



## **Abbey Healthcare (Mill Hill) v Simply Construct (UK) LLP - Is a Collateral Warranty a 'Construction Contract' under the Housing Grants Construction and Regeneration Act 1996?**



### **INTRODUCTION**

In *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2022] EWCA Civ 823 (21 June 2022), the Court of Appeal overturned the judgment in *Toppan Holdings Ltd and another v Simply Construct (UK) LLP* [2021] EWHC 2110 (TCC), finding that the Collateral Warranty could be a “construction contract” in accordance with section 104(1) of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996), which gave the parties a right to adjudicate.

### **THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996**

Section 104(1) of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”) defines a “construction contract” as:

***“an agreement with a person for any of the following (a) the carrying out of construction operations; (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise; (c) providing his own labour, or the labour of others, for the carrying out of construction operations.”***

If a contract contains adjudication clauses (such as those contained in JCT and NEC standard forms of contract), the parties are contractually bound to follow the procedures in the contract. However, if a contract does not contain adjudication provisions, but is a “construction contract” the mandatory statutory adjudication provisions under the Act apply.

### **TOPPAN HOLDINGS LTA AND ANOTHER V SIMPLY CONSTRUCT (UK) LLP [2021] EWHC 2110 (TCC)**

By a JCT Design and Build Contract dated 29 June 2015 (“**the Building Contract**”), Simply Construct (UK) LLP (“**Simply**”) were contracted by Sapphire Building Services Limited (“**Sapphire**”) to design

and construct Aarandale Manor ("**the Care Home**"). The Building Contract included obligations on Simply to:

- a. Carry out and complete the works in a proper and workmanlike manner and in compliance with the contract documents.
- b. There were express adjudication provisions.
- c. Sapphire was entitled to novate the Building Contract to the freeholder, Toppan Holdings Limited ("**Toppan**").
- d. In relation to collateral warranties, Toppan were also identified as a potential beneficiary of a collateral warranty as were Abbey Healthcare (Mill Hill) Limited ("**Abbey**") who were to be the ultimate tenant of the Care Home.

On 11 May 2015, Simply commenced building works.

On 15 October 2015, Simply executed a collateral warranty in favour of Toppan in accordance with their obligation to do so under the Building Contract.

On 10 October 2016, practical completion of the Care Home took place.

On 14 June 2017, Sapphire novated its rights and obligations under the Building Contract to Toppan Holdings Limited ("**Toppan**") on 14 June 2017.

On 12 August 2017, Toppan granted a 21-year lease of the Care Home to Abbey.

In August 2018, various fire safety defects were identified at the Care Home.

By 25 September 2019, remedial works undertaken by a third party engaged by Toppan were practically complete.

The Building Contract required Simply to execute a Collateral Warranty ("**the Collateral Warranty**") in favour of the Abbey. However, that had never happened.

On 23 October 2020, a Collateral Warranty was executed between Simply, Abbey and Toppan. The Collateral Warranty stated, amongst other things, that:

*"The Contractor warrants that (a) the Contractor has performed and will continue to perform diligently its obligations under the Contract; (b) in carrying out and completing the Works the Contractor has exercised and will continue to exercise ... reasonable skill care and diligence ..."*

Abbey brought adjudication proceedings against Simply to recover losses in respect of the fire safety defects at the Care Home. Abbey obtained a successful adjudication decision and were awarded £908,495.98 including VAT.

However, Simply disputed the decision on the basis that the Adjudicator did not have jurisdiction to determine the dispute as there was no contractual right to adjudicate and there was no implied contractual right to adjudicate under the Collateral Warranty as it was not deemed a "construction contract" under the Act.

## HIGH COURT DECISION

A summary judgment application was made by Toppan and Abbey to enforce the decision. However, the High Court refused to enforce the awards on the basis that the Collateral Warranty did not fall into the definition of a “construction contract” under the Act including because it was executed **after** construction operations had been completed. It was held:

***“... I do not consider that the Abbey Collateral Warranty can be construed as a “construction contract” within the meaning of Section 104 of the Act. I reach that conclusion because whilst construing the section widely I do not consider the agreement between Abbey and Simply Construct was an agreement for “the carrying out of construction operations ...”***

## COURT OF APPEAL JUDGMENT - ABBEY HEALTHCARE (MILL HILL) V SIMPLY CONSTRUCT (UK) LLP [2022] EWCA CIV

The Court of Appeal overturned the TCC’s decision on 21 June 2022. The Court held that the term “*construction contract*” does not only cover building contracts but can also include collateral warranties in certain circumstances.

