Neutral Citation Number: [2013] EWHC 2665 (TCC)

Case No: HT-13-283

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 29th August 2013

Before:

MR JUSTICE AKENHEAD

- -

Between:

PARKWOOD LEISURE LIMITED **Cla**

- and -

LAING O'ROURKE WALES AND WEST LIMITED **Defe**

- -

- -

Justin Mort (instructed by **Harrison Drury & Co Ltd**) for the **Claimant**

Steven Walker QC (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 23 August 2013

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JUDGMENT

Mr Justice Akenhead:

These Part 8 proceedings raise an interesting issue as to if and in what circumstances a collateral warranty can amount to a construction contract for the carrying out of construction operations within the meaning of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). The proceedings have been brought, amongst other things, for a determination as to whether the Claimant can institute adjudication.

The Background

1.
The Claimant, Parkwood Leisure Ltd ("Parkwood"), provides facilities management services in respect of a number of PFI projects, for amongst others, the Cardiff International Pool, a swimming and leisure facility. Cardiff City Council ("the Council") owns this facility but let it to Orion Land and Leisure (Cardiff) Ltd ("Orion") under a lease dated 25 April 2006 for a 25 year term. Orion sub-let the

facility to Parkwood under a sub-lease dated 11 January 2008 for a term of about 10 years. Parkwood operates this swimming facility for Orion and the Council pursuant to an agreement dated 11 January 2008.

2.
By a building contract dated 7 April 2006, Orion engaged Laing O'Rourke Wales & West Ltd ("LORWW") under a standard JCT design and build contract to complete the design for the facility and carry out and complete the construction. LORWW's primary obligation in Clause 2.1 was to:

"…upon and subject to the Conditions carry out and complete by Sections the Works referred to in the Employer's Requirements, the Contractor's Proposals…the Articles of Agreement, these Conditions and the Appendices in accordance with the aforementioned documents…"

3.
The Works were due to commence contractually in April 2006 and to be completed by 21 December 2007. Article 10 stated:

"The Contractor shall upon request made from time to time by the Employer, forthwith execute a deed of warranty in the form set out in Appendix # in favour of Cardiff County Council and/or any person providing finance in connection with the works and/or any first purchaser of the Works or any significant part thereof and/or Parkwood Holdings plc and/or any mortgagee of the completed Works or any part thereof provided always that the maximum number of deeds of warranty that the Contractors shall be obliged to execute shall not exceed five."

4.
On 6 December 2007 and before the Works were completed, a deed dated 6 December 2007 was executed between Parkwood and LORWW whereby the latter gave certain warranties, acknowledgements and undertakings to Parkwood (the "Collateral Warranty"). I will return later to the terms of the Collateral Warranty. It seems to be common ground that the Works did not reach Practical Completion until a date in 2008.

5.
Parkwood occupied the facility which was opened to the public. A number of problems arose over the following 30 months with Parkwood making a number of complaints about alleged construction and commissioning defects. On 17 February 2011, Parkwood wrote to LORWW as follows:

"1. I am writing to you again in connection with the construction of the Cardiff International Pool… carried out by [LORWW] during 2006-8 under a contract dated 7th April 2006 with Orion…

2. This letter is written in accordance with the Pre-Action Protocol for Construction and Engineering Disputes and constitutes our Letter of Claim.

Background

3. Following over 18 months of delay in resolving outstanding matters from the construction of the Cardiff International Pool, the issue was escalated to me early last year. You will recall that I wrote to you, at Reference B, on 10th May 2010 to formally express some of the concerns held by Parkwood Leisure…

Items Remaining of Immediate Concern

6. It was an implied term of the contract that the works would be carried out in a proper and workmanlike manner and in compliance with the contractual documents (as varied) and to a reasonable standard. [LORWW] owed to Parkwood Leisure a duty of care and has failed to deliver/ rectify or otherwise remedy the issues arising from the following major items:

…c. Air Handling Units (AHU). A number of AHU problems have led to excessive humidity and stained ceilings; both impact on building fabric and require urgent rectification before the degradation of affected areas becomes self perpetuating defect.

