Abbey Healthcare (Mill Hill) v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) (2024) UKSC 23 - Is a Collateral Warranty a 'Construction Contract' under the Housing Grants Construction and Regeneration Act 1996?

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INTRODUCTION

In Abbey Health Care (Mill Hill) v Augusta 2008 LLP (formerly Simply Construct (UK) LLP, the Supreme Court has recently considered whether a Collateral Warranty could be a "*construction contract*" in accordance with section 104(1) of the Housing Grants, Construction and Regeneration Act 1996, which gave the parties a right to adjudicate. They found in that case that the Collateral Warranty was not a "*construction contract*" and as such there was not a statutory right to adjudication under the Act. In doing so they agreed with an earlier High Court decision and disagreed with the Court of Appeal. This note provides an overview of the different decisions.

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.

THE FACTS

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 the following obligations:

a. Simply was to 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 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 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'S JUDGMENT

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"......"

THE COURT OF APPEAL'S JUDGMENT

The Court of Appeal overturned the TCC's decision on 21 June 2022. In summary, 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:

Issue 1 – Can a collateral warranty ever 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, in answer to whether in a specific case a collateral warranty amounted to a "*construction contract*", it was held that this would "*always depend on the wording of the warranty in question*".

Section 104(1) requires there to be:

"....a contract for the carrying out of construction operations"

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.

Issue 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*".

Issue 3 – Did the date on which the Abbey collateral warranty was executed make any difference?

The High Court had initially 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 retrospective effect; and (b) it would be artificial to have an arbitrary requirement that the collateral warranty had to actually be signed before construction works had been completed.

THE SUPREME COURT'S JUDGMENT

The Supreme Court disagreed with the majority view expressed by the Court of Appeal.

As explained above, the Act applies to contracts which regulate ongoing construction works.

The Supreme Court stated as a matter of generality that "*it is difficult to see how the object or purpose of a collateral warranty is the carrying out of construction operations*" because the "*main object or purpose of such a warranty is to afford a right of action in respect of defectively carried out construction work"* as opposed to the actual *"carrying out of such work*".

The Supreme Court highlighted that in a collateral warranty typically there is "*no promise to carry out any construction operation*" for the third party. Rather there is "*merely a promise to the beneficiary that the construction operations to be carried out for **someone else** under the building contract will be performed*".

The Supreme Court went on to highlight that there is a fundamental difference between an agreement which governs how construction works "*will be performed*" and the "*carrying out of the construction operations"* i.e. building contract and a collateral warranty, because under the collateral warranty the third party beneficiary *"is not entitled, for example, to instruct how the works are carried out, to order variations or suspend or terminate the works*".

As a matter of principle, for a collateral warranty to amount to a "*construction contract*" for the purpose of the Act there "*needs to be a separate or distinct obligation to carry out construction obligations for **the beneficiary**; not one which is merely derivative and reflective of obligations owed under the building contract*".

In relation to the specific collateral warranty under consideration the Supreme Court accepted it made a warranty in relation to "future performance", but the beneficiary did not have any rights

to regulate the construction works and as such was not a "*construction contract*" for the purpose of the Act.

CONCLUSION

We consider that the Supreme Court's decision makes it very difficult to see how a collateral warranty itself could amount to a "*construction contract*" for the purpose of the Act. This has the effect that in the vast majority of cases there will not be a statutory right to adjudication under a collateral warranty.

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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