

Aberdeen
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Collateral Warranties & Third Party Rights

Colin Clelland & Karen Manning

19 & 20 September 2017

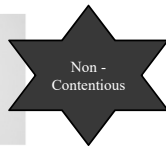
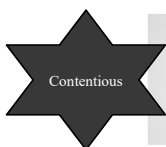
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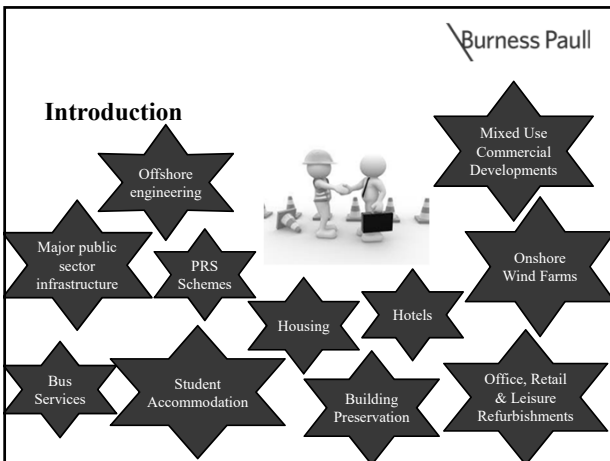
Agenda

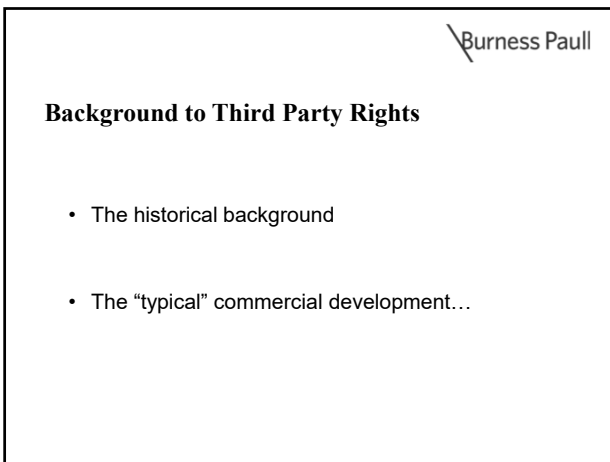
- Introduction/Background
- Options for Third Party Rights
- Advantages and Disadvantages of Options for Third Party Rights
- The Contract (Third Party Rights) (Scotland) Bill
- The Future

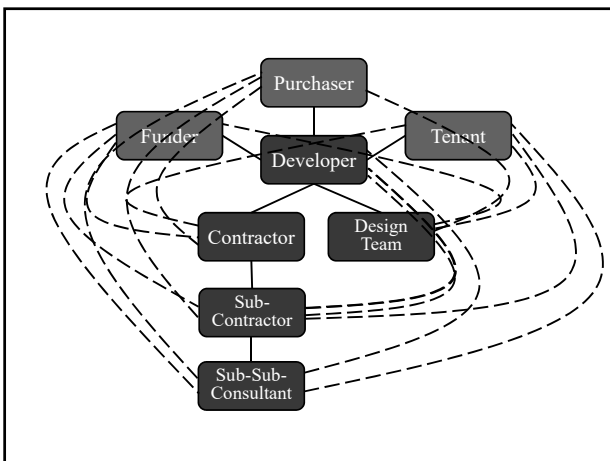
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Introduction









OPTIONS FOR THIRD PARTY RIGHTS

1. Collateral Warranties
2. Assignment/Novation
3. Third Party Rights

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Collateral Warranties

- Ancillary or "collateral" to a Construction Contract e.g.
 - Building Contract
 - Professional Appointment
- Creation of rights and remedies
 - Delictual liability and the contractual nexus
 - Professional Indemnity Insurance
- Prevalence in Commercial Development
 - Development Agreements
 - Agreements for Lease
 - Facility Agreements
- Standard e.g. SBCC, JCT, CIC and bespoke forms

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Collateral Warranties

- A "Construction Contract" for the purposes of the **The Housing Grants, Construction and Regeneration Act 1996 as amended?**
- Carrying out of "Construction Operations"?
- If the **Construction Act** applies...
 - Mandatory right to adjudicate s108

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Collateral Warranties

Adjudication is a statutory process for quickly resolving disputes under a construction contract on an interim basis pending final resolution of the dispute by litigation, arbitration or agreement between the parties.

