COLLATERAL WARRANTIES ON CONSTRUCTION PROJECTS

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1 WHAT ARE COLLATERAL WARRANTIES?

1.1 When preparing contract documents at the outset of a new commercial property development, a developer will usually have to bear in mind the potential interests of a range of third parties in the development. Typically, this will include the interests of future tenants, future purchasers and any financial institution providing funds to the developer for the construction of the development. The developer will have privity of contract with those with whom it contracts directly to design and construct the development and, as such, will have direct contractual rights against these entities for any breach of contract in their respective obligations. However, certain third parties will have a significant financial interest in the property, in particular if the building contractor or the design team default in the carrying out of the design or construction of the works. These third parties may be provided with direct contractual rights by the putting in place of collateral warranties between the third party and each party involved in the material design and construction elements of the development.

1.2 Collateral warranties are so called as they are agreements "collateral" to another. In a construction context, they are usually collateral to the principal agreements on a construction development, which are usually:

1.2.1 the building contract for the construction works;

1.2.2 a letter of appointment for the engagement of a member of the design team; and

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1 Partner and head of the Construction Group in Eugene F. Collins Solicitors
1.2.3 a design sub-contractor’s sub-contract.

As noted a collateral warranty is typically required by a third party who is not a party to and therefore does not derive any contractual rights under the main contract, under the letters of appointment or under the sub-contracts but wishes to obtain certain rights from those agreements.

1.3 Collateral warranties are now a well-established element of the suite of documents that will be prepared in connection with construction projects. In large commercial developments there are likely to be a significant number of collateral warranties required of each of the parties involved in constructing and designing the development – the contractor, each member of the design team and certain sub-contractors (more usually a sub-contractor with design obligations whose work forms an important part of the overall development either in technical or monetary terms). Typically, these might be required by: a tenant/lessee of part of the development, an operator, a future purchaser, a management company and a funder providing funds to the developer for the project. A sample form collateral warranty is set out at Appendix 1.

2 REASONS FOR COLLATERAL WARRANTIES

2.1 The collateral warranty provides a contractual remedy to a party who would not otherwise have contractual rights. By way of illustration - a building contract is entered into between a developer and a building contractor to construct a shopping centre. A prospective tenant of the shopping centre may wish to acquire rights under the building contract, principally the right to sue the building contractor in respect of any defects that might arise in the works however the tenant has no contract with the building contractor. If the tenant is taking on the obligations of a full repairing and insuring lease, it will seek to ensure that it has a means to sue the defaulting parties in respect of the design and construction of the property. While the tenant could rely upon its rights in negligence, with developments in the case law in negligence (largely in the UK) the rights of a party to recover certain heads of loss in tort were being diminished such that a third party was restricted to recovering damages for dangerous defects giving rise to third party injury or third party property damage only. The UK courts were rowing back from allowing recovery of damages, for claims in tort, in respect of qualitative defects i.e. defects which did not pose a danger to people or other property but gave rise to pure economic loss, e.g. diminution in value. However, such losses were recoverable under the law of contract.

2.2 Due to these limitations on the ability to recover certain losses in a claim made in negligence, a practice developed of requiring that collateral warranties be provided by the parties involved in a construction project, to third parties wishing to derive benefits from the principal contracts. This avoided the restrictions on the recovery of pure economic loss in a claim founded in tort. The provision of a collateral warranty was, in effect, the creation of a contractual link between two parties who otherwise had no contractual relationship and allowed the beneficiary of the collateral warranty to recover losses including pure economic loss arising from breach of contract.
2.3 In the example referred to above the tenant of the shopping centre could enter into a collateral warranty with the building contractor. The building contractor would, typically, warrant the construction of the works in accordance with the building contract, thereby enabling the tenant to sue the building contractor for breach of the contract should any defects arise in the building contractor's works.

2.4 However, the underlying rationale for collateral warranties of providing third parties with rights to recover damages, including more remote losses suffered, as damages for breach of contract, has to some extent now been undermined as it is common practice for a party providing a collateral warranty to seek to limit and cap its liability in a number of ways such that the warrantor limits its liability to repair of physical damage only; will have no liability to the beneficiary for any consequential loss or will seek to cap its liability to a defined sum or its level of professional indemnity insurance.

