Press Summary

8 July 2024

Abbey Healthcare (Mill Hill) Ltd (Respondent) v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) (Appellant)

[2024] UKSC 23

On appeal from the Court of Appeal [2022] EWCA Civ 823

Justices: Lord Briggs, Lord Hamblen, Lady Rose, Lord Richards, Lady Simler

Background to the Appeal

This appeal concerns whether the collateral warranty given by the Appellant ("**Simply**") to the Respondent ("**Abbey**") is a 'construction contract' within the meaning of section 104(1)(a) Housing Grants (Construction & Regeneration) Act 1996 (the "**1996 Act**") so as to give rise to a right to statutory adjudication.

Collateral warranties give third parties contractual rights against contractors should defects arise in respect of the works carried out by them. It is common practice in the construction industry for collateral warranties to be provided to third parties.

Simply is a contractor under a JCT Design and Build Contract 2011 (the "**Building Contract**") dated 29 June 2015. Simply was engaged by its employer Sapphire Building Services Ltd ("**Sapphire**") to design and build a 65 bedroom care home at Holder Hill Road, Mill Hill, London (the "**Property**").

On 10 October 2016 Simply completed works on the Property. On 14 June 2017, the Building Contract was novated from Sapphire to Toppan Holdings Ltd ("**Toppan**"). On 12 August 2017, Toppan granted a 21 year lease of the Property to Abbey.

In August 2018, Toppan discovered alleged fire safety defects at the Property. Simply was notified of the defects and requested to rectify them, which Simply did not do. Toppan subsequently engaged a third party contractor to conduct remedial works, paid for by Abbey.

On 23 September 2020 Toppan Simply provided a collateral warranty to Abbey and Toppan.

Toppan and Abbey made claims against Simply arising out of the fire safety defects and costs of remedial works. On 11 December Toppan and Abbey each referred to adjudication a dispute regarding the alleged defects, seeking sums in excess of £8.8m and £5.5m respectively.

Mr Peter Vinden ("the **Adjudicator**") issued his decisions on 30 April 2021 finding for Toppan and Abbey on liability. Simply did not pay the sums due. On 12 May 2021, Toppan and Abbey issued proceedings in the Technology and Construction Court to enforce the decisions by way of summary judgment.

Mr Martin Bowdery QC sitting as a Deputy High Court Judge (the "**Judge**") granted summary judgment in respect of Toppan and dismissed the summary judgment application on the grounds that the warranty given to Abbey (the "**Abbey Collateral Warranty**") was not a construction contract within the meaning of section 104(1) of the 1996 Act and therefore the Adjudicator lacked jurisdiction.

Abbey appealed to the Court of Appeal. All members agreed that a collateral warranty could be a construction contract and a majority held that the Abbey Collateral Warranty was such a contract with Stuart-Smith LJ dissenting on the latter issue.

On 21 December 2022, the Supreme Court granted Simply permission to appeal to the Supreme Court on the question of whether or not the Abbey Collateral Warranty is a construction contract within the meaning of the 1996 Act.

Judgment

The Supreme Court unanimously allows the appeal. Lord Hamblen gives the judgment with which Lord Briggs, Lady Rose, Lord Richards and Lady Simler agree.

Reasons for the Judgment

The appeal raises two issues:

1. What is the meaning of an agreement "for… the carrying out of construction operations" in section 104(1) of the 1996 Act (the "**statutory interpretation issue**")?

2. How should the Abbey Collateral Warranty be construed and, so construed, is it an agreement "for… the carrying out of construction operations (the "**contractual interpretation issue**")?

The statutory interpretation issue

Section 104(1) requires an assessment of whether the object or purpose of the agreement is the carrying out of construction operations [**64**].

The purpose of a collateral warranty is usually to afford a right of action in respect of defectively carried out construction works and not the carrying out of such construction operations themselves [**65**]. Such a warranty does not give rise to the carrying out of such operations; it is the building contract which does so. A collateral warranty that promises the beneficiary that the construction operations undertaken in the building contract will be performed derives from and mirrors the promise to perform obligations owed to someone else and typically provides the beneficiary with no control as to how those operations are performed [**66-69**].

In these circumstances, the Court concludes that a collateral warranty will not be an agreement "for" the carrying out of construction operations if it merely promises to perform obligations owed to someone else under the building contract. There needs to be a separate or distinct obligation to carry out construction operations for the beneficiary; not one which is merely derivative and reflective of obligations owed under the building contract [**70**].

Contractual interpretation issue

The majority of the Court of Appeal concluded that the Abbey Collateral Warranty was a construction contract. Critical to the decision of the majority was their interpretation of clause 4.1(a) of the Abbey Collateral Warranty under which Simply promised to Abbey that it "has performed and will continue to perform" its obligations under the Building Contract.

Whilst this is a promise to Abbey to carry out the works, it is an entirely derivative promise and the contractor is not thereby promising anything that is not already promised under the Building Contract [**72**].

On the approach of the majority, any collateral warranty which contains a promise in similar terms to clause 4.1(a) will bring the agreement within section 104(1), even where all construction operations have been performed at the time of the execution [**73**].

The approach of the majority also means that whether or not a collateral warranty falls within section 104(1) will depend on the niceties of the language used and may lead to parties drawing fine distinctions in relation to the drafting and interpretation of collateral warranties [**75**].

A more principled and workable approach is to draw the dividing line between collateral warranties which merely replicate undertakings in the building contract and those which give rise to separate or distinct undertakings for the carrying out of construction operations [**76**].

This approach means that the Abbey Collateral Warranty is not a construction contract.

It is also likely to mean that most collateral warranties will not be construction contracts [**77**]. There are, however, good reasons for concluding that, in general, such warranties were not intended to fall within the scope of the 1996 Act such as the fact that the various payment related provisions of the 1996 Act (sections 109 to 113) are inapplicable to collateral warranties and that one of the main purposes of the 1996 Act, improvement of cashflow, is not furthered by its application to collateral warranties.

This conclusion means that the decision of Akenhead J in Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd [2013] EWHC 2665 (TCC), upon which the majority of the Court of Appeal placed considerable reliance and rightly held to be indistinguishable, was wrongly decided and must be overruled.

References in square brackets are to paragraphs in the judgment.

NOTE:
This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: Decided cases - Judicial Committee of the Privy Council (JCPC)