

*Abbey Healthcare (Mill Hill) Ltd v Augusta
2008 LLP (fka Simply Construct (UK) LLP)*
[2024] UKSC 23

Vivek Kapoor, Patrick Hennessey, David Hopkins

39 Essex Chambers

22 July 2024

Construction contracts

104.— Construction contracts.

(1) In this Part a “construction contract” means an agreement with a person *for* [...]—

(a) the carrying out of construction operations;

Collateral warranties

- Third party pure economic loss claims: *Murphy v Brentwood District Council* [1991] 1 AC 398
- Collateral warranty gives contractual right
- Promise from construction professional that they have done their job properly

Abbey v Simply: Background

- June 2015: D engaged by Sapphire to build a care home
- Oct 2016: PC
- June 2017: Novation from Sapphire to C1, freehold owner
- Aug 2017: C1 grants C2 a 21-year lease
- Aug 2018: C1 discovers fire safety defects
- Sep 2020: D executes collateral warranty in favour of C2

Abbey v Simply: Warranty

4.1 The Contractor warrants that:

(a) the Contractor has performed and **will continue to perform** diligently its obligations under the Contract;

(b) in carrying out and completing the Works the Contractor has exercised and **will continue to exercise** all the reasonable skill care and diligence to be expected [...];

(c) in carrying out and completing any design for the Works the Contractor has exercised and **will continue to exercise** all the reasonable skill care and diligence to be expected [...].

Abbey v Simply: Adjudication

- 11 Dec 2020: C1 and C2 each refer to adjudication disputes regarding the defects
- D challenges jurisdiction in respect of C2's adjudication on the ground that the C/W is not a construction contract
- Adjudicator makes awards in each adjudication in favour of both C1 and C2

Abbey v Simply: Enforcement

- Martin Bowdery QC refuses enforcement: [2021] EWHC 2110 (TCC); 197 ConLR 241
- Majority of the Court of Appeal allows Abbey's appeal: [2022] EWCA Civ 823; 203 ConLR 1
- Stuart-Smith LJ, dissenting: “One of the incidents of a warranty [...] is that an injunction will not lie to enforce the underlying obligation”: para 109

Abbey v Simply: Supreme Court

- “*for* [...] the carrying out of construction operations”
- Difficult to see how the object of a C/W is the carrying out of construction operations: para 65
- Beneficiary has no control over the operations: para 67
- C/W not a construction contract unless there is a separate or distinct obligation to carry out construction operations for the beneficiary: para 70

Implications for beneficiaries and donors



Implications for the construction industry

- In “*the interests of certainty that there is a dividing line which means that [CW] are generally outside the 1996 Act ...*” (78)
- Reverting to the position “*as it was generally understood to be before Parkwood*” (83)

Implications for the construction industry

- Parties to a CW wanting to adjudicate:
 - Express provision in CW; or
 - Draft CW such that the warrantor owes a distinct and separate construction obligation to the beneficiary
- Existing disputes – into Court?

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Vivek is an experienced barrister, advocate and arbitrator specialising in complex commercial, construction, and investor-state disputes. He is recognised for his expertise in multi-jurisdictional disputes arising from energy, natural resources, infrastructure and construction, banking and financial services, and technology sectors. Vivek is described in leading legal directories as “an excellent litigator”, “an expert in law”, “an excellent advocate” and “a great strategic decision maker”.

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