The direct costs to Parkwood Leisure of replacing and rectifying elements to allow the continued operation of the site, as outlined above are £41,339 and are detailed at Annex A.

Further Items Requiring Remedy

7. The list at Annex B details further items requiring attention. Whilst these are less urgent they are of equal importance and must be remedied as soon as it is practicable to do so and certainly before 30th June 2011. The Photographs elaborating some of these issues were provided at Reference A…"

6.
Annex A contains a detailed list of remedial works supporting a figure of £41,339, some £6,800's worth expressly relating to various repairs to various AHUs ("Cool Solution" and "2A's/Electranet"). Annex B contains some 23 items listing various alleged defects and various comments apparently from LORWW as to their intentions as to how to deal with some of them. There is reference to "missing interlocks" relating to "all 13 AHUs" and to remedial works including decoration relating to staining to ceilings which was linked "to previous AHU fault".

7.
On 19 March 2012, Parkwood, its holding company, Orion and LORWW entered into a "Settlement Agreement", the terms of which I will return to later in this judgment.

8.
The evidence does not relate in detail what happened thereafter until Parkwood wrote another letter dated 5 February 2013, also said to be a Pre-Action Protocol letter, to LORWW, which materially said as follows:

"As you will be aware from the exchange of correspondence last summer and your subsequent site inspection on 18th October 2012 [Parkwood] considers that the air handling units at Cardiff International Pool are defective and/or not fit for purpose.

Further, [LORWW] has failed or refused to undertake any remedial works in respect of the air handling units.

Parkwood therefore has had no option other than to enforce its legal rights under the Collateral Warranty dated 6th December 2007. Accordingly, please regard this letter as formal notification of Parkwood's claim under the Collateral Warranty dated 6th December 2007.

For the avoidance of doubt, this letter raises entirely new and separate issues to those which were raised by Parkwood in its letter of Claim dated 17th February 2011 and which was the subject of a concluded compromise on 19th March 2012…

Summary of Claim

1. This claim concerns the defective design and/or installation of the air handling units (AHU) during the construction of Cardiff International Pool…

4. Under the terms of the Collateral Warranty, Laing warrants, acknowledges and undertakes that, inter alia:

(i) It has carried out and shall carry out and complete the Works (as more particularly described in the Contract)…

5. It is Parkwood's case that Laing was responsible for the design and installation of the AHU's under the Contract and that the said design and installation is defective…

7. Despite a further exchange of correspondence and a site visit to inspect the AHU's, Laing has failed or refused to undertake any remedial works and has to date refused to accept liability for the defects…

Evidence of Defects

10. [This refers to a report commissioned by Parkwood from Hoare Lea into the defects which was attached at Annex A]

12. Full particulars of the defects that have been identified with the AHU's are set out in detail in section 2 of the Hoare Lea report, but in summary those defects are as follows:

•
The wet AHUs are not compliant with the employers brief.

•
The design of the units is not suitable for a coastal atmosphere and [sic] of the potential for corrosion from salt and chlorine laden air.

•
The fans…are not suitable for purpose.

•
The motors are oversized leading to probable overheating issues.

•
The construction of the unit is considered to be poor with panel/seal failures occurring.

•
There is severe corrosion to air handling units control panels (external units).

•
The infill panels and access doors are poorly fitted.

•
There is extensive rusting on the pulleys and other internal components.

•
There is little or no internal protective coating on the units.

•
The supply intake and discharge for each unit is too close…

14. Hoare Lea has recommended that all of the AHUs are immediately replaced, together with all associated controls…

15 and 16 [These paragraphs set out work to two AHUs which fall short of full replacement]…

Remedies Sought

17. Laing has failed to carry out and complete the Works in accordance with the Contract and/or it has failed to exercise reasonable skill and care in the design and/or completion of the Works and is therefore in breach of the Collateral Warranty dated 7th December 2007.

