

Construction
Case Law Update
Rosling King LLP



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The Court of Appeal recently considered whether or not architect certificates can be construed to be collateral warranties.

The Facts

The first Defendant Optima (Cambridge) Limited (“Optima”) developed a new four story block of flats in Peterborough between 2001 and 2004. A number of the flats were sold to long leaseholders and some were retained by Optima and rented out. Optima had contracted Strutt & Parker (“S&P”), a firm of architects, to carry out inspections of the buildings in the course of the development and to produce architects certificates (the “Certificates”) in respect of the flats for the benefit of the purchasers and their lenders.

The Claimants were eight long leaseholders who had purchased flats in 2003 and 2004. A number of defects in the properties had become apparent and the Claimants suffered damages and loss. Four of the Claimants alleged that Optima was in breach of its agreement with them. All eight Claimants claimed that S&P should have noticed the defects on their inspections of the development and should have reported on these to Optima and/or should not have provided the Certificates attesting to the satisfactory construction of the flats..

The Decision – First Instance

Negligent Misstatement and Duty of Care

Akenhead J found that the Certificates amounted to negligent misstatements. He found that there were two separate duties of care owed by S&P to future purchasers and lenders to whom the Certificates were issued or later passed; a duty to take care in the work leading to the Certificates and a second duty to compile the Certificates carefully. S&P were found to be in breach of both duties for not carrying out the inspections to the required standard and in their preparation of the Certificates.

Reliance

Five of the Claimants did not receive the certificates until after the exchange of the contracts and execution of the lease. Akenhead J found that the fact that the certificates were provided to the Claimants after the sale and completion was immaterial in the circumstances. He found that the Claimants did rely on the certificates or at least the fact that they would be coming later, and that the wording of the Certificates themselves accepted that they would be relied on.

Collateral Warranties

Additionally, Akenhead J found that the Certificates could be construed as warranties due to their wording, which suggested contractual intention, allowing a claim in contract to succeed.

Limitation

For one of the Claimants, a limitation point arose as the claim was issued more than six years after the date of the Certificate, the exchange of contracts and the lease. S&P contended that

the claim was time barred. Akenhead J however found that s14A of the Limitation Act 1980 applied allowing the Claimant an extra limitation period for actions in negligence where the action is brought within three years of knowledge of the material facts and, in this case, that the damage was attributable to the alleged negligence of S&P. Akenhead J found that there were distinct categories of damage and that the Claimant lacked the requisite knowledge in respect of some of those categories of damage within three years of the commencement of the action.

The Decision – Court of Appeal

The Court of Appeal overturned Akenhead J's findings and allowed the appeal on the following grounds.

Negligent Misstatement

The Court of Appeal found that the Claimants could not have relied on the Certificates as they were not in existence at the time the Claimants committed themselves to the purchase of the properties. Additionally, the Claimants could only have relied on an understanding that they would receive a Certificate after completion. However, any such understanding would have resulted from advice given by their own solicitors as they received standard form drafts of the Certificates from S&P's solicitors. S&P did not make any statements to the Claimants themselves prior to issuing of the Certificates.

Collateral Warranties and Duty of Care

The Court of Appeal found that the Certificates did not amount to contractual warranties as they were negotiated between professionals in the field who are familiar with the distinction between a warranty and a representation. The wording of the Certificates did not include any reference to a promise, warranty or guarantee nor was there consideration. Additionally, the Certificates included the wording 'I am aware that this certificate is being relied upon...' which would be superfluous in a case of a document which assumed contractual liability.

Further, the Court of Appeal found that there was no separate duty in respect of the inspections of the properties to the purchasers and future Certificate holders. It was found that S&P owed a contractual duty to this extent to Optima, but that such a duty in tort could not be imposed on S&P in relation to purchasers who would receive Certificates after purchase. S&P would not have provided the Certificates or made the statements contained within them, at the time the duty of care in relation to inspection of the development would have arisen.

Limitation

The Court of Appeal found that, as a claim based on negligent misstatement, the Claimant's action arose when she purchased the flat on the faith of a negligently prepared Certificate. In order for the Claimant to take advantage of section 14A she would have had to show that the knowledge of the damage she had in this regard was not such that would have been

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considered sufficiently serious to bring a claim against the Defendant. The Court of first instance did not make this finding in relation to this head of damage (however it did in relation to other damage) and thus the Court of Appeal found that S&P's limitation defence succeeded.

Commentary

The Court of Appeal's decision highlights that reliance is key if a claimant intends to make a recovery on the basis of a negligent misstatement. In addition, the Court makes it clear that any tortious liability arising out of negligent certificates is based on the representations made in the certificate itself, not on the actions carried out prior to the certificate. In the absence of clear wording, statements in the form considered in this case will not amount to collateral warranties and will thus not attract contractual liability.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.