- It is a **statutory right**.
- The decision is **interim binding only** until finally determined by arbitration, the courts or by agreement of the parties.
- The process is **quick: 28 days/42 days** with any further extensions requiring the agreement of both parties.

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Collateral Warranties – Court Action!

- The Courts have recently intervened where:
 - a party failed to **execute and deliver** a Collateral Warranty
 - there was a **fundamental error** in the Collateral Warranty provided by a party

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Courts – Failure to Deliver Collateral Warranty

- Potential Remedies
 - financial consequences (if outlined contractually)
 - damages for breach of contract
 - Specific Implement (*Scotland*)
 - Specific Performance (*England*)

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Courts – Failure to Deliver Collateral Warranty

- *Kier Construction Ltd v WM Saunders Partnership LLP* [2016]



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Courts – Errors in Collateral Warranty

- *Albyn Housing Society v Active Air Conditioning Ltd t/a Active Sustainable Energy Systems* [2016]

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Assignment/Novation

- Building Contracts & Consultant Appointments
- Collateral Warranties
- Benefit vs Burden
- Intimation

Third Party Rights

- Ancillary to a Construction Contract
- Similar type provisions to a collateral warranty
- Standard e.g. SBCC, JCT and bespoke forms
- Unpopular
- Jus Quaesitum Tertio

**HOW DO THE OPTIONS
COMPARE?**

Advantages & Disadvantages

How do the Options Compare?

Collateral Warranty Advantages	Collateral Warranty Disadvantages
Step In Rights	Execution Issues
Assignment	Enforcement & Delivery Issues
Market Expectation	Time & Money consequences
Stand alone Contract	Negotiation of collateral warranty terms / opening up of underlying contract

How do the Options Compare?

Assignment & Novation Advantages	Assignment & Novation Disadvantages
1 Assignment can cover many construction contracts!	Intimation Issues
Little or no negotiation on novation agreements typically	Prescription Issues
No opening up of underlying construction contract	Terms of Assignment
	Burden transfers too in the case of novation – any payment or other obligations?
	Only 1 assignment possible
	Timing Issues
	No Step In Rights

How do the Options Compare?

Third Party Rights Advantages	Third Party Rights Disadvantages
Created on Notice to the Granter – no separate contract required and no execution or enforcement issues	Uncertainty in Scots Law
Step In Rights?	Availability of step in rights?
Assignment	Acceptable to funders?
Time and Money Savings	

THE CONTRACT (THIRD PARTY RIGHTS) (SCOTLAND) BILL

The Contract (Third Party Rights) (Scotland) Bill



The Contract (Third Party Rights) (Scotland) Bill

- Undertaking in underlying contract and intention that third party entitled to invoke undertaking
- Third party identifiable from the contract
- Right to modify or cancel a third party right unless third party right relied upon

The Contract (Third Party Rights) (Scotland) Bill

- Third party's remedy for breach of the right is any remedy that would be available to the contracting party had the right been in favour of that party
- Contracting party's defence to a claim for breach of the right by a third party is:
 - Any defence they would have against any other contracting party; and
 - A defence which is relevant to the right

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The Bill if enacted...

- Makes law on third party rights clear
- Removes inflexibility of current position
- Certainty v adaptability

THE FUTURE...

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The Future...

- Death of the Collateral Warranty?

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Get in touch:

Colin Clelland
Director

+44 (0)141 273 6713
+44 (0)7912 774 415
Colin.Clelland@burnesspaul.com

burnesspaul.com
@BurnessPaul

Get in touch:

Karen Manning
Senior Associate

+ 44 (0)141 273 6809
+44 (0)7950 772 001
Karen.Manning@burnesspaul.com

burnesspaul.com
@BurnessPaul

Q / A
