

Collateral Warranties: Time to Break the Habit

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Under English law, one can in general, only sue on a contract if one is a party to it. In simple cases, this is not a problem. However, not all cases are simple. Take, for example, a development project. Key contractual documents are the building contract/subcontracts and also the appointments under which the various consultants are engaged. They contain core obligations, where only the developer and/or the main contractor are the benefiting parties. However, other key players, such as a funder, a purchaser or an occupational tenant, will only participate in the development if they too can enforce those promises. Using collateral warranties is the traditional method for achieving this. In this paper, it will be explained how The Contract (Rights of Third Parties) Act 1999 has created an opportunity to abandon the use of contractors' and consultants' warranties by giving non-parties to a contract the right to enforce its provisions in cases where the contract expressly provides or clearly intends that they should be able to do so. Copyright © 2005 John Wiley & Sons, Ltd.

INTRODUCTION

One of the objects of the Contracts (Rights of Third Parties) Act 1999 is to allow stakeholders in commercial property to be protected against construction defects or the insolvency of the developer without the cost, complexity and inconvenience of collateral warranties.

Any move to take advantage of the 1999 Act must come from the property industry itself. To date, all but a small minority of the development community has neglected this opportunity, probably due less to any doubts as to the effectiveness of the new legislation than to a concern as to its acceptance by the market in general. Although, latterly, there has been a growth of interest in the use of the Act, the majority of developers will not feel

able to abandon collateral warranties until the funds, in particular, are willing to accept such a change. The issue for the funds (i.e. lenders and investors in commercial property) and their advisors is whether or not to support such a shift in practice.

PROBLEMS WITH COLLATERAL WARRANTIES

Collateral warranties give rise to a number of difficulties of a technical nature, which are considered later in this paper. They also impose a considerable burden on the property industry. Measured simply by the amount of paper they require to be generated, their cost can be excessively high. As development schemes have tended to become larger and more complex, the number of warranties required for a fairly average project has grown, running into hundreds. The popular idea that they can be produced by word processors at virtually no cost is a myth. An engrossment can be in duplicate,

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triplicate or quadruplicate, and each copy will require to be executed by as many parties. The process of getting them all signed and returned in readiness for the completion of a letting or sale, or in order to satisfy the conditions precedent to drawdown under funding arrangements, can be a major exercise. The cost of this alone can account for around a quarter to a third of the construction lawyer's fee on an average-sized scheme, without counting the further costs expended in negotiating the agreed forms of warranty beforehand.

The invisible cost of warranties as a drag factor on property deals is even greater. It is not unusual for the delivery of completed warranties in agreed form to be a condition precedent to the completion of a sale or letting, or the triggering of the rent commencement date. However, it is seldom possible to be able to guarantee the delivery of all the warranties in agreed form, particularly, but not exclusively, in the case of those from subcontractors; lettings and disposals are often agreed before all of the subcontractors have been appointed. Even provisions allowing agreed form documents to be subject to reasonable amendments are no guarantee against a nail-biting experience. Deals do fall through and developers do go out of business, simply from the inability to get the warranties required to complete, usually in cases where the tenant or purchaser has had a change of heart and is prepared to seize on the opportunity presented to him to withdraw.

Various devices are utilized by construction lawyers to manage these risks, but with limited success. The intended donor of warranties can be asked to grant an irrevocable power of attorney enabling the developer to execute the required warranties in the agreed form. Often, such requests are refused point blank. There are sometimes penalty clauses for failure to execute and deliver the required warranties, but these may be unenforceable and are of no avail against an insolvent contractor, subcontractor or consultant. The High Court can, *in extremis*, be invited to exercise its jurisdiction under section 47 of the Supreme Court Act 1981, and to nominate a person to execute a document in the name of a party who has failed to comply with the order of the Court to do so. However, this is likely to take longer to achieve than the developer can afford to wait.

One desperate measure which seems to be growing in popularity is to get blank warranties signed in advance of the identification of the intended beneficiaries, and for the developer's solicitor to fill in the details later, as each beneficiary becomes known. Although this might produce a document which has the appearance of a duly executed

deed of warranty, the true position is thought to be that such a document is incapable of creating legal relations when signed, and that this cannot be cured by subsequent alteration, even with the full permission of the donor. At best, the practice gives rise to an estoppel in favour of a beneficiary who relies on the document, believing it to have been duly executed.