2.5 It is now usual, in significant commercial developments that the parties will negotiate on the terms of the collateral warranties. It will be important for a developer to establish, at the outset of a project, with the main contractor, the design team and the design sub-contractors, that they will be required to provide collateral warranties to a list of prospective beneficiaries and that the terms of same be agreed at an early stage. A developer may have considerably less bargaining power on the terms of the collateral warranty if it is not sought at the outset and if it is only being negotiated after the principal contract is entered into with the contractor or design consultant/sub-contractor. For this reason the developer will seek to include a requirement in its building contract and its design team letters of appointment that they will each provide a collateral warranty to a defined list of beneficiaries in an agreed form attached to the principal agreement.

3  STANDARD FORMS

3.1 Many of the professional representative bodies for construction professionals have produced standard form collateral warranties which they have recommended be used by their members. Where an architect or an engineer is requested to enter into a collateral warranty which is not in the standard form provided by its professional representative body, it may have to check with its professional indemnity insurers that its insurance will extend to cover the terms of the collateral warranty being sought.

3.2 Model forms of collateral warranty for use in conjunction with GCCC forms of contract have been produced by the Department of Public Expenditure and Reform. The model form and guidance on how to complete them is provided at www.constructionprocurement.gov.ie. The forms comprise a collateral warranty to be entered into by a sub-consultant of a consultant and the client and a form of collateral warranty to be entered into by specialists contractors with the employer where the Works Requirements provide that collateral warranties are to be provided by those specialists. The public works contracts include provisions whereby monies can be withheld from the contractor for failure to provide the specialists collateral warranties by the date by which
they were required to be produced and increasingly clauses of this nature are being included in other forms of contract.

4 STANDARD OF CARE

4.1 The collateral warranty will usually warrant the carrying out of the works, the provision of the design services in accordance with the respective building contract or letter of appointment. Therefore, in reviewing a collateral agreement it is essential that the underlying principal contract upon which the warranty is based is also reviewed to ascertain that the underlying contract appropriately describes the nature of the works/services being warranted.

4.2 The warranty usually provides that a contractor/design consultant has carried out its work or provided the services with reasonable skill, care and diligence. With respect to a building contractor, a warranty is usually sought that the contractor:

- has carried out the works using reasonable skill and care;
- that the contractor has complied with the provisions of the building contract; and
- that the contractor has supervised the sub-contractors (to the extent that the contractor has an obligation to do so under the main contract).

A design consultant will usually be asked to warrant that it has performed the services with reasonable skill, care and diligence in accordance with the terms of its letter of appointment. It may also warrant that the services have been carried out with the standard of skill, care and diligence reasonably to be expected of a properly qualified consultant providing services comparable in value, scope and complexity to that required under the letter of appointment.

4.3 A building contractor and a design consultant would need to beware of collateral warranties which provide that the design consultant/contractor warrants that the works shall be "fit for their purpose" as the higher standard of care may not be covered by their professional indemnity insurance cover.

4.4 A fitness for purpose warranty is the appropriate form of warranty in respect of the supply (and design) of a product for a construction project.

5 LIMITATIONS ON LIABILITY

5.1 It is usual for a warrantor to seek to limit its liability so that it will not be liable to the beneficiary of the warranty for any act or omission that is not a breach of the principal agreement. The design consultant may seek that it will have no greater liability, pursuant to the collateral warranty, than it would have to its employer for a breach of its letter of appointment. Further the collateral warranty may provide that the contractor or design consultant is entitled to rely upon any of the defences or limitations on liability available to it under the principal building contract or letter of appointment. For example, if the letter of appointment included a financial cap on the consultant's liability, the
consultant will wish to have the benefit of that cap under the collateral warranty.

5.2 Many design consultants / contractors will endeavour to limit their liability to the cost of making good any physical defects in the development. The collateral warranty may also exclude liability for various types of consequential loss. Given judicial consideration in case law over the last number of years as to what headings of loss are included under the words "consequential loss" and the difference between direct losses and consequential losses, it may be helpful if a party wishes to limit its liability for indirect or consequential loss, to say expressly what types of loss it wishes to exclude.

5.3 A design consultant may also endeavour to limit its liability by providing that its liability shall be no greater than its level of professional indemnity insurance cover. In these circumstances it is important for the beneficiary of the collateral warranty to seek a copy of the insurance broker’s letter / certificate confirming the basis and level of professional indemnity insurance cover in place and to seek advices from its insurance broker as to whether the level of insurance cover is appropriate for the type of development being carried out.

