

Construction contract or product warranty? Not all collateral warranty disputes can be adjudicated

By Belinda Green

Collateral warranties might be parasitic on a construction contract, but that doesn't automatically mean they are. The individual wording and circumstances need to be considered. In some cases, like in [Toppan Holdings Limited v Simply Construction \(UK\) LLP](#) [2021] EWHC 2110 (TCC), a collateral warranty is better viewed as a product warranty, with no commitment as to works. As a result, those warranties cannot be enforced through adjudication.

Collateral warranty issued to tenant

Simply Construction (UK) LLP (**Simply**) contracted to build a London care home in 2016 under the [JCT Design and Build](#) 2005 contract form. The contract required Simply to issue a collateral warranty to the landowner and tenant of the property on notification.

The contract was novated to landowner Toppan Holdings Limited (**Toppan**) in 2017, and remedial works were carried out in 2018–19. By 2020, the construction and remedial works had well and truly finished. Anticipating enforcement, Toppan called on Simply to issue a collateral warranty in favour of tenant Abbey Healthcare (Mill Hill)

Limited (**Abbey**). The warranty was issued in the standard form attached to the contract (the **Abbey Warranty**). In it, Simply warranted that it had performed and would continue to perform its obligations under the JCT contract.

The matter proceeded to adjudication under the UK-equivalent of New Zealand's Construction Contracts Act 2002. Simply resisted enforcement, saying that the adjudicator had no jurisdiction to decide the dispute because the collateral warranty wasn't a construction contract.

Is a collateral warranty a construction contract?

The UK and the NZ legislation have differences in wording, but the general gist under both is that a construction contract is a contract for *carrying out construction work*.¹ If a collateral warranty is a 'construction contract', then disputes under that warranty can be [adjudicated](#).

The temptation is to say that a collateral warranty derives from a construction contract and so the warranty is, by its very nature, also a construction contract. From a commercial standpoint it would certainly make sense to allow so-called *parasitic warranties* to be enforced in the same way that

¹ Section 5, [Construction Contracts Act 2002](#) (NZ).



the underlying contract can be enforced. But as always, the specifics of the contract need to be considered.

A collateral warranty might be parasitic upon a building contract but so would a parent company guarantee. No one would construe a parent company guarantee as a construction contract.

Carrying out construction work: prospective or retroactive?

People often think of a construction contract as a contract to perform future works: you sign the contract, and then construction commences. But that doesn't always happen in practice. Collateral warranties in particular are frequently signed during construction or after construction has been completed. Is a collateral warranty not a 'construction contract' simply because the works have already started, or have been completed? The English courts considered this in 2013 and found that this was not the case.

In *Parkwood Leisure*, the Court confirmed that the meaning of 'construction contract' in the Act should be given a *broad expression*, and that the factual background and wording of the collateral warranty needed to be taken into account.² This meant that the Court could not confirm that every collateral warranty would be a construction contract. However, the Court could confirm that retroactivity was not a bar to the warranty being a construction contract.

As a result, a collateral warranty *does not have to be wholly or even partly prospective* in order to be a 'construction contract' for the purposes of the Act. This, too, makes commercial sense: as much as the lawyers might wish it to, the 'paperwork' doesn't always come first; and some contracts are finalised mid-construction or even after construction is complete.

Construction works or product warranty?

So the timing of a warranty doesn't change the fundamental legal nature of the contract. But neither is timing completely irrelevant.

On the strength of the *Parkwood Leisure* case and some accompanying commentary in a

well-known textbook, Toppan and Abbey argued that the Abbey Warranty was a construction contract: The Abbey Warranty was derived from the JCT contract; it related to the carrying out of construction works; and the fact that the works had been completed didn't mean the warranty couldn't properly be viewed as a construction contract. After all, the Parkwood Leisure warranty was found to be a construction contract – why not this warranty too?

The TCC was not convinced. Yes, timing is not a barrier. But the wording and factual background as a whole needed to be considered. The Abbey Warranty was signed four years after practical completion and eight months after the remedial works had been undertaken. No further works were anticipated at the time it was signed. These were clear signs that the warranty was not a contract for the carrying out of construction works.

Don't forget the wording

The TCC also considered the wording of the Abbey Warranty. In *Parkwood Leisure*, the contractor *warranted, acknowledged and undertook* to carry out the works. Here, Simply had only *warranted* them. Although those of us who have had to deal with standard form contracts and the urgencies of commercial transactions might beg to differ, the courts generally assume that all words have been included deliberately and with purpose. Simply had *warranted* the works, but not *acknowledged* or *undertaken*. This was further evidence that the collateral warranty was not a contract for the carrying out of construction works.

As an aside for those who enjoy a good linguistic analysis: it wasn't the tense of the verbs that the Court relied on here. In fact, the Abbey Warranty explicitly referred both to a past state of affairs and future performance (saying *Abbey will continue to perform* and *will continue to exercise*). Rather, it was the verb choice itself that was interpreted as conveying meaning.

Construction contract or product warranty?