ORIGIN AND PURPOSE OF COLLATERAL WARRANTIES

Collateral warranties, or, as they used to be called, duty of care deeds, first came into common use about 15 or more years ago. Their invention is sometimes attributed to a series of decisions of the courts during the late 1980s and early 1990s which narrowed the scope of the law of negligence, with particular reference to the design and construction of buildings. A number of well-publicized cases decided that, outside any contractual relationship between claimant and defendant, there is no general duty of care to avoid causing defects in buildings (or products) which could cause economic loss to persons who acquire or use them.

It is doubtful whether this line of authority was in fact the main cause of the emergence of collateral warranties. These decisions, culminating in *Murphy v Brentwood District Council* [1991] AC 177, did no more than to restore the law as it had been understood before about 1972. Various decisions which had undermined the pre-1972 status quo, and which were later discredited, were concerned mainly with the narrow question of the statutory duty of local authorities in the exercise of their functions under the building by-laws (subsequently the Building Regulations) in cases involving defective dwellings. In many of these cases, owners were successful in recovering repair costs or diminution in value from the local authority, on the general principle of a duty of care to avoid the risk of harm to health and safety. Although these decisions were treated at the time as having far wider application than perhaps they deserved, it seems unlikely that investors in commercial property would have regarded them as an important basis for legal protection which, hitherto, they had been prepared to be without.

More probably, the main reason for the widespread adoption of collateral warranties was the deep and prolonged recession in the property market which began in about 1989. The resulting fallout of insolvent developers and bad debts highlighted the inadequacy of the security arrangements on which banks had been only too keen to lend in

the booming market which had preceded the collapse.

From a fund's perspective, collateral warranties serve two main purposes. The first is to afford a right of action against the contractor and the design team, if the fund incurs losses as a result of their failure to carry out their contractual responsibilities. The second is to provide a right to step in (a right to be substituted for, or to nominate a substitute for, the developer) if the developer defaults under the facility agreement/forward sale and funding agreement, before the completion of the development.

In the case of a secured lending transaction, the first of these purposes is virtually redundant, provided that the security package is properly drawn up. A defects action on a bank warranty would be relevant only if there were construction defects going materially to the value of the security asset, the borrower were to be insolvent and unable to meet any shortfall, and if the market value of the property under charge were to be less than the secured debt. This would be a relatively unusual confluence of circumstances. However, there would be no need to rely on a fund warranty in such circumstances if the bank had followed the usual course of taking an assignment by way of security of the building contract and the consultants' appointments or warranties. This would be sufficient in itself to bring within the bank's security and control all of the developer's rights to damages against the construction team, whether for defects, cost overruns, delayed completion or other default (see *L/M International v Circle Ltd* [1995] 49Con LR 12 [CA]). Such damages, by definition, could never be less than any damages the bank would be able to recover in its own right under any collateral warranty.

Although it would be less usual to take such security in the context of a development agreement, there is no reason, in principle, not to do so, as a form of security for the performance of the developer's obligations towards the fund.

With regard to step-in, the advantage to the fund of including substitution rights in a warranty rather than relying on its charge or debenture as a means of taking control is that it avoids the necessity to appoint a receiver, and the cost and delay which this would occasion. However, the general conclusion to be drawn is that the importance of collateral warranties as a component of a well-structured security package is considerably less than the cost and effort devoted to obtaining them would appear to suggest. If it were otherwise, then, no doubt, it would be less difficult to find examples of a case

in which a collateral warranty has been used in anger.

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

The relevance of the Third Party Rights Act to collateral warranties is that it abolishes the rule of law which made it necessary to invent them. The doctrine of privity, which took root in English law in the mid-nineteenth century, is that, as a general rule, a third party upon whom a contract confers the promise of any right or benefit is unable to enforce such promise at law. Nor, generally, can the promisee—that is, the party to the contract who stipulated for the promise in consideration of the contractual obligations assumed by him. The promisee can, in certain limited circumstances, obtain an order for specific performance enforcing the promise, but the third party is not ordinarily able to compel the promisee to do so (*Beswick v Beswick* [1968] AC 58).

The privity rule was a feature peculiar to contract law in England and the Commonwealth. It has no equivalent in European legal systems derived from the Napoleonic Codes, and although the privity rule was the creation of the English judges, it had attracted increasing judicial hostility and demands for statutory reform as time went on. The Law Revision Committee called for the abolition of the rule as long ago as 1937, but it was not until after the Law Commission published recommendations for reform and a draft Bill in July 1996 (*Privity of Contract: Contracts for the Benefit of Third Parties; Report No. 242*) that Parliamentary time was found to enact the necessary legislation. The Third Party Rights Act was passed in November 1999 and came fully into force in May 2000.