18. Parkwood requires Laing to undertake the following remedies under Clause 12 of the Collateral warranty:

a. Damages. Laing O'Rourke shall compensate Parkwood for the loss and costs it has incurred to date in the sum of £337,693 made up as follows:

(1) [Professional fees]… £6,710

(2) The cost of rectification works…to date and identified in Annex B £68,047.30

(3) A contribution of £16,652.58 towards Parkwood's increased maintenance costs incurred to date in relation to the air maintenance units… more particularly in respect of remedial maintenance required… on the building infrastructure, furniture, fixtures and fittings décor…or any other damage attributable to the inadequate functioning of the air handling system… £14,421.50

(4) A contribution of £19,194.75 towards the increased utility costs that Parkwood has incurred directly as a result of the specific and acute failure of the AHUs in October 2011 further details of which are provided at Annex C…

(5) A contribution of £2,750 towards the increased management costs that have been incurred specifically to deal with this issue …

(6) Loss of income as a result of a fall in memberships since July 2011 as a direct result of the discomfort caused by the excessive heat and humidity in all areas caused by the repeated failure of the AHUs since July 2011 specifically as a result of the acute failure in October 2011, further details of which are provided at Annex D £226,569.75…"

The attached Hoare Lea report explains, apparently articulately, what the problems are said to be. The attached photographs show apparent corrosion staining on a number of AHUs or their control panels. Annex D purports to list a drop in membership from July 2011 from 2299 to 1925 members.

LORWW responded on 1 July 2013 saying amongst other things:

"1.2.1 The subject matter of the current claim and the claim made by Parkwood in hits letter dated 17 February 2011 are the same. The claim has been settled…

2.5 Our position is as follows:

2.5.1 The subject matter of the earlier claim and the present claim are the same; i.e. the AHUs.

2.5.2 The earlier claim was to the effect that the AHUs did not work properly. The present claim is about the reasons for the failure to work properly. It cannot be brought because the claim relating to the AHU's was settled.

2.5.3 The original claim was caused by the matters about which complaint is now made…

2.5.6 Clause 2.42 [sic] of the Settlement Agreement preserved Parkwood's ability to claim in respect of "new matters relating to the subject matter of the Settled Claims which do not exist as at the date of this Agreement". Expressly, and by necessary implication, it excluded Parkwood's ability to claim in respect of other matters relating to the subject matter of the Settlement Claim…

2.6 For these reasons, the current matter is a Settled Claim which is subject to clause 2.4.2 of the Settlement Agreement where Parkwood "undertakes not to make any further or future demand all claims against LORWW…under the Collateral Warranty"".

On 4 July 2013, Parkwood responded saying that it did not "accept that this claim was compromised by the Settlement Agreement" saying that the issues raised were "entirely separate and distinct from the AHU claim identified at paragraph 6(c)".

The Proceedings

On 29 July 2013, Parkwood issued Part 8 proceedings seeking

"…determination of the following question: whether the parties' contract entitled Contractor/ Beneficiary Warranty Deed, and dated 6 December 2007, is a construction contract for the purposes of part II of the Housing Grants Construction and Regeneration Act 1996."

Parkwood sought a declaration that this contract was "a construction contract on the basis that it contains the Defendant's express agreement to carry out construction work", section 104(1)(a) being engaged. It also sought a determination of another question:

"…whether the Claimant's claim in respect of defective air handling units, intimated in a letter of claim dated 5 February 2013, (or any part of that claim,) was compromised in a settlement agreement made by the parties dated 19 March 2012"

In relation to this question claimant sought a declaration:

"that the said claim has not been compromised. Whilst the parties did compromise some earlier claims that the Claimant had made in relation to the same handling units the material claims were not."

The proceedings were accompanied by a statement of Mr Wadland, Parkwood's commercial director. Directions were issued by the Court on 30 July 2013. LORWW did not submit any evidence and their position was explained and amplified in the skeleton arguments of its Counsel.

The Collateral Warranty

This was executed as a Deed (under seal), with LORWW named as the "Contractor" and Parkwood as the "Beneficiary". Relevant parts of it are:

"RECITALS

A. The Contractor has entered into a contract dated 7 April 2006 ("the Contract") with Orion…("the Employer") for the design, carrying out and completion of the construction of a pool development… ("the Works") as more particularly described in the Contract.

