

Insight: Construction

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New Court Ruling Permits Adjudication Claims under a Collateral Warranty

For decades, contractors and consultants have been giving collateral warranties to relevant third parties on UK construction projects. However, in a recent unexpected development, in the case of *Parkwood Leisure Limited v Laing O'Rourke Wales and West Limited*,¹ Mr. Justice Akenhead has ruled that a collateral warranty may constitute a "construction contract" under the Housing Grants Construction and Regeneration Act 1996 ("the Construction Act") and, as a result, the beneficiary may be entitled to bring adjudication claims under the collateral warranty.

The Decision

Mr. Justice Akenhead concluded that the collateral warranty in question was "*a construction contract for the carrying out of construction operations by others*" within the meaning of the Construction Act. He reasoned that the Construction Act was widely drafted and that there was nothing to suggest that collateral warranties should be excluded. In considering the wording of the collateral warranty, he placed importance on the direct link between the collateral warranty and the underlying contract and, crucially, the fact that there were on-going obligations for the contractor to undertake future works. The Judge took care to emphasize that not all collateral warranties will be construed as construction contracts under the Construction Act; it will depend on the particular wording and interpretation of the collateral warranty in question. In particular, it appears that a strong indicator will be whether the contractor / consultant undertakes to carry out future works (as opposed to warranting only that past works / services have been carried out in accordance with the underlying contract / appointment).

Implications of the Decision

The decision in *Parkwood* potentially provides parties to a collateral warranty with the right to bring claims via adjudication, which is a much quicker and cheaper form of dispute resolution than full-scale litigation or arbitration proceedings. As a result, this will expose the contractor / consultant to a greater risk of claims than had been expected prior to this Court decision. Conversely, beneficiaries of collateral warranties (i.e. tenants, purchasers, and funders) may now find it quicker and easier to bring claims against construction companies for defects etc. From either perspective, the parties' positions under collateral warranties issued to date may now require re-examination in light of this decision.



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¹ [2013] EWHC 2665 (TCC)

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Going forward, subject to any appeal which may be made, it is anticipated that contractors / consultants (and industry bodies, such as the JCT²) will look to explore whether there are ways to draft collateral warranties in such a way that they cannot be construed as falling within the Construction Act. Alternatively, this decision may motivate the industry to move away from collateral warranties entirely and place increased reliance on the Contracts (Rights of Third Parties) Act 1999.³ Applying this alternate approach, it would seem clear that the third party (tenant, purchaser or funder) would not be regarded as a party to the contract and, therefore, the Construction Act would not be applicable to the third party rights vested in him – i.e. no adjudication claims. That may be one approach that could be used if the parties want to return to the perceived *status quo*.

² The writer, Paul Cowan, is a long-standing member of the JCT Council.

³ For many years, the JCT and others have put forward approaches that would use the Contracts (Rights of Third Parties) Act 1999 to deliver the same rights as had been traditionally provided by collateral warranties, but take-up to date appears to have been quite limited.