The 1999 Act is short, simple and well drafted. It has now been on the statute books for a sufficient time to have received exhaustive scrutiny by academic and practising lawyers and there is no body of opinion to suggest that it is materially flawed. The limited case law that exists on the Act raises no doubt as to the willingness of the courts to uphold it (see, for example, *Nisshin Shipping v Cleaves* [2004] 1 All ER (Comm) 48). This is not surprising, given the repeated calls that there had been from the appellate courts for the Legislature to address the patent injustices which the privity rule had caused over many years and the purposive approach to the interpretation of statute law which now prevails.

The cornerstone of the 1999 Act is the provision in section 1(1) that a person who is not a party to a

contract may, in his own right, enforce a term of the contract if it expressly provides that he may, or purports to confer a benefit upon him.

By section 1(2), a contract term which merely purports to confer a benefit on the third party is negated if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by him.

For the purpose of enforcement of the relevant terms, section 1(5) confers on the third party all the remedies that would have been available to him for breach of contract if he had been a party to the contract, including, as applicable, damages, injunction, specific performance or other relief. Under section 7(3), the limitation period applicable to the third party's rights of action is six years if the principal contract is a simple agreement, or 12 years if it is a specialty (i.e. executed as a deed).

By section 1(4), such rights are enforceable subject to and in accordance with any other relevant terms of the contract. Thus, the rights conferred on the third party are subject to any pre-conditions, exclusions, limits of liability or other qualifications expressed in or arising out of the contract, so far as relevant to the term to be enforced.

Section 3 provides, subject to any contrary term of the contract, for there to be available to the promisor, in a claim by a third party, any defence or set-off arising from the contract which is relevant to the claim, which the promisor would have been entitled to raise if the claim had been brought by the promisee. Whereas, in general, this seems to accord with principle, it would be necessary to exclude the right of the promisor to rely on any set-off, in order to protect the third party from the deduction of any outstanding financial entitlement due to the promisor from the other contracting party.

Section 5 of the Act provides that in cases where any loss incurred by the third party which it would be entitled to recover pursuant to the Act has previously been recovered by the promisee, then the compensation to be awarded to the third party on his claim may be adjusted by the court to take account of the sum previously recovered by the promisee. It is important to note that section 5 applies only if the loss actually incurred by the third party has previously been recovered, or the promisor has previously met the expense to the promisee of making good to the third party the default of the promisor. The fact that the promisee may have recovered its own loss arising from the relevant breach of duty by the promisor is insufficient to bring section 5 into play. The circumstances in which section 5 could apply are therefore seldom likely to arise.

A useful feature of the Act, in the context of its capacity to replace collateral warranties, is the provision in section 1(3) that although the third party must be expressly identified by name, or as a member of a class, or as answering a particular description, it need not be in existence when the contract is entered into.

The majority of the substantive clauses in a typical collateral warranty are a duplication of (or shorthand for) clauses found in the underlying principal contract document. Examples are the primary performance covenants, duty of care clause, copyright licence and obligation to maintain insurance. Whereas the invention of collateral warranties was largely a matter of replication, the use of the 1999 Act permits the warranty to be collapsed back into the primary contract, and requires any clauses which are unique to the warranty, such as step-in provisions, to migrate into the primary contract in the same way.

CONFERRING THIRD-PARTY RIGHTS

There are essentially two ways in which third parties can be given the right under the Act to enforce relevant terms of a principal contract. (Such contracts—that is, consultants' appointments and construction contracts—which utilize the Act are described here as 'Three in One contracts', for ease of reference.) The simpler (automatic) method, which seems to be what was contemplated in the Law Commission report, is to identify or categorise the intended third parties and to state which provisions of the Three in One contract they are to be entitled to enforce. Such third parties, as and when they acquire a relevant interest in the development, whether as purchaser, lender or tenant, would automatically acquire a right of enforcement without further process being required. All they would need is an authenticated copy of the Three in One contract.

