

KNOW YOUR LIMITATION PERIOD...

- ▶ When does the limitation period applicable to claims under a collateral warranty entered into by a building contractor after PC of the Works start under English law?
- ▶ Is the position affected by the date of execution of the collateral warranty by the beneficiary?
- ▶ Are English law and Scottish law the same on this point?

What's it about?

- ▶ The recent case of **Swansea Stadium Management Co Ltd v City and County of Swansea (1) and Interserve Construction Ltd (2) [2018] EWHC 2191 (TCC)** considered the limitation period applicable to a claim under a collateral warranty given to the tenant of the Swansea Liberty Stadium. The warranty was executed as a deed by the contractor and developer and provided to the tenant shortly after Practical Completion, however it was left undated. The tenant claimed that it executed the warranty some 7 years later.
- ▶ 12 years and 5 days after PC was certified the tenant commenced proceedings (1) in relation to defects in the works and (2) alleging that the contractor was in breach of his defects liability obligations in respect of them. Interserve pleaded that claim (1) was time barred as the warranty was retrospective back to practical completion and applied for summary judgment to strike out claim (1) on that basis.
- ▶ The TCC held that the warranty did have a retrospective effect. Whether a clause in a contract can have a retrospective effect depends on the express or implied intention of the parties. The warranty here did not contain an express commencement or expiry date, but the court found that it was intended to have retrospective effect based on the words used in the warranty and the factual matrix. It seems likely that the same position would apply under English law in relation to most standard warranties.
- ▶ The tenant sought to argue that PC had not occurred on the date certified as the works were incomplete and defective at that time, citing the extensive snagging lists. This argument did not succeed: the contract was based on the JCT form (WCD) which expressly stated that "practical completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in the statement [of practical completion]". Such statement was sent by the Employer's Agent to Interserve on 1 April 2005, and included the following "...we are writing in accordance with Clause 16.1 of the Conditions of Contract, to inform you that the Works have reached Practical Completion as at 31 March 2005..." increased costs of goods and materials – whether through the introduction of or changes to import duties/tariffs, exchange rate fluctuations, increased transport charges or otherwise.

Why does it matter?

- ▶ This case adopts the well-established principle under English law that a cause of action under a construction contract pursuant to which there is an obligation to "carry out and complete" the works accrues at the date of practical completion. As such, that deemed date will also apply to a cause of action for a breach of a collateral warranty, where the warranty is retrospective and/or the beneficiary is otherwise considered to be in the same position as the employer under the building contract.
- ▶ This case is also interesting as it deals with the situation where the warranty was not executed by the counterparty or dated until some time after PC. As the warranty was considered to have retrospective effect this did not, however, give rise to a limitation period linked to the execution or dating of the warranty.
- ▶ The warranty contained a proviso that expressly limited the liability of the contractor to the liability it would have had if the claimant had been named as joint employer under the building contract. Although this did not expressly refer to the duration

of the contractor's liability it was seen by the court to be "the clearest indication that the parties intended the Claimant to be in the same position vis-à-vis the Second Defendant as the employer was under the Building Contract".

What now?

- ▶ Whilst there is nothing particularly surprising in this decision, its consideration of the retrospective effect of a collateral warranty and the commencement of the limitation period for claims under a warranty is interesting (and no doubt comforting to contractors who have entered into warranties after practical completion which contain no express limitation period or who have not received confirmation that such a warranty has been executed by the beneficiary).
- ▶ The warranty in this case was somewhat unusual as it did not contain an express expiry date for the bringing of claims (or other express limitation provision) which is relatively standard in the market. The inclusion of such a provision provides clarity and would have avoided part of the dispute in this case and, as such, is to be recommended.
- ▶ A comparison of this case and the Scottish case of *British Overseas Bank Nominees & Henderson v Stewart Milne Group*, considered in more detail in this edition of *Constructive Comments*, highlights the significant differences between the English law of limitation and the Scottish law of prescription which results in the same wording in collateral warranties being able to have different effects. In this case under English law a 'no greater liability' defence was interpreted as meaning that there is a retrospective commencement of the collateral warranty from the date when the Employer's rights were created (and consequently the limitation period under the collateral warranty commences from that date) whereas Scots law proceeds on the basis that a collateral warranty creates rights from the point of its execution, they are not retrospective and all rights arising under the collateral warranty are subject to the full prescriptive period under Scots law.

Who to contact

SAM COMER

Associate

020 7788 5011

07850 096329



LUKE BAINES

Partner

020 7160 3504

07736 553961



10-29155494-1

addleshawgoddard.com

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office

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