B. By an agreement dated 8 April 2006 and made between the Employer (1) the Beneficiary (2) Parkwood Holdings PLC (3) and the County Council of the City and Council of Cardiff (4) ("the Agreement") the Beneficiary has agreed to acquire an interest as tenant in the Works or part of them.

C. Pursuant to Article 10 of the Contract Contractor has agreed to execute a deed in the form of this deed in favour of the Beneficiary…

NOW IT IS AGREED in consideration of the payment of £1… and without prejudice to the rights and obligations of the Contractor under any contract or sub-contract to which the Contractor is a party, the following warranties and undertakings shall apply as between the Contractor and the Beneficially –

1. The Contractor warrants, acknowledges and undertakes that:-

1 it has carried out and shall carry out and complete the Works in accordance with the Contract;

2. subject to this Deed, it owes a duty of care to the Beneficiary in the carrying out of its duties and responsibilities in respect of the Works;

3 in the design of Works or any part of the Works, in so far as the Contractor is responsible for such design under the Contract, it has exercised and will continue to exercise all reasonable skill and care to be expected of an architect or, as the case may be, other appropriate professional designer…

4 all materials and goods supplied or to be supplied for incorporation into the Works are or shall be of a quality, kind and standard which complies with the express and implied terms of the Contract;

5 all materials and goods recommended or selected or used by or on behalf of the Contractor shall be in accordance with good building practice and the relevant provisions of British Standard documents to the extent required by the Contract;

6 all workmanship, manufacture and fabrication shall be in accordance with the Contract;

7 it has complied and will continue to comply with the terms of regularly and diligently carry out its obligations under the Contract

Provided that the Contractor shall have no greater liability, duties or obligations under this Deed than it would have had if the Beneficiary had been named as joint employer with the Employer under the Contract and the Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation or term in the Contract and to raise the equivalent rights in defence of liability as it would have against the Employer under the Contract…

3. Nothing in the Contractor’s tender or in any specification, drawing, programme or other document put forward by or on behalf of the Contractor and no approval, consent or other communication at any time given by or on behalf of the Employer or the Beneficiary shall operate to exclude or limit the Contractor’s liability for any breach of its obligations hereunder provided that nothing in this Deed shall preclude the Contractor from raising the defence of contributory negligence.

5. Insofar as the beneficial ownership of copyright and any other intellectual property right in the same is vested in him, the Contractor hereby grants to the Beneficiary an irrevocable, royalty-free and non-exclusive licence to use and reproduce any and all drawings, specifications and other design information and industrial and construction know-how…which has been or will be prepared by or on behalf of the Contractor for the purposes of the Works…

8. This Deed shall be governed by English law and the parties hereby submit to the jurisdiction of the English Courts.

10. The Contractor shall have no liability under this Deed or at all for and in respect of any delay in the progress and/or completion of the Works or any part of them.

11. No action or proceedings arising under out of or in connection with this Deed…shall be commenced against the Contractor after the expiry of 12 years from the date of Practical Completion.

12. In the event of any breach of this Agreement the Contractor shall be liable for the reasonable cost of repair renewal and/or reinstatement of any part or parts of the Works to the extent that the Beneficiary incurred such costs and/or the Beneficiary is liable either directly or by way of financial contribution for such costs. The Contractor shall also be liable for further or other losses or damages or costs incurred or suffered by the Beneficiary as a result of breach of this Agreement by the Contractor including without limitation loss of use, loss of profit or other consequential losses up to a maximum aggregate sum of £2,500,000".