5.4 Warranties may also provide that the costs of repair of physical defects in the property shall include any design costs required for the carrying out the repair works.

5.5 In recent negotiations with design consultants many have sought to cap their liability to the level of their professional indemnity insurance cover, but as a trade-off for the developer in agreeing to such a cap, the consultant will not exclude liability for consequential loss.

6 PROPORTIONATE LIABILITY / NET CONTRIBUTION CLAUSES

6.1 A warrantor may seek to include a provision in its collateral warranty whereby the warrantor will be liable only to the extent that it is responsible for any defaults arising in the works. Such clauses are referred to as proportionate liability or net contribution clauses. Typically, such a clause would provide that where collateral warranties are required from other designers / contactors / sub-contractors on a project the liability of the contractor / designer / sub-contractor will be limited to that sum for which each would have been liable had all of those who were required to provide collateral warranties actually provided them.

6.2 Such clauses are used in an attempt to overcome the provisions of the Civil Liability Act, 1961 ("the Act") providing for joint and several liability of "concurrent wrongdoers" (i.e. two or more persons where both or all are responsible to a third party for the same damage).

6.3 In a claim for a defective building which may have multiple defendants, for example, the contractor, the architect and the civil and structural engineer; a plaintiff may be awarded damages against each of these parties. If a Court
finds that each of the parties is a concurrent wrongdoer, the plaintiff is entitled to look to each of the parties to recover the entirety of its judgment so that the plaintiff is not left without a remedy. This could mean in effect, that although, the architect was found to be only 10% liable and the other parties were 90% liable between them but it turns out that only the architect is insured, the plaintiff could seek to recover the entirety of its judgment against the architect. The insertion of a net contribution clause in the collateral agreement is an attempt to overcome these provisions of the Act and this type of scenario by providing that the warrantor's liability for the loss suffered by the beneficiary will be no greater than the warrantor's responsibility for the loss. So far as I am aware, such clauses have not been tested in the Irish courts and therefore it remains to be seen whether they are effective to defeat the Act.

7 PROFESSIONAL INDEMNITY INSURANCE

7.1 Collateral warranties will usually provide that the design consultant is to put in place and maintain professional indemnity insurance for a defined level of indemnity for a defined time period. The standard form warranties as provided by consultants' professional bodies will usually require that consultants use "reasonable endeavours" to put in place and maintain professional indemnity insurance for a defined monetary indemnity limit for a period of 6 years from the date of practical completion of the works provided that the professional indemnity insurance cover is available to the consultant at commercially reasonable rates.

7.2 In practice, there can be some debate between the parties as to the period of time for which insurance cover should be available. Some design consultants will seek to argue that they will only have an absolute obligation to maintain the insurance in place for the first three years and thereafter they will only have an obligation to provide it for so long as it is available at "commercially reasonable rates". Some collateral agreements may require that the warrantor keep professional indemnity insurance in place for a period of 12 years, although this is less usual (and will also depend upon the period of liability under the principal agreement). The parties might also try to define what "commercially reasonable rates" means and it has been expressed in some forms of collateral agreement as no more than a certain percentage increase of the premium payable at the date of renewal of the last premium.

7.3 It is not usual that the building contractor be required to put in place or maintain professional indemnity insurance, save if the building contractor is taking on liability for design, such as in a design and build contract. In such case, the building contractor should be required to put in place and maintain professional indemnity insurance in respect of the design of the works. Similarly, if a sub-contractor has design responsibility in respect of certain design elements for the works it is usual to expect that the sub-contractor would have professional indemnity insurance in respect of its design elements of the works. Further, a building contractor will not have liability for a nominated sub-contractor's design work and therefore prospective tenants / purchasers / management companies for a development may seek collateral agreements in respect of a nominated sub-contractor's design. The failure of a sub-contractor's design could have significant repercussions, e.g. specialist
cladding or glazing elements and therefore a developer, at the outset of a project should identify those sub-contractors with design input and ascertain that they will be in a position to provide collateral warranties to any prospective tenants / purchasers / funders of the development. Clearly if advising the tenant / purchaser / funder collateral warranties should be sought from such sub-contractors.

