

Western Counties Branch Newsletter

Welcome and Introduction

Welcome to the first newsletter of 2023. I trust that the members of the Western Counties Branch are keeping well and busy, in what continues to be a difficult period, with the war in Ukraine causing a fuel crisis. This has led to spiralling inflation with material and wage costs increasing to industry and manufacturers, and in turn being passed on to us, the consumer.

As a consequence of the increase in the cost of living, we are experiencing strikes across much of the public sector and the railways, and it has a similar feel to that of the winter of discontent from back in the late 1970's, for those old enough to remember.

In these times of economic difficulty, with tensions increasing over wage demands between workers and employers, and contractual disputes up and down the supply chain, the need for the services provided by our members is in high demand, in providing Alternative Dispute Resolution, be that mediation, conciliation, expert determination, arbitration or, in the construction industry, adjudication.

We are now more or less recovering from the pandemic, although not completely, but we are now back to some semblance of normal with being able to meet up and most of our CPD is now back to being in-person.

Branch AGM

Our Annual General Meeting is on Wednesday 19 April 2023 at 17:00 hours at VWV Solicitors, Narrow Quay House, Narrow Quay, Bristol, BS1 4QA. The notice of the AGM, with the agenda and other details is in a separate document accompanying this newsletter.

Nominations for the Branch Committee

At the AGM, new members are to be elected to the branch committee. If you are interested in joining the committee, please complete the nomination form sent as a separate document with this newsletter. Full instructions are provided on the form.

We welcome applications from any members in accordance with the institutes Equality and Diversity policy.

Becoming a member of the branch committee can be rewarding in helping to run CPD or training events, contributing to thought leadership, learning from peers and networking, to enhance your education and career.

CPD

We recently provided a seminar on **“How to prepare a claim for Adjudication”**. This was a joint event with the Adjudication Society and the Chartered Institute of Building. This was also supported by the Institute of Civil Engineers and the Chartered Institution of Civil Engineering Surveyors.

The event proved popular with a good attendance with representatives from all of the professional bodies involved.

Future CPD events

Our next CPD event, will follow the AGM and the subject is **“The Role of Expert Witnesses in ADR”**. Our speaker will be Matt Malloy, a Director of MCMS, who is a highly experienced and well known Adjudicator, Arbitrator and Mediator. Matt has been appointed as dispute resolver in over 900 disputes.

This is a joint event with the Bristol Law Society and the Adjudication Society and promises to be a popular and interesting seminar.

Full details of this event will be sent out separately however, to ensure that it is in your diaries, it is on 19 April 2023 at 18:00 for an 18:15 start, at VWV Solicitors, Narrow Quay House, Narrow Quay, Bristol, BS1 4QA.

Article

Is a collateral warranty a construction contract for purposes of the Housing, Grants, Construction and Regeneration Act 1996 (as amended)?

This is an article by Kai von Pahlen, a Senior Associate at DAC Beachcroft and Western Counties Branch committee member. This updates his previous article following the Court of Appeal decision that reversed the judgement at first instance and the continuation of the matter to the Supreme Court.

Contractor obtained permission to appeal Abbey vs Simply judgment concerning collateral warranties, to the Supreme Court

The case of Abbey vs Simply case follows the 2021 judgment of the Technology and Construction Court (TCC), when the contractor (Simply) successfully mounted a defence in adjudication enforcement proceedings brought by a tenant under a collateral warranty. The Court of Appeal reversed that TCC judgment in June 2022, but the Supreme Court has now granted the contractor permission to appeal.

How Is Adjudication Used in Construction?

The Construction Act of 1996 introduced a statutory right for parties to a construction contract to refer their disputes to adjudication.

Contractors soon started to use adjudication to aid cash-flow during a construction project, allowing them to swiftly (and relatively cheaply) enforce an outstanding payment and continue the project. Employers too recognised the benefits in using adjudication, specifically to advance defects claims against contractors, often years after completion of the projects.

In the Abbey vs Simply cases, it was not a contractor or an employer who wanted to use adjudication. It was a third party, specifically a tenant who was a beneficiary under a collateral warranty. This was controversial because the Construction Act only applies to construction contracts; and, unlike the contractor and the employer, the tenant had never been a party to the original construction contract.