The Settlement Agreement

This was entered into by Parkwood, its holding company, LORWW and Orion. Material parts are as follows:

"Recitals:

…(d) A series of disputes have arisen in connection with the construction of the CIP [Cardiff International Pool] and the Parties have agreed to settle certain of them, being the Settled Claims, and to enter into this Agreement to record the terms of the settlement

1 Definitions and Interpretation…

"the Non-Settled Claims means those of the Parkwood Claims which are not Settled Claims being, for the avoidance of doubt:

(a) those claims made by Parkwood against LORWW under the… Collateral Warranty that LORWW is liable to it in damages for breach of contract and/or negligence, as outlined in paragraph 6(e) in the Pre-action Protocol Letter; and

(b) the claim made by Parkwood for payment by LORWW of the Fourth Parkwood Invoice…

"the Parkwood Claims" means, together:

(a) those claims made by Parkwood against LORWW under the… Collateral Warranty that LORWW is liable to it in damages for breach of contract and/or negligence as outlined in paragraph 6(a) to (g) (inclusive and paragraph 7 in the Pre-action Protocol Letter;

(b) the claim by Parkwood that LORWW is obliged to pay each of the Parkwood Invoices; and

(c) the claim by Parkwood that LORWW is obliged to pay the Fourth Parkwood…

"the Pre-action Protocol Letter" means the letter dated 17th February 2011 and written by Parkwood to LORWW…

"the Settled Claims" means:

(a) those claims made by Parkwood against LORWW under the… Collateral Warranty that LORWW is liable to it in damages for breach of contract and/or negligence, as outlined in paragraph 6 (a), (b), (c), (d), (f), and (g) in the Pre-action Protocol Letter; and

(b) each of the Parkwood Invoices…

2.1 In consideration of the agreements and acknowledgements contained within this agreement Parkwood, LORWW and [Orion] have agreed to settle the Settled Claims on the terms set out herein.

2.3 LORWW shall pay to Parkwood the sum of… £15,000 (which payment is being made without any admission of liability and which will be accepted on that basis) within…10 Working Days of Parkwood complying with clause 2.2

2.4 Subject to the provisions of clause 5.5, Parkwood:

2.4.1 will accept the payment of the sum in clause 2.3 and the carrying out of the Further Work in full and final settlement of the Settled Claims and upon receipt of those monies and satisfactory completion of the Further Works LORWW will be automatically released from the claims Parkwood made which constitute the Settled Claims; and

2.4.2 undertakes not to make any further or future demand or claims against LORWW and/or [Orion] and/or under any Collateral Warranty it has the benefit of in relation to Settled Claims upon receipt of the sum in clause 2.3 provided that Parkwood shall not [be] precluded from making any further or future demand or claims in relation to new matters relating to the subject matter of the Settled Claims which do not exist as at the date of this Agreement

3 LORWW undertakes:

3.1 To carry out complete each part of the Further Work as soon as practicable and by no later than three months of the date of this Agreement…

5.1 Parkwood and LORWW each agree and acknowledge that notwithstanding the entry into of this Agreement and the completion of the matters contemplated hereunder the…Collateral Warranty shall remain in full force and effect and LORWW's rights and obligations under the…Collateral Warranty shall not be affected or released by this Agreement…

5.5 Parkwood and LORWW each agree and acknowledge that notwithstanding the entering into of this Agreement and the completion of the matters contemplated hereunder Parkwood shall remain entitled to pursue LORWW in relation to each of the Non-Settled Claims but they will each use reasonable endeavours to settle the same…"

Discussion - "Construction Contract"

Section 104 of the HGCRA appears to be simply drawn:

"(1) In this Part a "construction contract" means an agreement with a person for any of the following –

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement –

(a) to do architectural, design, or surveying work, or

(b) provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations…”

"Construction operations" are defined in Section 105 which also identifies certain operations which are not to be construction operations within the meaning of the Act. Section 106, broadly, excludes construction contracts with residential occupiers.

Section 108 provides parties to construction contracts with the right to refer disputes arising under the contract to adjudication with provision made for the Scheme for Construction Contracts to apply if the contract does not make adequate provision for adjudication.

There is no authority directly on the proposition as to the extent to which (if at all) contracts such as the Collateral Warranty in this case are to be considered as construction contracts for the purposes of Part II of the HGCRA. There is little or nothing in the Act itself other than the simple wording of section 104 (1) which illuminates what an agreement "for…the carrying out of construction operations" means. It could be said that the words are unambiguous and therefore there is no need to resort to the Hansard transcripts of the debate in Parliament on the bill as it then was.