While the automatic method has the advantage of extreme simplicity, it is not always likely to be practicable. There are cases in which the construction team will legitimately expect there to be some restriction on the number of beneficiaries of third-party rights of each category, and it is now common for professional indemnity insurers to seek to impose such restrictions wherever possible. For example, in large retail schemes, it may be necessary for each of the major space users to receive a full warranty package, but a blanket third-party rights clause in favour of all first tenants would also extend quite unnecessarily to dozens, or even hundreds, of tenants of small shop units as well. In

mixed-use residential and commercial schemes, professional indemnity (PI) insurers and the insured contractor and consultants could not be expected to expose themselves to direct contractual liability to the purchasers of individual apartments, where NHBC or Zurich cover, or similar protection, would be the norm.

In cases in which the automatic method is not feasible, it is necessary for the beneficiaries of third party rights to be nominated on a case-by-case basis. Three in One contracts can therefore include a procedure for the promisee to serve notice on the promisor, identifying any intended beneficiary and the nature of its interest (such as secured lender, purchaser or tenant) in the relevant development. Because of the importance of maintaining confidence that the power of nomination will be exercised strictly within agreed limits, it is considered advisable that any nomination form should require the signature of the developer's solicitors. Where, as an element of its security, the fund also requires the power to nominate as a beneficiary any eligible tenant or purchaser, the fund's nomination form should instead require to be signed by the fund's solicitors.

Additional considerations apply to the case of subcontractors. Ideally, one would hope to be able to include third-party rights provisions in subcontracts, but for practical reasons that is not always likely to be achievable. If not, an acceptable alternative is to obtain a collateral warranty from the subcontractor in favour of the developer, in which are also included third-party rights provisions in favour of all other necessary beneficiaries, such as the fund, purchasers and tenants.

'NO GREATER LIABILITY' CLAUSES

An issue that has dogged collateral warranties is the penchant of insurers for insisting on the inclusion of so-called no greater liability clauses. The inspiration for such provisions is thought to be that PI policies commonly exclude, in one way or another, cover for claims under any collateral warranty which imposes any obligations that are more onerous or longer-lasting than any related liability under the principal contract. Such is the addiction of insurers to clauses of this kind that they are considered *de rigueur*, even when the warranty is inherently incapable of infringing the prohibition which the clause is intended to observe. Since most warranties are, as noted above, a straight pass-down of the relevant obligations in the principal agreement, and are subject to the same limitation period, in the majority of cases, such 'no greater liability'

clauses are inserted quite unnecessarily. The reason why that can be a problem is that they are sometimes worded so as to have unintended and undesirable consequences.

A typical clause of this kind provides for the donor to have no greater liability to the beneficiary than the donor has, or would have, to the client under the principal agreement. However, 'liability' is usually construed as going to the measure of damages, rather than the existence or nature of the breach of duty in respect of which damages are claimed. It is self-evident that the damages suffered by a purchaser or tenant resulting from defective design or construction have no necessary equivalence to the damages (if any) suffered by the developer from the same cause. Arguably, therefore, a warranty which is qualified in this manner would afford no remedy at all to, say, a claimant who is the tenant under a full repairing lease, or a purchaser, if, as is often the case, the developer no longer had any surviving liability towards the claimant in respect of the construction of the development.

One of the attractions of the Three in One contract is that the issue of no greater liability clauses simply goes away. If, as it does, the third party only acquires the right to enforce specified provisions of the underlying contract, then no question can arise of imposing in favour of the third party any more onerous or longer-lasting obligations than are assumed towards the client himself. This is reinforced by the provisions of sections 1(4) and 1(5) of the Act (see above) that the third party's rights of enforcement are what they would be if it were a party to the contract, and are subject to any relevant terms of the contract. Section 3 provides, for good measure, that the promisor has the same defences against a claim by the third party as would be available under, or in connection with, the contract if the claim had been brought by the promisee. Short of rather unnecessarily restating verbatim in the contract itself these eminently reasonable provisions of the Act, it is difficult to see what further protection could be necessary, to avoid infringing the applicable exclusions in any relevant policy of professional indemnity insurance.

ASSIGNMENT

The Law Commission commented in paragraph 3.19 of its Report that the abolition of the privity rule would remove entirely certain difficulties associated with the quantification of damages under collateral warranties after they have been assigned.

What the Law Commission appeared to contemplate was that the need for the assignment of third-party rights would not arise, since the definition of a third party would be such as to include successors in title without the requirement for formal assignment of the rights conferred under the Act.