In giving the leading judgment, Coulson LJ considered three fundamental elements in the matter:

### 1. Can a collateral warranty be a “construction contract” as defined by section 104(1) of the Act?

The Court of Appeal said the answer to this question was “Yes”.

However, whether in a specific case a collateral warranty amounted to a “*construction contract*”, it was held that would “*always depend on the wording of the warranty in question*”. The Court of Appeal affirmed the judgment in *Parkwood v Laing O'Rourke* [2013] EWHC 2665 (TCC), that whether a collateral warranty is a “*construction contract*” will be contingent on the actual wording of the collateral warranty.

Section 104(1) requires there to be:

***“... a contract for the carrying out of construction operations”***

The Court of Appeal highlighted that to satisfy section 104(1) the collateral warranty needed to one which “*regulates (at least in part) the ongoing carrying out of construction operations*”. The Court of Appeal explained that:

- a. A collateral warranty to the effect: “*We completed these works two years ago and we warrant that they were completed in all respects in accordance with the Building Regulations*”, in their view, “*may not*” be a contract for the carrying out of construction operations because it does not “*recognise or regulate the ongoing carrying out of any future work*” .
- b. In contrast to the above, the Court of Appeal held that a “*warranty that the contractor was carrying out and would continue to carry out construction operations (to a specified*

standard)", in their view, "may well" amount to a "construction contract" because it was an agreement which in part regulates **ongoing** construction operations.

The Court of Appeal also rejected the notion that a construction contract must include detailed payment provisions, finding that a nominal payment provision in a collateral warranty would satisfy Section 109.

## **2. Did the terms of the Abbey collateral warranty make it a construction contract?**

The collateral warranty warranted that Simply: "has performed and will continue to perform diligently its obligations under the contract." The Court of Appeal found that this meant that there was a standard to which the work was to be performed. Furthermore, the warranty applied to both past and future performance and that the ongoing promise for future performance was "an agreement for the carrying out of construction operations".

## **3. Did the date on which the Abbey collateral warranty was executed make any difference?**

The High Court had found that because at the time the collateral warranty was signed there were no future works to be undertaken it could not be a "construction contract".

The Court of Appeal disagreed with the High Court because:

- a. The terms of the collateral warranty meant it had a retrospective effect.
- b. As a matter of construction of the Act it would be counter-intuitive to uphold the High Court's decision. If the High Court were right then it meant that if a collateral warranty were signed before construction operations had concluded, then it could be a "construction contract" meaning there was a statutory right to adjudicate. Whereas if it were signed, say, a day after construction operations had been completed, then there was no right adjudicate. The Court of Appeal considered that could not be the intention of the legislation.

## **IMPACT ON THE CONSTRUCTION INDUSTRY**

The adjudication process allows parties to construction contracts to quickly and cost effectively resolve disputes. To that end, it is a useful process. The decision provides greater clarity and certainty on when collateral warranties are capable of being "construction contracts" under the Act. This certainty will be welcome to the construction industry and lawyers advising those operating within it.

The Court of Appeal's decision could amount to substantial boost to the beneficiaries of collateral warranties (landlords, tenants, employers, etc) seeking to resolve disputes quickly via adjudication.

## CONCLUSION

The Court of Appeal's judgment in *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2022] EWCA Civ 823 (21 June 2022) provides the industry with greater clarity, finding that collateral warranties can be deemed as "construction contracts" in accordance with Section 104(1) of the Act and that clarity should be welcomed.

### Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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**Caytons**  
Changing  
Perceptions

**Sam Moore**

Partner

E: [moore@caytonslaw.com](mailto:moore@caytonslaw.com)

**Alex Gormally**

Trainee Solicitor

E: [gormally@caytonslaw.com](mailto:gormally@caytonslaw.com)