

## Collateral Warranties - A Judicial Baptism of Fire



**Scottish Widows Services Ltd v Harmon/CFEM Facades Ltd (In Liquidation), Building Design Partnership, WSA Inc and Scottish Widows Services Ltd v Kershaw Mechanical Services Ltd, Building Design Partnership: Outer House, Court of Session.**

**The Facts:** Various defects arose from the design and construction of Scottish Widows' new head office at Fountainbridge, Edinburgh, in respect of which Scottish Widows made claims under various collateral warranties against two of the works package contractors and the architect for the reinstatement costs.

The case came before the Outer House in response to a vigorous challenge by each of the Defenders on the ability of the Pursuers to bring a claim against them in terms of the collateral warranties which had been granted by the Defenders to subsidiaries of the Pursuers, of which the Pursuers had become beneficiaries by virtue of various assignments.

This is first time that collateral warranties have come under detailed scrutiny of the courts notwithstanding that they have been a widespread feature in the construction industry since **Murphy v Brentwood District Council** in the early nineties.

The Outer House confirmed the essential purpose of collateral warranties as being *"to ensure that the party who suffers loss has a right of action against any contractor or member of the professional team who has provided defective work"* and that they are to be interpreted so as to further this purpose.

Further points of note are:

- It is not essential for a claimant to have had a proprietary interest in the defective building at the time the defect became manifest to claim under a collateral warranty. The person responsible for the repair can recover this cost if he is in a direct contractual relationship with the person whose breach of contract caused the loss.
- Although a lease may only contain an obligation to maintain and keep the subjects in good and tenable repair (as distinct from an obligation to improve the subjects), a tenant is compelled to carry out repairs to have a building fit for occupation. It is the fact that necessary repairs have been carried out at the expense of those granting the collateral warranties that gives rise to a claim.
- A court must restrict joint and several liability to take into account the effect of a net contribution clause and other similar clauses in collateral warranties.
- The key issue which has to be proved to establish joint and several liability is that a breach of contract occurred by each Defender which contributed to a single loss by the Pursuer. The fact that these were breaches under different contracts is irrelevant.

In the Scottish Widows case, collateral warranties have proved that they are a force to be reckoned with when challenged. For those who are at risk of sustaining financial loss during or following completion of a construction project, everything is therefore to be gained by ensuring that an appropriate set of collateral warranties is in place at the outset of a project. **bto's** Construction and Engineering Team frequently draft and review collateral warranties for our clients to ensure that their interests are adequately protected.

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## City Inn - The Final Chapter on Concurrent Delay?

Three judges in the Inner House of the Court of Session delivered their decision in the case of **City Inn Limited v Shepherd Construction Limited** on 22 July 2010. This case has attracted interest in relation to delays.

The case concerned the construction of a hotel in Bristol. In simple terms the contractor, Shepherd Construction Limited sought to have finally determined by legal proceedings their entitlement to an extension of time and a claim for loss and expense. The employers, City Inn Limited, wished to resist the claim and to deduct liquidated damages. The court proceedings followed earlier adjudications. The case went to debate in 2002. There was a reclaiming motion in 2003 followed by a proof in which judgement was issued in November 2007. City Inn reclaimed against that judgement.

The decision of the Inner House substantially reaffirms the judgement of the Lord Ordinary (Lord Macfadyen) following proof and to that extent is not revolutionary. It examines closely the several grounds of appeal in which it was contended that the Lord Ordinary had erred.

Of particular interest was the appeal judges' consideration of the approach taken by the Lord Ordinary to assessing concurrent delaying events for the purposes of clause 25 of the Standard Form of Building Contract (Private Edition with Quantities) (1980 Edition). That clause allows the Architect, where the delay is a Relevant Event, to award an extension of time which he estimates as fair and reasonable. City Inn Limited argued that the Lord Ordinary failed to properly interpret clause 25.

The Lord Ordinary held that what is required by clause 25 is that the architect should exercise his judgement to determine the extent to which completion has been delayed by Relevant Events. The architect must make a determination

on a fair and reasonable basis. He also held that where there is a concurrency between the Relevant Event and a contractor default, it may be appropriate to apportion responsibility for the delay between the two causes. Lord Osborne, who delivered the leading judgement in the Inner House, held that discussion of whether or not there is true concurrency does not assist the essential process to be followed under clause 25 of the contract. He did, however, endorse the Lord Ordinary's view that it may be appropriate for the architect to apportion responsibility for delay between two causes. That view was endorsed by Lord Kingarth, reinforcing the decision in this respect.

Fellow Inner House judge Lord Carloway distanced himself from Lord Osborne's comments on concurrency. He did not consider that the application of clause 25 was an apportionment exercise. Rather, it is one involving a professional judgement on the part of the architect to determine, as a matter of fact, whether the Relevant Event would have or did cause delay beyond the Completion Date and then to estimate a fair and reasonable new Completion Date. Accordingly, where the contractor can show that an operative cause of delay was a Relevant Event, he is entitled to an extension to such new date as would have allowed him to complete the works in terms of the contract. The words "fair and reasonable" are not related to the determination of whether a Relevant Event has caused the delay to the Completion Date, but to the exercise of fixing a new date once causation is already determined.

This judgement provides confirmation that the assessment of an extension of time under the 1980 contract wording should be a simple and straightforward factual exercise. As part of this, apportionment may be appropriate, but it does not assist the essential process.

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## Update

Local Democracy  
Economic  
Development and  
Construction Act

After a period of inertia, having been caught up in Vince Cable's review of the new laws which has been approved by the previous Government, it seems that progress has resumed towards the LDEDC Act becoming law. You will recall that the LDEDC Act received Royal Assent on 12 November 2009. It addresses a number of long awaited changes to the Construction Act. The LDEDC Act will only come into force once the Scheme for Construction Contracts (England and Wales) Regulations and their Scottish and Northern Irish counterparts have been revised and agreed. The English consultation has closed and the Scottish Scheme went out for consultation this month, with the intention that the Scottish Government will report on the outcome of this towards the end of June. Resultant amendments will also have to be made to the industry's standard forms of contract. Provided this progress is maintained, we could be looking at the LDEDC Act becoming law late 2011/early 2012.

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