While that approach is entirely feasible, it overlooks the almost universal requirement of contractors, consultants and their insurers to limit the transmissibility of the rights against them of funds, tenants and purchasers. It also overlooks the needs of a purchaser, in certain cases, to assign its rights against the construction team by way of security, or of a tenant to transfer its rights to an under-tenant, or the rather more complicated issues that arise on a sale and leaseback, where the owner has the rights of a purchaser but is unable to acquire the separate rights usually conferred on a tenant.

Although the 1999 Act is silent as to the assignability of the rights arising under it, there is no doubt that such rights constitute a 'chose in action' (i.e. legal rights enforceable by legal proceedings), and as such are inherently capable of assignment under the rules of Equity or under section 136 of the Law of Property Act 1925.

The difficulties with assignment referred to in the Law Commission Report arise essentially from the principle that the assignment by a promisee of his contractual rights cannot be permitted to increase or alter the nature of the obligations of the promisor. Correctly understood, this should probably be taken to refer to the performance duties of the promisor, rather than the precise quantification of the damages recoverable by an assignee for breach of those duties, but this distinction has become clouded by a series of rather confusing decisions of the courts over the last 13 years. Readers wishing to examine this issue in more detail than space allows here are referred to *Tolhurst v Associated Portland Cement* [1903] AC 414; *Linden Gardens v Lenesta Sludge* (1992) 57 BLR 57 (CA); [1994] 1 AC 85; and *Blyth & Blyth v Carillion* (2002) SLT 961. Suffice it to say here that the Court of Appeal in *Linden Gardens* appeared to approve the proposition that an assignee of a cause of action for damages can recover no more than the damages his assignor would have been entitled to recover, had the assignment not occurred. In cases in which the assignee and the assignor are differently circumstanced, this raises an obvious difficulty with the assessment of the damages to which the assignee is entitled. The application of this rule in the *Blyth & Blyth* case had the disastrous result that the contractor, as assignee (under a deed of novation) of a developer's causes of action against his

engineer, was able to recover no more than nominal damages for the substantial losses incurred by the contractor because of the engineer's alleged negligence in the preparation of the structural design.

Against this background, it is suggested that the optimum approach to assignment under Three in One contracts is to express the rights of the third party to be assignable, and to define the third parties to include the original beneficiary and all permitted assignees. The original and subsequent third parties will then each enjoy in its own right the same entitlement to damages as if it had been a party to the principal contract. The difficulty arising from the *Linden Gardens* case would then not arise.

PROFESSIONAL INDEMNITY INSURANCE

For there to be a general move towards the take-up of the 1999 Act, there has to be confidence that any claims brought in reliance of the Act will be within the scope of the defendant's PI insurance policy, to no less an extent than if the claim were brought under a collateral warranty conferring similar benefits.

Although policy wordings vary, the general scope of indemnity under PI cover is in respect of liability at law arising from the conduct of, or from negligence committed by the insured in the course of, the insured activity. It goes without saying that this includes liability so arising towards the claimant as a consequence of a contractual relationship between the claimant and the insured.

Most PI policies exclude, in one way or another, any increased liability arising by reason of the insured having given any express warranty or guarantee, while preserving cover for any liability which would have attached to the insured in the absence of such express warranty or guarantee. The purpose of such exclusions is to protect the insurer from any liability of the insured arising as a result of the insured having accepted a performance standard more onerous than the duty of skill, care and diligence ordinarily attaching as a matter of law to a professional man in the exercise of his calling.

Most policies which contain such an exclusion go on to say, as noted above, that the policy nevertheless insures liability under any collateral warranty, provided that the warranty confers no benefit which is greater or longer lasting than the benefits given to the client of the insured. Such collateral warranty extensions usually also place limits on the number of times a warranty is assignable before

it passes out of the scope of the indemnity afforded by the policy.

Few, if any, PI policies currently in the market make any reference to the Contracts (Third Party Rights) Act 1999, but this is only a matter of time. It is to be expected that in due course such policies will deal with the 1999 Act similarly to the manner in which they currently deal with collateral warranties. For this reason, it is as well to draft third-party rights, and the provisions governing their assignment, so as to observe the restrictions commonly found at present in PI policies with respect to collateral warranties.

