

## Collateral Warranties: A Reminder of their Importance

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The judgment of *O'Farrell J in Swansea Stadium Management Co. Ltd v Swansea City and County Council ([2018] EWHC 2192 (TCC))* provides guidance on collateral warranties and acts as a warning for any potential claimants to be mindful of any limitations of time in which to commence proceedings under them.

The facts of the case are fairly straightforward. The City & County of Swansea (the **"Council"**) is the freehold owner of the Liberty Stadium, home to Swansea City Football Club and the Ospreys. The Council leased the Stadium to Swansea Stadium Management Company (the **"Claimant"**), which is the management company for the Stadium. Interserve Construction was employed by the Council to design and construct the Stadium under a JCT Standard of Form of Building Contract with Contractor's Design 1998 Edition (subject to certain bespoke amendments) (the **"Building Contract"**).

On 1 April 2005, the Employer's Agent under the Building Contract informed Interserve that practical completion of the Stadium works had been achieved on 31 March 2005. The Council then entered into a 50 year lease with the Claimant, which contained a tenant's repairing covenant. At about that time, all parties entered into a collateral warranty in respect of the works under the Building Contract (the **"Collateral Warranty"**). The Collateral Warranty was executed as a deed but was left undated.

The Stadium experienced certain alleged defects, namely, paint delamination and inadequate resistance for floor traffic, causing visitors to slip and fall. In April 2017, the Claimant brought a claim for damages of £1.3million against Interserve (and the Council), complaining of defective workmanship and a failure to rectify the defects in breach of Interserve's obligations under the Building Contract and that such breaches constituted breaches of the Collateral Warranty.

Interserve applied for summary judgment submitting that the claims were time-barred as any cause of action under the Collateral Warranty accrued by the latest on the date of practical completion, i.e., 31 March 2005. As the Collateral Warranty was executed as a deed, the Claimant had 12 years from the date of Interserve's breach of contract in which to bring a claim. The Claimant had issued proceedings on 4 April 2017, which was more than 12 years after the date of practical completion, and Interserve asserted that the Claimant was, therefore, out of time to sue successfully. On the other hand, the Claimant argued that practical completion had not been achieved on 31 March 2005 as at that date the works were incomplete and defective and that the Collateral Warranty did not have "retrospective" effect, i.e., that the Court should decide that the limitation period commenced from the date the deed of warranty was signed not from the date of practical completion.

O'Farrell J granted Interserve summary judgment and ruled that the Claimant's claim against Interserve under the Collateral Warranty was, indeed, statute barred; therefore, the Claimant had no real prospect of success.

### So what does the judgment tell us?

Collateral warranties would normally have "retrospective" effect such that the same limitation period applied to the Collateral Warranty as applied to any claim under the Building Contract. Indeed, most collateral warranties



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would contain an express limitation of liability to the effect that no claims can be commenced more than 12 years after practical completion of the works under the relevant building contract. In reaching her decision, O'Farrell J. paid close attention to the wording of the Collateral Warranty itself which specifically referred to the past and future performance of Interserve and that the Collateral Warranty intended to cover the *“full scope of the contractual work regardless of when it was executed”* (our emphasis).

The Collateral Warranty (as is common with most collateral warranties) contained a “no greater liability” clause: *“Provided that [Interserve] shall have no greater liability under the [Collateral Warranty] than it would have had if [the Claimant] had been named as joint employer with [the Council] under the [Building Contract]”*. O'Farrell J. held that the commercial purpose of the “no greater liability” clause was to put the Claimant in a position of it being as if it *“had been named as joint employer”* and clearly indicated that the provision intended to operate as if the Claimant was to *“stand in the shoes of the employer”*. In effect, Interserve's liability to the Claimant was intended to be co-terminous with its liability to the Council under the Building Contract. It was important to look into Interserve's liability under the Building Contract *“to determine the limits of its liability under the Collateral Warranty”*. Any breach of contract created by the Collateral Warranty was to be regarded as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty.

Finally, O'Farrell J. was not prepared to look behind the wording of the written statement of the Employer's Agent when determining if practical completion had been achieved on 31 March 2005. She concluded that there was no evidence that provided any *“challenge to that statement or that the parties did not operate the relevant provisions of the Building Contract on the basis that practical completion had been achieved”*. In general, the clause was clear; when the Employer's Agent issued a notice that practical completion had been achieved, practical completion under the Building Contract was deemed to have been achieved.

So, O'Farrell J. held that the Claimant's claim under the Collateral Warranty against Interserve could not be pursued as it was statute barred. The decision provides guidance not only on the importance of any time limits within which proceedings have to be commenced but also on “no greater liability” clauses. In this instance, the “no greater liability” provision allowed a limitation defence to carry across into the Collateral Warranty from the underlying Building Contract. This was particularly important here as the Collateral Warranty was executed after practical completion of the works.

*Daniel Cartmell, of K.L. Gates London offices, also contributed to this piece.*

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