Victoria Peckett draws lessons from two recent cases on the defences available against claims under collateral warranties

UNWARRANTED CLAIMS?

GENERALLY THE PRINCIPLE IS ACCEPTED THAT THE GIVER OF A WARRANTY SHOULD HAVE NO GREATER LIABILITY TO THE BENEFICIARY THAN IT WOULD HAVE HAD TO THE CLIENT UNDER THE ORIGINAL BUILDING CONTRACT

The terms of collateral warranties have come under the spotlight again – this time looking at defences available against claims brought under them. Generally the principle is accepted that the giver of a warranty should have no greater liability to the beneficiary than it would have had to the client under the original appointment or building contract to which the warranty relates. A variety of clauses have been inserted into warranties to achieve that principle. But quite what the principle means in practice depends on both the drafting of the clause in question and the law governing the warranty – as illustrated by a couple of recent cases.

Last June Mrs Justice O'Farrell considered the terms of a warranty given by Interserve to the management company running Swansea Stadium (Swansea Stadium Management Company Ltd vs (1) City & County of Swansea and (2) Interserve Construction Ltd [2018] EWHC 2192). It was executed as a deed in April 2015 and a claim was brought under it in April 2017. However, practical completion had taken place in March 2005 – more than 12 years before proceedings commenced. The question therefore arose whether the claim under the warranty would fail because of being brought too late.

The court found the warranty had retrospective effect, so that any breach of the underlying building contract would have given rise to a claim under the warranty at the same time, even though the warranty was entered into at a later date. In addition it found that the key clause "the contractor shall have no greater liability under this [warranty] than it would have had if the beneficiary had been named as joint employer with the employer under the contract" meant that Interserve's liability to the management company under the warranty was coterminous with its liability to the employer under the

Ryan Fordham compares approaches to the risk of encountering unforeseen ground conditions

HOW TO DIG YOURSELF OUT OF A HOLE

Key risks in construction contracts are being closely examined as a result of the ongoing Brexit uncertainty so that they can be effectively managed and priced accurately to ensure the commercial viability of projects. One of these is the risk of encountering unforeseen ground conditions. Standard forms differ greatly in their approach to allocating this risk, including one that does not expressly deal with it at all. A number have also released new editions of their design and build contracts over the past couple of years, and with construction activity falling last month and insolvencies on the rise across the industry, it is a good time to take stock so that the legal consequences of this risk (at least) are foreseeable.

ICC Design and Construct Version 2018

The new DCV contract (unlike its predecessor) requires the employer to warrant to the contractor that it has included all data in its possession or control relating to the site within the site information (a contract document), but this warranty does not cover the accuracy of any such information and the contractor would be wise to validate it.

The contractor is deemed to have inspected the site, obtained all reasonably available information in relation to it, satisfied itself as far as practicable as to the form and nature of the site including the subsoil and hydrological conditions and obtained all necessary information as to the risks that may affect its tender. Save for these qualifications, the contractor is responsible for interpreting all such information (even if provided by the employer).

The contractor may claim for time and money if a ground condition that could not reasonably have been foreseen by an experienced contractor delays the works. What is capable of being reasonably foreseen will depend on the information the contractor was required to obtain and to have satisfied itself of as part of its investigation of the site.

JCT DB 2016

Despite it being the most commonly used form of contract for commercial developments in the UK, this contract (like its previous iterations) is silent on the risk of unforeseen ground conditions. As a result, this risk generally sits with

building contract. The argument raised on behalf of the management company that this clause affected only the nature and scope of Interserve's liability, but not its duration, was rejected. As a result the management company's claims for defects in the works were found to be time barred.

Fast forward six months to the judgment of Lady Wolffe in British Overseas Bank Nominees Ltd and WGTC Nominees Ltd (nominees and trustees for the Janus Henderson UK Property PAIF) vs Stewart Milne Group Ltd [2018] CSOH 125. Stewart Milne constructed a car park in 2009 that the claimants bought in June 2013, obtaining a warranty from Stewart Milne in August 2013. Defects became apparent, in respect of which the claimants commenced proceedings in June 2018. Under Scottish law, any claims under the underlying building contract would be prescribed (time-barred) five years after practical completion (so in June 2014), so the question arose as to whether Stewart Milne could rely on this to defeat the claim against it under the warranty.