7.4 Professional Indemnity insurance usually operates on a claims made basis i.e. the insurance must be in place for the year in which the claim against the policy is made and must be renewed each year. For this reason, an obligation is usually included that the insurance be maintained for the period of liability under the collateral warranty. In light of this, many collateral agreements will also include provision that the warrantor must, when requested to do so, provide evidence that the insurances are being maintained and that the warrantor must immediately notify the beneficiary if the warrantor is unable to maintain the insurance so that the beneficiary and the warrantor can discuss what may be done to redress this.

7.5 It is not common practice to require quantity surveyors to provide collateral warranties as they have no design function, save they may be required for the benefit of funders. If the quantity surveyor carries out the role of the employer's representative (typically under a design and build contract) and has a role in certification, then it might be required to provide a collateral warranty.

8 DRAWINGS AND DOCUMENTATION

8.1 There can be debate between the design consultant and the employer as to the extent of design rights being given by the consultant to the beneficiary of a collateral warranty. The design consultant may endeavour to limit design rights so that the design would not be used for extending or reconstructing the development but that if the beneficiary proposes to extend or reconstruct it, the design consultant would be entitled to a further fee for the design rights for same. The design consultant may wish to avoid a requirement that it give design rights or if design rights are to be given, that they be given in limited circumstances or on payment of a fee whereas the beneficiary of the collateral warranty may argue that it requires extensive design rights so that, if, in the future, it wishes to extend or alter the development it will have those rights available to it without having to pay additional fees. In addition, the consultant may endeavour to limit its liability for the use of any drawings or design material for any purpose other than the purpose for which they were originally prepared and produced. The more usual wording for inclusion in a collateral warranty where broad design rights are being required is that "an irrevocable and royalty free licence" is granted in respect of the design. The standard ACEI form of collateral warranty provides that design drawings cannot be used for extending or reconstructing the development. The standard RIAI and ACEI warranties provide that a copyright licence is granted subject to payment of the design consultant's fees. However, a potential beneficiary may be wary of such a clause as it may be difficult for it to ascertain if, in the event of a dispute about design rights, the fees have been paid and the beneficiary of the collateral warranty may be left without the ability to obtain
design rights due to an outstanding dispute on fees between the employer and the design consultant.

9 COMMON LAW RIGHTS

9.1 The collateral warranty may provide that notwithstanding the terms of the warranty the parties' common law rights are preserved. The intent of such a clause is that although the parties have a collateral warranty setting out the nature of their rights and obligations to each other, either party could still institute proceedings in negligence with the intent that the terms of the collateral warranty would not affect the rights and obligations of the parties in the tort of negligence. Conversely, the parties might agree that the rights and obligations set out in the collateral agreement are exhaustive of the parties' rights and obligations and that the parties would not be entitled to institute proceedings in common law. A party may wish to reserve its rights at common law as giving it an extra or additional protection so that if the collateral warranty has significant caps or limitations on liability, a party may wish to reserve its rights in negligence on the basis that it hopes to recover additional damages in a parallel claim in negligence (although whether it could actually do so or not could be highly questionable).2

10 STEP-IN RIGHTS

10.1 Step-in rights are usually required by funding institutions who may wish to step into the shoes of the employer in the employer's principal contracts with the main contractor, the design team and the building contractor's contracts with design sub-contractors so as to enable the funding institution to finish out the development if the employer defaults under its loan facility e.g. becomes insolvent. For example, in a commercial development, a design consultant for the works may provide a collateral warranty to the funder in respect of its design for the works. If the employer is being provided with finance by a funding institution and the employer becomes insolvent, the funding institution will wish to have rights to step into the shoes of the employer, in the letter of appointment between the employer and the design consultant, so that the design consultant will continue to provide its design services for the works, notwithstanding the insolvency of the employer. Those step-in rights into the letter of appointment are provided by the inclusion of a step-in clause in the collateral warranty being provided to the funder by the design consultant. The employer would have to be a party to such a collateral warranty as essentially the exercise of the step-in rights is a novation of the original letter of appointment between the design consultant and the employer to the funder and the design consultant.