In light of the timing and the wording, the TCC concluded that the Abbey Warranty was not a construction contract. Yes, the warranty was derived from the JCT construction contract. And

² [Parkwood Leisure Limited v Laing O'Rourke Wales and West Limited](#) [2013] BLR 589.



yes, commercial sense and the law both tell us that collateral warranties are often 'construction contracts'. But neither indicated that here.

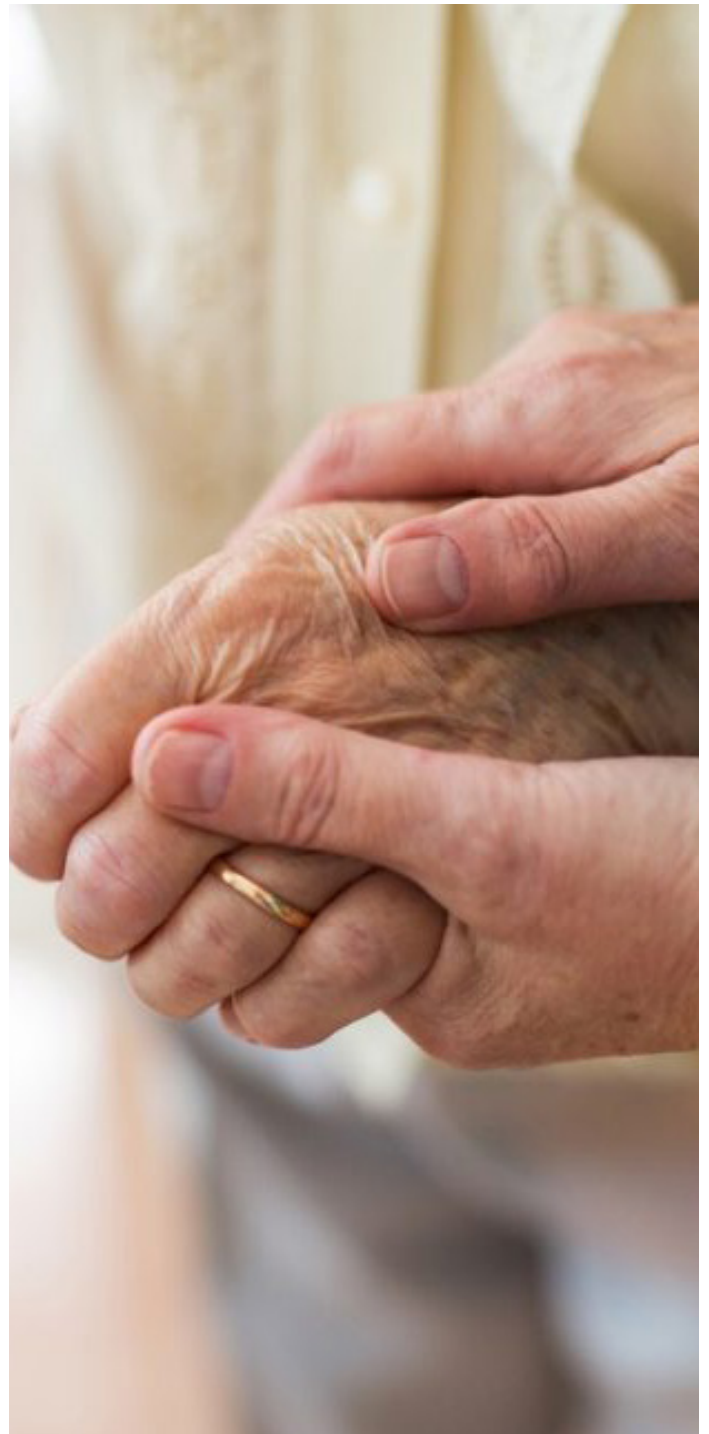
The Abbey Warranty was a warranty as to the past and future state of affairs, much more akin to a manufacturer's product warranty than to a contract to carry out works. Its source in the JCT contract did not change the Court's view on that. *After all, a collateral warranty might be parasitic upon a building contract but so would a parent company guarantee. No one would construe a parent company guarantee as a construction contract.*

Adjudication and collateral warranties

Toppan v Simply demonstrates that you can't assume a collateral warranty is enforceable as a construction contract: the wording and factual background of the warranty must be taken into account.

If you are seeking to enforce a collateral warranty, consider your options carefully. If the warranty was entered into during the course of construction or shortly after, you may well have a 'construction contract' on your hands. If so, the timing and cost advantages of adjudication may be of interest to you. But if the warranty was signed well after the works finished, spending resources in adjudication may not be in your best interests.

If you are drafting a collateral warranty, take a moment to consider your language choice – is this a 'warranty' only? Consider also the timing of the warranty – will that affect the enforcement options available? In the UK context parties can contract to use the adjudication process, so this issue can be solved by an express clause. But the solution is not so obvious in New Zealand.



ABOUT THE AUTHOR



Belinda is a solicitor in NZDRC's KnowHow Team.* She has over 16 years' experience, working in both private and government sectors. Belinda has joined us from the Parliamentary Counsel Office where she drafted commercial legislation, and prior to that she practised as a commercial property lawyer.

* Building Disputes Tribunal is a part of the NZDRC Group.