It can be said that there is a verbal difference (at least of emphasis) between sub-sections (1) and (2). Sub-section (1) talks about an agreement with the person for the carrying out of construction operations whilst sub-section (2) talks about an agreement "to do architectural, design, or surveying work". The former is broader whilst the latter requires the doing of various aspects of professional work. Undoubtedly, sub-section (1) is drawn very widely albeit that the term "construction operations" is more closely defined. Mr Justice Coulson in his book "Coulson on Construction Adjudication" 2nd edition says that the effect of Sections 104 and 105 are that "the 1996 Act applies to all contracts related to the carrying out of construction operations" (Paragraph 2.17), albeit that he was not obviously applying his considerable experience specifically to the issue raised in the current case.

In my judgment, there can be no doubt that the reference to a "contract" must mean a contract under English law, however it is formed (simple, in writing, oral, under seal or otherwise) and that it is by reference to that contract that one must determine whether or not it is a construction contract under the HGCRA. Put another way, it must be primarily by reference to the contract entered into between the requisite parties that one determines whether the contract is one for the carrying out of construction operations, the arranging of the carrying out of construction operations by others or the provision of labour or the labour of others for the carrying out of construction operations. One must then apply ordinary contractual interpretation principles to determine this aspect of the contract.

In that context therefore, one can draw the following conclusions:

(a) The fact that the construction contract (if it is one) is retrospective in effect is not a bar to it being a construction contract. It is common for contracts to be finalised after the works have started and to be retrospective in effect back to the date of or even before commencement. If that is what the effect of the parties’ agreement is, then that can not prevent it from being a construction contract for the carrying out of construction operations. Put another way, a construction contract does not have to be wholly or even partly prospective.

(b) One must be careful about adopting a peculiarly syntactical analysis of what words mean in this statute when it is clear that Parliament intended a wide definition. An agreement "for…the carrying out of construction operations” is a broad expression and one should be able, almost invariably at

least, to determine from the contract in question whether it fits within those words, without what could be a straight-jacketed judicial interpretation.

(c) Usually and possibly invariably, where one party to a contract agrees to carry out and complete construction operations, it will be an agreement "for the carrying out of construction operations".

Reference was made by Mr Mort to the Construction Contract (England and Wales) Exclusion Order 1998 as support for his proposition that the word "for" in sub-section (1) meant "in relation to". There were extensive arguments based on authority as to whether and the extent to which a later statutory instrument could be deployed in the interpretation of the original statute. The authorities were **Regina (A) v Director of Establishments of the Security Service**[2009] UKSC 12 and **Hanlon v The Law Society** [1981] AC 124. In the later Supreme Court case, Lord Hope was prepared to regard the enabling statute which received the Royal Assent on 28 July 2000 and the statutory instrument made on 28 September 2000 as all part of the same legislative exercise. In the earlier House of Lords case, Lord Lowry in an authoritative judgement starting at page 193G stated as follows:

“A study of cases and of the leading textbooks… appears to me to warrant the formulation of the following propositions:

(1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulation or where the meaning of the Act is ambiguous.

(2) Regulations made under the Act provide a Parliamentary or administrative contemporanea expositio of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority of the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.

(3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.

(4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former.

(5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modified.

(6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act”.

The Exclusion Order in question was made pursuant to Sections 106 (1) (b) and 146 (1) of the HGCRA. It was made on 6 March 1998, almost 2 years after the HGCRA was passed, but both were to come into force in early May 1998. The order made it clear by Section 5 that finance agreements were to be excluded from the operation of Part II of the HGCRA. Sub-section (2) identifies the types of finance agreements being excluded as (amongst others) "any contract of insurance" and

“(e) any contract under which the principal obligations include an undertaking by a person to be responsible as surety for the debt or default of another person, including fidelity bonds, advance payment bonds, retention bond or performance bond.”

Mr Mort’s argument runs in effect along the line that, because such contracts are being excluded, they must at least potentially have been included within the definition of "construction contract”

originally and therefore almost by analogy warranty arrangements relating to construction operations must be intended to be included. I am unconvinced by that argument for at least three reasons:

(a) The exclusion order was drafted just under two years after the enabling legislation.