10.2 Terms of step-in clauses vary and some have complex drafting on how the funder may choose to step-in or nominate another party to do so. Typically, such a clause will provide that a design consultant having a right to determine its employment pursuant to its letter of appointment, will, before exercising

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the right, give the funder notice of its intention to do so. During the notice period the funder can decide whether it wishes to exercise its step-in rights. Such a clause would also usually provide that if the funder exercises its right to step into the shoes of the employer, the funder assumes all of the obligations of the employer and the letter of appointment would continue to have full force and effect in all respects as if the letter of appointment had been entered into ab initio between the consultant and the funder. A design consultant, in reviewing a step-in clause will wish to ensure that all of its fees will be paid, where such fees are outstanding, if a third party proposes to step into the shoes of the employer. On the other hand, the party stepping into the shoes of the employer might wish to provide that it would have no liability in respect of any unpaid fees due prior to the date upon which it exercises its step-in rights.

11 LIMITATION PERIOD OF THE COLLATERAL WARRANTY

11.1 A collateral warranty, executed under seal, unless otherwise stated and as a contract under seal, will have a limitation period of 12 years from the date of the breach of the warranty. If not under seal, the limitation period will be for six years from the date of the breach. It is more usual practice, in the current market, that collateral warranties include a clause expressly providing that the warrantor will have liability for a period of 6 years from the date of practical completion of the works. Some parties may endeavour to obtain a collateral warranty from the building contractor, for a period of 12 years, on the basis that the building contractor will have liability in any event, pursuant to the main contract, for a period of 12 years, as the main contract will (in all likelihood) have been executed under seal. Therefore, the argument is made that if the main contractor has liability under the building contract for a period of 12 years, it should not have difficulty providing a collateral warranty for a period of 12 years. From a contractor’s perspective the contractor will try to limit the number of parties to whom it will have a potential liability and the period of time for which it will have liability.

12 ASSIGNMENT OF COLLATERAL WARRANTIES

12.1 Standard form collateral warranties usually provide that the benefit of the warranty cannot be assigned. However, it is common for the beneficiaries of collateral warranties to seek inclusion of a provision that the benefit of the collateral warranty can be assigned to another party. An employer might wish to ensure the inclusion of such a provision, in particular, for commercial developments that will be let to tenants, as the employer would be aware that many of the tenants will wish to assign or sub-let their leasehold interest and the ability to assign the benefit of a collateral warranty can enhance the marketability of such an interest. There can be debate between the parties as to whether one or two assignments will be allowed as the warrantor will wish to limit the potential number of parties to whom it may be exposed to liability. A proviso might be included whereby one assignment may be allowed without the prior written consent of the warrantor but thereafter any assignment must be with their consent (such consent not to be unreasonably withheld or delayed). It might also provide that the consent is not required for, or that an
inter-group company assignment would not be regarded as an assignment for the purposes of this clause.

13 DISPUTE RESOLUTION

13.1 The collateral warranty may include a clause as to how any disputes arising out of the collateral warranty are to be resolved. Parties often include Conciliation, Mediation or Arbitration clauses, as these are the more usual dispute resolution mechanisms in the construction industry.

13.2 The introduction of the Construction Contracts Act 2013 may give rise to interesting questions on whether a collateral warranty is a construction contract for the purpose of the Act, in particular with reference to the adjudication provisions of that Act. In a surprising decision in the UK in Parkwood Leisure Limited (Parkwood) v. Laing O’Rourke Wales & West Limited (LORWW)\(^3\), the Court found that in the circumstances of this case the collateral warranty was to be treated as a construction contract (for the purposes of Part II of the Housing Grants Construction Regeneration Act 1996 (UK)). The case arose out of a dispute on a collateral warranty relating to Cardiff International Pool – a swimming and leisure facility. The pool was owned by Cardiff City Council and was let to Orion Land & Leisure (Cardiff) Limited (Orion). Orion sublet the facility to Parkwood who provided facilities management services. Orion engaged LORWW under a JCT Design & Build Contract to carry out the design for the facility and to carry out and complete the construction. LORWW executed a collateral warranty in favour of Parkwood. Certain defects arose and there was a dispute between the parties in relation to a settlement agreement. The question that came before the Court was whether the collateral warranty was a construction contract (for the purposes of Part II of the Housing Grants Construction Regeneration Act 1996 (UK)). It was decided that this particular collateral warranty was to be treated as a construction contract under the UK legislation, although it was emphasised that the Court’s findings were specific to the particular terms of the collateral warranty entered into between the parties and the Judge noted that it did not follow that all collateral warranties given in connection with construction developments would be construction contracts under the UK Act. The wording and the relevant factual background behind each warranty would have to be looked at to see whether, properly construed, the warranty was indeed a construction contract for the carrying out of a construction operation. It remains to be seen how the Irish courts will approach this question.

