GILES DIXON SOLICITORS

Briefing:
Collateral Warranties & Net Contribution Clauses

Background

Contractors and consultants are regularly asked to provide deeds of collateral warranty in favour of end users, either purchasers or tenants on any substantial construction project.

Insurers and lawyers advising a consultant or contractor will normally recommend that the document includes a 'net contribution clause'. This is needed because of a quirk in the English legal system: if responsibility for a defect in a building is 20% the fault of the architect and 80% that of the contractor, and the contractor goes out of business, the architect can be left paying for 100% of the loss. This is due to the principle of joint & several liability.

So, in order to avoid this risk, a net contribution clause will say that the party giving the warranty will only be liable to the extent that he was responsible, calculated on a fair and reasonable basis and on the basis that other parties involved had given similar undertakings to the client.

RBS v. Halcrow – the facts

A number of cases involving collateral warranties have come to the courts in recent years and in the case of Royal Bank of Scotland plc v.Halcrow Waterman Limited 2013 a net contribution clause was under scrutiny. Unfortunately for Halcrow, the clause did not in this case protect them because the wording only referred to other consultants and made no reference to the contractor.

Halcrow had been appointed by a developer to provide structural engineering services in relation to a property in Edinburgh. Halcrow's appointment was novated to the main contractor, Lilley Construction, and Halcrow was required to provide a collateral warranty in favour of the tenant of the property, SBCI investment Banking Limited. SBCI later assigned their interest in the lease to Royal Bank of Scotland.

Some time after RBS went into occupation structural difficulties appeared with respect to the floor slabs. RBS brought a claim against Halcrow claiming that they were responsible. In defence, they argued that the problems with the slabs were due to the main contractor Lilley or one of its other subcontractors.

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The net contribution clause

The collateral warranty deed included a net contribution clause, under which it stated:

'The Consultant's liability arising as a result of any breach of this agreement shall be limited to that proportion of the tenant's losses which it would be just and equitable to require the Consultant to pay having regard to the extent of the Consultant's responsibility for the same and on the basis that all Other Consultants shall be deemed to have provided contractual undertakings to the Tenant on terms no less onerous than this Agreement in respect of their services in connection with the Development and shall be deemed to have paid such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility.'

The argument

By the time the case came to court, Lilley, the main contractor, had gone into liquidation. Halcrow argued that the net contribution clause restricted their liability to RBS where responsibility for the loss also lay with the main contractor or one of its subcontractors. The absence of express mention of the Contractor in the clause was not sufficient to undermine the principal purpose of the clause which was to limit liability to a just and equitable proportion of the loss.

The decision

The judge did not agree: he said that the words "Other Consultants" (which was not in fact defined in the contract in spite of the capital letters) could not reasonably be construed as including the Contractor and that it would not have been difficult to draft a clause which did include reference to the Contractor.

Conclusion

This case makes it clear that any consultant or contractor entering into a collateral warranty deed should ensure that if it contains a net contribution clause, the clause is sufficiently widely drafted to cover the other parties – both consultants and contractors - who are engaged on the project.

Giles Dixon, January 2014

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