> QUITE WHAT THE PRINCIPLE MEANS IN PRACTICE DEPENDS ON BOTH THE DRAFTING OF THE CLAUSE IN QUESTION AND THE LAW GOVERNING THE WARRANTY

The defence clauses in this case were slightly different from in the Swansea Stadium case. Here the key clauses provided both that Stewart Milne "shall have no greater duty to the [claimants] under this [warranty] than it would have had if the [claimants] had been named as the employer under the building contract" and that it "shall be entitled in any action or proceedings by the [claimants] to raise the equivalent rights in defence of liability as it would have against the employer under the building contract".

In this case the court found that interpreting the warranty as having retrospective effect would not lead to the prescription (time limitation) for claims under the warranty starting any earlier than the date of the warranty itself. On that basis the five-year period started in August 2013 and the claim commenced in June 2018 was in time.

The court found the contractual defence clauses did not assist Stewart Milne. The first meant that the content and scope of Stewart Milne's duties were equivalent to those owed to the employer but it did not affect the duration of those duties. On the second clause the court gave a perhaps surprisingly narrow interpretation, finding it did not affect the question of prescription as that arose by operation of law and therefore did not constitute a defence under the building contract.

Might the result have been different if the first clause had referred to "liability" rather than "duty"? Or if the phrase in the second clause had read "equivalent rights in defence of liability as it would have against the employer in respect of claims arising under the building contract"? Perhaps.

But the clearest way of dealing with the issue would be to refer specifically to duration in the defence clause. An alternative in England would be to provide for third party rights rather than warranties – as under the Contracts (Rights of Third Parties) Act 1999 the same limitation period can be relied on whether the claim is brought by the promisee or the third party.

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the contractor under common law, which could be detrimental to a contractor because the express terms in other standard forms seek to balance this risk between the parties.

FIDIC Yellow Book 2017

The second edition of the FIDIC Yellow Book (like the first edition) has detailed provisions regarding the risk in unforeseen ground conditions. It applies a test of foreseeability (like the ICC DCV) from the base date (28 days before the latest date for submission of the contractor's tender) rather than the date for submission of the tender (unlike the first edition) in determining whether the contractor takes the time and money consequences of this risk. In most cases, this will result in an earlier date for assessing foreseeability in the contractor's favour.

The employer must also provide the contractor with all of its site data before the base date, but the contractor is not able to rely on it. The contractor is then deemed to have inspected and examined the site and to have satisfied itself as to various matters affecting the site (like the ICC DCV) including subsurface, hydrological and climatic conditions. The contract price is further expressed to have taken account of the site data and the contractor's own inspections and examinations of the site. The contractor therefore is responsible for the risk of any foreseeable ground conditions and will be awarded time and money for those that are unforeseeable subject to a more detailed notice regime in this second edition.

NEC4 ECC 2017

The NEC4 ECC expressly deals with encountering unforeseen ground conditions (like the NEC3). However, the test on who bears this risk is not strictly one of foreseeability (as in the ICC and FIDIC). Instead, the chance of adverse ground conditions existing must be so small at the date of the contract that it would have been unreasonable for an experienced contractor to have allowed for the event in its prices and programme. The NEC guidance clarifies that the contractor is only entitled to the effects of the difference between what was found and what it would have been reasonable to expect.

The project manager then assesses the compensation event, which assumes the contractor has taken into account the site information, publicly available information in the site data and information obtainable from a visual inspection. Although the contractor can rely on the information supplied to it and on its own inspections, it must also crucially obtain information that it would be reasonable for an experienced contractor to investigate and obtain.

The clear allocation of the risk of unforeseen ground conditions benefits projects by enabling the risk to be managed more effectively and reducing the chances of disputes. Parties therefore need to be mindful of the varying and updated approaches to dealing with this risk because common practices under one standard form will not likely be of any use under another. In high-value projects, parties will also invariably amend these standard provisions for even greater clarity as the consequences of misunderstanding the allocation of this risk and its associated liabilities can be severe.

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