14 CASE LAW

14.1 The only reported Irish case on collateral warranties is the Irish High Court decision in Bowen Construction Limited v. Kelcar Developments Limited\(^4\), a decision of Mr. Justice Ryan delivered on 16 October 2009, concerning Blarney golf course, club house, hotel and 56 cottages. The course was owned by Kelcar Lands Limited and the club house and hotel by a group of private investors. Kelcar was the Employer under a construction contract with Bowen.

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\(^3\) [2013] EWHC 2665 (TCC).
Construction Limited as the Contractor. Kelcar transferred the ownership of the buildings to other parties, including associated persons and companies on foot of various development agreements. Under the building contract, Bowen agreed to execute collateral warranties for the transferees of these buildings and the various development agreements also included warranties by Kelcar as to the quality of the buildings. Bowen executed collateral warranties in favour of the private investor owners of the club house and the hotel, however, although it agreed to provide warranties in respect of the cottage owners, they had at the time of the hearing of the case not actually been executed.

14.2 The arbitrator, in proceedings between Kelcar and Bowen, raised various questions for the decision of the Court in the form of a special case to the High Court and a legal query raised was whether the Employer - Kelcar could counterclaim and set-off, in the arbitration proceedings, the costs of remedying defects and anticipated consequential losses arising from the defects in circumstances where those losses had been or would be sustained by other persons or companies who were not actually parties to the building contract between Kelcar and Bowen. Kelcar sought, in the arbitration proceedings, to set up the cost of remedying the defects in the buildings and consequential losses associated with them by way of counterclaim and set-off in reduction of the claim by Bowen for extra payment. Bowen argued that Kelcar was not entitled to make such claims because it had not and would not sustain those losses itself and that the parties that had done so or would do so were not parties to the building contract and Bowen relied upon the doctrine of privity of contract and that only a party to a contract can sue for breach. Kelcar argued that Bowen’s argument would result in a situation where the Building Contractor would be entitled to escape all liability for its wrongdoing. The Judge, in analysing the case law, came to the following conclusions arising out of these:

- **Privity of contract** together with a general prohibition on claiming for loss or damage sustained by third parties are subject to exceptions in order to avoid injustice.

- In building contract cases, the exception applies to cases where there would be a "legal black hole", meaning that the person who sustains the loss would be without any remedy in law, the person entitled to sue would not be able to prove substantial loss and the party in breach of contract would go scot free.

- Where the party suffering the loss has a right of action against the person in breach of contract, the exception does not apply.

- On the "broader ground" that Lord Griffiths applied in *Linden Gardens Trust v. Lenesta Sludge Disposal Limited* [1994]: IA.C.85, the Employer has a right to sue for failure to provide what was contracted for, if it is shown that the Employer intends to do the remedial work but that basis of claim has not been adopted in other cases. If it were to be adopted in a case where it was not necessary in order avoid injustice because there was no other remedy available, it would give rise to a problem as to the status of any damages that might be awarded to the
Employer in respect of repairs or consequential losses sustained by other parties.

14.3 The Judge was concerned that by awarding damages to the Employer in respect of the losses of other parties, this would compromise the rights of those other parties to recover damages themselves should they need to do so at a later stage. The Judge noted that in this case the owners of the club house and hotel had their own remedy against the building contractor as they held collateral warranties and the lodge owners were also entitled to a similar remedy, although the collateral warranties had not actually been provided to them at that time.

14.4 In those circumstances he felt that there was no legal black hole and in the absence of any refusal by the builder to provide the collateral warranties to the cottage owners, he could not see how the employer would be entitled to pursue the claims of third parties. He concluded that this was not a case within the exceptions to the privity rule. Therefore, while the Court accepted the findings of the *Linden Trust* and *Aefred McAlpine Construction Limited v. Panatown Limited [2001]: A.C 518* cases as representing the law in Ireland on these matters, it found, in the particular circumstances of this case that the Employer was not entitled to include other parties' losses within its counterclaim so as to reduce its exposure to the claim by Bowen.

Margaret Austin
APPENDIX 1
SAMPLE ONLY

COLLATERAL AGREEMENT BETWEEN THE CONSULTANT AND PURCHASER / TENANT / FUNDER / MANAGEMENT COMPANY

THIS AGREEMENT is made on the day of [ ] 20( ).