(b) It is difficult to see that the Exclusion Order was anything other than clarificatory of the principal Act because it must have been fairly obvious that insurance or a bond would in all probability have not been a contract “for the carrying out of construction operations”. This judge at least has a recollection that the insurance and bond industries made representations to the relevant Minister after the Act was passed but before it came into force for such clarification.

(c) It is something of a jump to say that, because insurance and bond contracts were excluded by the Order, collateral warranties were as a class intended to be retained within the definition of construction contract.

One therefore moves on to the actual wording used by the parties here. I have no doubt that this particular collateral warranty was and is to be treated as a construction contract "for…the carrying out of construction operations". My reasons are as follows:

(a) There has been no suggestion that the form of collateral warranty used was in a particular standard form. Indeed, there are only a few standard forms for collateral warranties.

(b) The Recital itself sets out that the underlying construction contract (the "Contract") was "for the design, carrying out and completion of the construction of a pool development". There can be little or no dispute that the Contract was a construction contract for the purposes of the HGCRA.

(c) That wording is replicated in Clause 1 of the Collateral Warranty which relates expressly to carrying out and completing the Works.

(d) Clause 1 contains express wording whereby LORWW "warrants, acknowledges and undertakes”. One should assume that the parties understood that these three verbs, whilst intended to be mutually complementary, have different meanings. A warranty often relates to a state of affairs (past or future); a warranty relating to a motor car will often be to the effect that it is fit for purpose. An acknowledgement usually seeks to confirm something. An undertaking often involves an obligation to do something. It is difficult to say that the parties simply meant that these three words were absolutely synonymous.

(e) This is reflected in the following sub-paragraphs which relate to the past as well as to the future. This recognised the fact that the Works under the Contract remained to be completed. The acknowledgement by LORWW most obviously relates to the fact that the Contractor had already carried out a significant part of the Works and the design. The undertaking primarily goes to the execution and completion of the remaining works. The warranty goes to the work and design both already carried out or provided and yet to be carried out and provided.

(f) LORWW is clearly in Clause 1 (and in particular sub-clause 1) undertaking that it will carry out and complete the Works in accordance with the Contract between Orion and LORWW. That undertaking however is being given by LORWW to Parkwood. Thus, LORWW is undertaking to Parkwood that, in the execution and completion of the Works, it will comply with that Contract. Most obviously, that relates to the quality and completeness of the Works. The Contract specifications and drawings will need to be complied with as will the Statutory Requirements (such as Building Regulations – see

Clause 6.1 of the Contract Conditions) and the standards and scope described in the Employer's Requirements and Contractor's Proposals (see, for instance, Clause 8 of the Contract Conditions).

(g) The Collateral Warranty, being contractual in effect, will give rise to the ordinary contractual remedies. Thus, if LORWW completes the Works but not in compliance with, say, the Employer's Requirements or the standards therein specified, there will be an entitlement for Parkwood to claim for damages because there will be a breach of contract. Similarly, there could be remedies if LORWW had repudiated the Contract because it will then have failed to complete the Works at all. It is at least possible that, in those circumstances, Parkwood would have had locus to seek injunctive relief in terms of a mandatory injunction or specific performance, albeit that it is often difficult to secure such injunctions or orders in practice when they relate to the execution of detailed and extensive construction work.

(h) Although Clause 10 expressly excludes liability for delay in progress and completion, it does not exclude liability otherwise for non-completion. That is recognised in Clause 12 where a remedy is given for repairs, renewals and reinstatement and also for "further or other losses or damages or costs incurred as a result of breach". This is not a contract which is simply limited to the quality of work, design and materials.

(i) Clause 1 (1) is not merely warranting or guaranteeing a past state of affairs. It is providing an undertaking that LORWW will actually carry out and complete the Works. Completion of the Works is not only important so far as time is concerned; it is also important because LORWW is undertaking that the Works will be completed to a standard, quality and state of completeness called for by the Contract.

(j) Thus, this Collateral Warranty is clearly one "for the carrying out of construction operations by others", namely by LORWW.