However, it is important to note that the exclusion from the scope of indemnity under PI policies of liability arising because of (and only because of) express warranties or guarantees does not render claims pursuant to the 1999 Act uninsured. The liability of the insured for such claims will arise from the performance obligation itself, whether or not coupled with an express warranty of skill and care. The law has always implied a duty of skill and care in a contract for the performance of a service, and this is now embodied in section 13 of the Supply of Goods and Services Act 1982. Section 12 of the 1982 Act defines a contract for the supply of a service as a contract under which a person agrees to carry out a service, including a contract under which goods are also to be transferred. The implied duty of skill and care in section 13 therefore applies to construction contracts under which the contractor agrees to perform design services, as well as to the appointment of a design consultant. There is therefore no reason to suppose that any claim pursuant to the 1999 Act founded on negligence on the part of a consultant, or on negligent design by a contractor under a design and build contract, would be treated any less favourably under a PI policy than would any similar claim brought under a collateral warranty.

VARYING THE PRINCIPAL CONTRACT

An issue that has exercised lawyers over the use of the Act is the provision in section 2 that, generally, contracting parties may not agree to vary or rescind their contract so as to alter or extinguish any rights under the contract that have been conferred on a third party, where the third party can be assumed to have relied on those rights. So far as funds are concerned, similar restrictions usually apply in any event, but not, generally, in the case of purchasers or tenants.

The Act allows the contracting parties to exclude or modify the application of section 2 by including provisions to do so in the contract itself. It is there-

fore suggested that Three in One contracts should reserve to the contracting parties the right to vary the required works or services, price or remuneration and the time for performance of any obligation. This would allow the contracting parties to exercise a proper degree of freedom to manage their commercial relationship as any developer or contractor or consultant would normally expect to be able to do, free from unnecessary interference from tenants and purchasers. This would, for example, permit the developer and the contractor to settle a claim for delay and loss and expense, without first needing to obtain the consent of any tenant to a revised date for completion of the development. Should the fund wish to restrict the freedom of the developer to deal with such matters without the approval of the fund, such restrictions should be contained in the funding documentation.

STEP-IN CLAUSES

Whereas the 1999 Act allows benefits under a contract to be conferred on a third party, it does not, of course, permit the contracting parties to impose any obligations on a third party. This raises a question as to how step-in provisions can be made fully effective pursuant to the Act, in that step-in provisions in collateral warranties invariably require the fund, on stepping-in, to take responsibility for the payment obligations of the developer, and such provisions are enforceable by the receiving party by virtue of the fund having executed the collateral warranty.

This difficulty would seem to be resolved by the provision in section 1(4) (see above) that the Act does not confer a right on a third party to enforce any term other than subject to and in accordance with any other relevant term of the contract. However, commentators on the Act have expressed doubt as to this point. It is therefore recommended that any step-in notice under a Three in One contract be required to take the form of a deed, and to include an undertaking by the fund to meet the financial obligations expressed in the step-in provisions, as they arise. Because undertakings given in a deed are enforceable without any requirement for consideration, any possible doubts as to the efficacy of section 1(4) to address the issue would cease to be of consequence.

THE RIGHT TO ADJUDICATION

A point of concern that has been expressed is whether a third party enjoying a right of enforcement under the 1999 Act would automatically

acquire the right to refer any claim he might have against the promisor to adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996. If this were to be so, it would be of such great concern to PI insurers that it would simply kill off any prospect of the Act ever taking the place of collateral warranties. Similar questions were raised in relation to claims under collateral warranties, when the 1996 Act was first introduced, but the received view is now that the Act does not apply in those circumstances.

Fortunately, and whether by accident or design, it is clear that the issue does not arise. Section 108 of the 1996 Act, which confers a right to refer to adjudication any dispute under a construction contract (which is sufficiently widely defined to include a consultant's appointment) applies only to a party to the contract. It is also clear from the general language of the 1999 Act that a third party enjoying a right of enforcement of a contract term pursuant to the Act does not thereby become a party to the contract. This is reinforced by section 7(4) of the 1999 Act, which provides, in effect, that a third party is not to be treated for the purposes of any other enactment as a contracting party.

CONCLUSIONS

Analysis suggests that the Contracts (Rights of Third Parties) Act 1999 offers the development and property-investing communities significant practical and technical advantages over collateral warranties, with no material drawbacks. It is difficult to imagine that collateral warranties will still be with us in ten years' time, which begs the question as to why the industry should wait any longer to embrace the opportunity presented by the Act. The time to break the habit is now!

BIOGRAPHY

The author is a partner in Addleshaw Goddard's real estate department and specialises in non-contentious construction and project work. He is the author of a loose-leaf publication: *Manual of Construction Agreements* (Jordans, 1998–2005) and has recently piloted the development and introduction of a suite of Three in One construction precedents for the benefit of the Firm's clients.