BETWEEN

(1) [ ] [Company No. ] having its registered office at [ ] (the "Beneficiary" which expression shall include its assigns);

(2) [ ] [Company No. ] having its registered office at [ ] (the "Consultant" which expression shall include its assigns) [. and,]

(3) [ ] [Company No. ] having its registered office at [ ] (the "Employer/Developer").]

RECITING:

A. The Consultant has been appointed as Architect by [ ] [Employer/Developer") in relation to the design and construction of an office building at [ ] (the "Development"), under a Letter of Appointment dated [ ] 200( ) (the "Appointment").

B. Under the terms of the Appointment, the Consultant has agreed to enter into this Agreement with the Beneficiary.

C. The Beneficiary:  
   Has agreed to purchase (by way of transfer, conveyance, lease or otherwise) the whole or part of the Development.
   Has agreed to take a lease of the whole or part of the Development.
   Has agreed to provide funds in connection with the design and/or construction of whole or part of the Development.
   Has agreed to manage the common areas of the Development once the Development is complete.

5Employer/Developer to join in Funder Collateral Agreement to give consent to exercise of step-in-rights by Funder, otherwise not necessary to join.
6 Delete as appropriate.
NOW IT IS HEREBY AGREED between the Beneficiary and Consultant that the following warranties and agreements shall have effect:

1. The Consultant warrants and undertakes to and with the Beneficiary in so far as relates to the Development that the Consultant has exercised and will continue to exercise all reasonable skill and care in relation to such matters which fall within the scope of the Appointment, and that the Consultant will comply with its obligations under the terms of the Appointment.
   
   (a) The Consultant shall be liable under this Agreement for the reasonable cost of repairing any defect, omission or other fault in the Development to the extent that such defect, omission or default is caused by the Consultant's failure to exercise the reasonable skill and care referred to in Clause 1 hereof and/or making good any physical damage resulting from such defect, omission or fault.
   
   (b) The Consultant shall have no liability in respect of proceedings issued after the expiration of six (6) years from the date of practical completion of the Development.
   
   (c) Nothing in this Agreement shall prejudice the Beneficiary's common law rights.

2. The ownership and copyright in all drawings, plans, specifications or other documents prepared by or on behalf of the Consultant in relation to the Development or for any purpose whatsoever in connection with the Development together with all amendments and additions thereto which are now or may at any time in the future be prepared, designed or drawn by the Consultant and which relate to the Development, (the "Documents") shall remain vested in the Consultant Provided However that it is agreed that the Beneficiary (and/or its nominees) shall have a licence to use and reproduce the Documents for purposes relating to the Works (including, without limitation, the construction, completion, reconstruction, modification, extension, repair, use, letting, sale and advertisement of the Development or any part thereof) but the Consultant shall not have any liability arising from any such use or reproduction of the Documents.

3. This Agreement may be assigned twice only by the Beneficiary by way of absolute legal assignment to another person taking an assignment of the Beneficiary's interest in the Development without the prior written consent of the Consultant and thereafter with such consent (such consent is not to be unreasonably withheld or delayed). PROVIDED ALWAYS that this restriction shall not apply to the assignment of the benefit of this Agreement in whole or in part to any subsidiary or associated company of the Beneficiary.

4. During the currency of the Appointment and for 6 (six) years after the date of issue of the certificate of practical completion of the Development pursuant to the provisions of the building contract the consultant shall keep in force a Professional Indemnity Policy covering all matters for which it is legally liable arising out of or in relation to the Appointment or this Agreement. Such
policy shall have an indemnity limit of not less than [€6,500,000 (six million five hundred thousand Euro)]\(^7\) for each and every claim.

5. Unless otherwise agreed, the Consultant and each of its sub-consultants (of whatever tier) shall maintain at their own costs:

(i) Employer's liability insurance for not less than [€13,000,000 (thirteen million Euro)] for any one claim or event; and

(ii) Public liability insurance for not less than [€6,500,000 (six million five hundred thousand Euro)] for any one accident, without inner limit.

As and when requested, the Consultant shall produce to the Beneficiary documentary evidence that the insurances specified in Clause 4 and this Clause are being maintained and the Consultant shall immediately notify the Beneficiary if for any reason the Consultant is unable to maintain the insurance in force during the currency of this Appointment so that the Beneficiary and the Consultant can discuss the means of best protecting their respective positions at your cost in the absence of such insurance.