(k) The remainder of Clause 1 is consistent with and complementary of this view. Sub-clause 3 contains an important prospective element, (LORWW "will continue to exercise" care and skill). Similarly sub-clauses 4, 5, 6 and 7 have such an element.

(l) The fact that proviso to Clause 1 makes it clear that Parkwood is not a joint employer under the Contract is not to the point because the purpose of the proviso is to provide LORWW with all the defences which would be available to LORWW under the Contract. That simply relates to the "deal" which was done. It is in any event partly balanced by Clause 3.

It does not follow from the above that all collateral warranties given in connection with all construction developments will be construction contracts under the Act. One needs primarily to determine in the light of the wording and of the relevant factual background each such warranty to see whether, properly construed, it is such a construction contract for the carrying out of construction operations. A very strong pointer to that end will be whether or not the relevant Contractor is undertaking to the beneficiary of the warranty to carry out such operations. A pointer against may be that all the works are completed and that the Contractor is simply warranting a past state of affairs as reaching a certain level, quality or standard.

It follows from the above that the Claimant is entitled to a declaration in appropriate terms to the effect that the Contractor/Beneficiary Warranty Deed dated 6 December 2007 is a construction contract for the purposes of Part II of the HGCRA.

Discussion - The Settlement Agreement

It emerged during argument that LORWW was not seeking to argue that necessarily all claims in relation to AHUs were necessarily compromised. The parties eventually agreed a form of wording which can form the subject matter of a declaration. It is therefore strictly speaking unnecessary for the Court to address the issues which were raised.

It may be helpful however if I identify the thought process which I have had in relation to those issues:

(a) It would prove difficult for the Court to give a declaration in the form sought by Parkwood. This is primarily because to do so the Court would have to undertake a factual analysis to determine the extent to which the new claim as intimated was in whole or in part (if at all) one of the Settled Claims within the terms of the Settlement Agreement.

(b) There can be no doubt that one of the Settled Claims was that outlined at Paragraph 6(c) in the letter dated the 17th February 2011 from Parkwood to LORWW. That was written in somewhat imprecisely defined terms:

“A number of AHU problems have led to excessive humidity and sustained ceiling; both impact on building fabric and require urgent rectification before the degradation of affected areas becomes self perpetuating defect.”

(c) There was no evidence before the court as to what these "AHU problems" actually were historically. One would need to look at the factual background to determine, in interpreting this letter what these "problems" actually were. Doubtless there are some letters between the parties which precede this February 2011 letter and they may cast some relevant light; no such correspondence was provided to the Court and there was no evidence to explain with any precision what the "problems" were.

(d) It is clear that what was being settled was AHU problems which had led to "excessive humidity and stained ceilings”. It may well be the case (but I do not decide) that some of the later complaints identified in the February 2013 letter do not fall within that category. An example would be the failure (if so it was) properly to guard against corrosion of the AHU units themselves. That might well not be a problem which had led to excessive humidity and stained ceilings but an inherent problem within the AHU units themselves.

(e) It is also possible, but I do not decide, that Paragraph 6(c) is qualified by being limited not only to AHU problems which can lead to excessive humidity and stained ceilings but also only those which impact on building fabric and require urgent rectification.

(f) It is accepted that there is a further qualification highlighted by Clause 2.4.2 of the Settlement Agreement where the proviso clearly enables Parkwood to pursue further claims in relation to "new matters… which do not exist as at" 19 March 2012 even if they relate "to the subject matter of Paragraph 6(c). I am simply not in a position on the evidence put before the Court to identify whether any of the matters raised in the February 2013 letter fall into this category.

(g) It at least arguable that some parts of the damages claim identified in the February 2013 letter may be within the ambit of Paragraph 6(c). If or to the extent that for instance the alleged falling membership since July 2011 is attributable to the "AHU problems" referred to in the earlier letter, that sub-claim may fall to be reduced.

Decision

There will be judgment for Parkwood by way of declaration to the effect that the Contractor/ Beneficiary Warranty dated 6 December 2007 is a construction contract for the purposes of Part II of the HGCRA. There will be declarations as to the effect of the Settlement Agreement as agreed by Counsel.