Can Adjudication Be Commenced Under a Collateral Warranty?

As the name suggests, a collateral warranty is 'collateral' to an underlying construction contract.

Under a collateral warranty, the primary rights and obligations remain with the employer and the contractor, so the beneficiary does not normally gain any control over the

construction works (e.g. giving instructions as to how work is carried out). The collateral warranty would merely enable the beneficiary to bring a claim against the contractor if a defect interferes with their interest in the property after work is completed. Such a claim would normally be brought in court, but the tenant here wanted to use adjudication.

In 2013, Mr Justice Akenhead (who was in charge of the TCC at the time) considered whether the Construction Act applied to a beneficiary (a tenant) under a collateral warranty, who wanted to bring a defects claim against the contractor. He gave his judgment in *Parkwood v Laing* in 2013, ruling that the parties' collateral warranty was a construction contract under the Construction Act and that the beneficiary therefore had a right to refer a dispute to adjudication. He notably placed emphasis on the contractor having 'undertaken' and 'warranted' that it shall carry out the works. He went on to rule that the collateral warranty was therefore a construction contract – an "agreement for the carrying out of construction operations" – as defined in the Construction Act.

What Did the TCC Decide in 2021?

In 2016, a construction project was completed in London. The tenant in the new building obtained a collateral warranty from the contractor, but not until 2020. The tenant then used its recently acquired collateral warranty to refer a defects claim to adjudication. The contractor challenged the adjudicator's decision in the TCC.

In its ruling in July 2021, the TCC sided with the contractor and declined to enforce the adjudicator's decision. Mr Martin Bowdery QC (sitting as a Deputy TCC Judge in *Toppan & Abbey vs Simply* 2021) held that the collateral warranty was not a construction contract and that there was no right to adjudicate under the Construction Act. He noted that the wording of the collateral warranty was different to that in *Parkwood* (it omitted the verb 'undertake').

What Did the Court of Appeal Decide in June 2022?

The TCC decision was appealed to the Court of Appeal, where the legal issues were scrutinised by Lord Justices Peter Jackson, Coulson and Stuart-Smith (the latter two are former specialist TCC judges).

When the judgment arrived in June 2022, it was divided 2:1. Lord Justice Coulson delivered his leading judgment in favour of the tenant, whereas Lord Justice Stuart-Smith delivered a dissenting judgment in favour of the contractor.

Lord Justice Coulson ruled that a collateral warranty can be a construction contract, even if the contractor does not 'undertake' to carry out the construction works. This was an important point because many standard-form collateral warranties are drafted similarly to the one that was before the Court of Appeal, using the word 'warrant' without including the word 'undertake'.

Lord Justice Stuart-Smith disagreed (in his dissenting judgment), saying that 'an undertaking often involves an obligation to do something', whereas 'the normal meaning of the verb "to warrant" is to provide a promise about a fact, circumstance or outcome' (paragraph 107). He concluded that "the contractor in Parkwood undertook and assumed direct obligations to the beneficiary. The contractor in Abbey vs Simply did not" (para.139).

What will Happen in the Supreme Court?

On 21 December 2022, the Supreme Court granted permission to appeal the decision of the Court of Appeal.

The appeal is an opportunity for the Supreme Court to provide guidance on the proper interpretation of wording typically found in collateral warranties on construction projects.

In particular, the Supreme Court will have to consider whether a collateral warranty must include 'an undertaking to do something' (as envisaged by Lord Justice Stuart-Smith), for it to be properly considered to be a construction contract (i.e. an 'agreement for the carrying out of construction operations'). That will then determine to what extent adjudication can still be used as a dispute resolution method under a collateral warranty.

Whatever the outcome, it is plain that practitioners must consider the precise wording of a collateral warranty very carefully.

My thanks to Kai for providing this article.

The Year Ahead

The committee look forward to seeing as many of the local membership as possible at our future events. A new branch business plan was accepted by head office for the forthcoming year with a number of CDP and other events planned.

My two-year tenure as Chair will conclude at the AGM, which is still a couple of months away however, I would like to take this opportunity to thank my committee for their support in running the committee and helping to organise and run events.

Trevor Drury

Chair – Western Counties Branch