6. (a) The Consultant undertakes to the Beneficiary that the Consultant will not without first giving the Beneficiary not less than 21 (twenty-one) days previous notice in writing (the "Consultant's Notice") exercise any right it may have to terminate the Appointment or to treat the Appointment as having been repudiated by the Employer or to discontinue the performance of any duties to be performed by the Consultant pursuant to the Appointment.

(b) The Consultant's Notice shall specify the grounds upon which the Consultant claims it is entitled to terminate the Appointment, treat the Appointment as having been repudiated by the Employer or to discontinue the performance of any duties to be performed by the Consultant.

(c) The Consultant's rights to terminate the Appointment shall cease if before the expiry of the periods stated in the Consultant's Notice:

(i) any and all breaches of the terms of the Appointment specified in the Consultant's Notice insofar as they would entitle the Consultant to terminate the Appointment, treat the Appointment as having been repudiated by the Employer or to discontinue the performance of any duties to be performed by the Consultant have been remedied; or

(ii) the Beneficiary gives notice in writing to the Consultant substituting the Beneficiary or its appointee for the Employer as employer under the Appointment (a "Notice of Substitution") and the Beneficiary commences taking the

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\(^7\)Insurance brokers to advise of appropriate levels of insurance cover for the Development.
appropriate steps to rectify the relevant breach on the part of the Employer giving rise to the Consultant's Notice.

(d) Upon, but not before the giving of a Notice of Substitution the Consultant shall accept the instructions of the Beneficiary or its appointee to the exclusion of the Employer in respect of the performance of the Appointment:

(i) upon the terms and conditions of the Appointment; or

(ii) if required by the Beneficiary or its appointee upon the terms and conditions of a new contract between the Consultant and the Beneficiary or its appointee in the same terms (as nearly as may be) as the Appointment.

(e) It shall be a condition of any Notice of Substitution given by the Beneficiary that the Beneficiary or its appointee accepts liability for payment of the fees and expenses payable to the Consultant under the Appointment and for performance of the Employer's obligations including payment of any fees and expenses outstanding at the date of such notice.

In either event, all obligations of the Consultant to the Employer under the Appointment whether in respect of matters arising before or after the giving of a Notice of Substitution shall be deemed to be obligations to the Beneficiary as if it had at all relevant times been a party to the Appointment in place of the Employer.

7. The governing law relating to any matter arising under this Agreement or in connection therewith shall be the law of Ireland.

8. (a) If a dispute or difference arises between the parties with regard to any provisions of the Agreement, such dispute or difference shall be referred to conciliation in accordance with the Conciliation Procedures published by the Royal Institute of the Architects of Ireland in agreement with the Society of Chartered Surveyors and the Construction Industry Federation.

If a settlement of the dispute or difference is not reached under the conciliation procedures either party may refer the dispute to arbitration in accordance with Clause 8(b).

(b) If any dispute, difference or question shall at any time hereafter arise between the parties to this Agreement or their respective assigns in respect of the construction of this Agreement, as to the rights, liabilities or duties of the said parties hereunder the same shall be and is hereby referred to the arbitration of a person to be agreed between the said parties or, failing agreement between the said parties within fourteen days of either party having made a request in writing to the other party to concur in the appointment of an arbitrator, a person to be nominated by the President for the time being of the Royal Institute of
the Architects of Ireland upon the application of either party. Every or any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 2010 or any Act amending the same.

[(c) If the difference or dispute to be referred to arbitration under this Agreement raises issues which are substantially the same as/or connected with issues raised in a related dispute between the Beneficiary and any third party and if such related dispute has already been referred for determination to an arbitrator or any court the parties hereby agree that the difference or dispute under this Agreement can be referred to such arbitrator or such court and that such arbitrator shall have power to make such directions and all necessary awards in the same way as if the procedure in the High Court as to the joining of one or more co-defendants or third parties was available to the parties and to such arbitrator.]

IN WITNESS whereof this Agreement is duly executed on the day and date first hereinbefore written.

PRESENT when the common Seal of
THE BENEFICIARY was affixed
hereto:

___________________
Director

___________________
Director/Secretary

PRESENT when the common Seal of
THE CONSULTANT was affixed
hereto:

___________________
Director

___________________
Director/Secretary

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8Joinder arbitration clause.