courts will give effect to them.
- A consultant might have a liability to a beneficiary (or to its original client), for failing to appoint a specialist sub-consultant, when it did not have the in-house expertise to fulfil a function required of it under its professional appointment.

If you would like any further information on this Bulletin, or any other Construction & Engineering issues, please contact

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This Bulletin is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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