

ASSIGNMENT OF CONTRACTUAL WARRANTIES: CAN THE ASSIGNMENT EXTEND TO WARRANTIES BREACHED BEFORE ASSIGNMENT?

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Legal Briefings

In this article we consider the recent decision in the case of *Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd*, in which the party who had been assigned the benefit of contractual warranties provided by the contractor, sued the contractor for breach of those warranties as a result of defects. The contractor accepted that the works were defective but argued that they fell outside the scope of the assignment and therefore that it had no liability to the assignee.

ASSIGNMENT OF CONTRACTUAL RIGHTS

In simple terms, contractual assignment usually involves the transfer of the benefit of one or more contractual rights from a contracting party (the assignor) to a third party (the assignee). The assignment allows the third party to enforce those rights against the other contracting party as if it were a party to the contract in the first place. The contract between the original parties otherwise remains in full force and effect.

There are several reasons why contractual rights may be assigned. For example, it is common for assignment to be considered when an owner sells infrastructure that it contracted to have designed and built, and if done properly, it will enable the new owner to have the same rights as the original owner with respect to contractual rights (such as warranties as to design, construction and fitness for purpose), and to pursue those rights if they are breached. This can be particularly important in the case of (latent) defects.

TZANEROS INVESTMENTS PTY LTD V WALKER GROUP CONSTRUCTIONS PTY LTD

This case concerned the construction of a container terminal on land owned by the Sydney Ports Corporation (the **Land**). In 2003, P&O Trans Australia Holdings Ltd (**P&O**), who was lessee of the Land, entered into a contract with Walker Group Constructions Pty Ltd (**WGC**) for the design and construction of 5 warehouses, and associated work, which included laying pavements in between and outside of the 5 warehouses (**D&C Contract**).

In the D&C Contract, WGC gave certain warranties as to standard of workmanship and fitness for purpose. The D&C Contract also provided that neither party could assign any right or benefit under the contract without the other's prior approval.

After the works were completed, P&O's leasehold interest in the land was transferred to Tzaneros and P&O entered into a Deed with Tzaneros purporting to assign WGC's warranties under the D&C Contract. WGC consented to the assignment of the warranties to Tzaneros in the following terms:

- *...[WGC] hereby acknowledges that ...the benefits of the building warranties contained in the Contract will pass to Tzaneros Investments Pty Ltd from the sale date...*
- *...In accordance with clause 9.1 of the Contract, Walker Group Constructions hereby consents to, and accepts the assignment of the building warranties to Tzaneros Investments from the sale date.*

After the pavement was laid, cracks and spalling began to appear. By the time of the litigation, some pavements had been repaired (with Tzaneros contending that the repairs were inadequate), and some had been replaced.

TZANEROS' CLAIM BASED ON THE ASSIGNED WARRANTIES

Tzaneros commenced proceedings in the Supreme Court of New South Wales based on breach of the contractual warranties purportedly covered by the assignment in the Deed. Tzaneros claimed nearly AU\$15 million in damages from WGC and other parties as a result of the defects. A key issue was whether assignment of the benefit of the contractual warranties allowed Tzaneros to pursue its claim against WGC.

THE PARTIES' ARGUMENTS

WGC accepted that the concrete pavement was defective, and that the warranties provided under the D&C Contract had therefore been breached.

However, WGC argued that the cause of action (for breach of warranty) had accrued before the assignment was effected, and that the terms of assignment were not broad enough to extend to such causes of action. Put another way, WGC argued that if a warranty had been breached before the Deed was executed, the entitlement to sue on that warranty had not been assigned to Tzaneros, and remained with P&O, the principal under the D&C Contract.

Tzaneros argued that the assignment was not limited in this way, permitting it to pursue WGC for breaches of the warranties under the D&C Contract, irrespective of whether or not they accrued before the assignment was effected.

DECISION

Dealing first with the terms of the assignment, Ball J observed that the Deed provided that *'the Assignor as beneficial owner and for valuable consideration...assigns to the Assignee absolutely all of the **benefit of the Building Warranties**'* (emphasis added).

His Honour found that the provisions in the Deed dealing with assignment had to be construed in the context of P&O and Tzaneros entering into the Deed when they were aware that there had been cracking in the pavements and therefore must have contemplated a claim against WGC for breach of warranty. Further, His Honour concluded that the ordinary and natural meaning of the words *'all of the benefits of the Building Warranties'* included the right to sue in respect of breaches that had occurred before the date of the assignment. His Honour opined that had the parties intended to limit the assignment to breaches arising after the assignment was effected, *'they would have said so specifically'*.

WGC argued that it did not consent to the assignment in such broad terms. Specifically, WGC relied on the fact that the letter provided that consent to the assignment was granted *'from the sale date'*. This argument failed for two reasons. First, His Honour opined that the consent could not impact the scope and found that *'either WGC consented to the assignment or it did not'* and that the letter clearly operated as the consent required by clause 9.1 of the General Conditions of the D&C Contract. Second, his Honour held that on a proper construction of the letter, *'from the sale date'* could not be *'interpreted as placing a limit on the consent insofar as the scope of the assignment is concerned'*. Instead, that date was interpreted as identifying the date from which the assignment would take effect.

His Honour accordingly held that the assignment allowed Tzaneros to sue WGC for breaches of the contractual warranties that occurred before the date the assignment was effected. Tzaneros' claim against WGC for breach of warranty succeeded, resulting in damages being awarded.

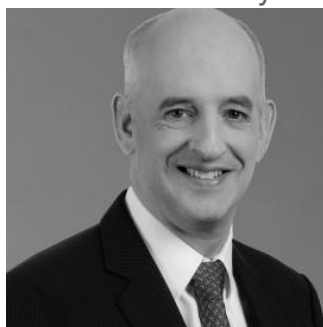
CONCLUDING REMARKS

The Supreme Court of NSW found that neither the assignment nor the consent was limited only to causes of action that accrued after the assignment took place. The assignment was broadly construed.

The result turned on the terms of the assignment and consent, along with the surrounding circumstances. Indeed, the fact that the assignment was construed in broad terms is perhaps unsurprising in light of those things. Nevertheless, this case serves as an important reminder that any limitations a party wishes to place on the scope of the assignment need to be clearly identified, and that particular care must be taken when consent is being considered and provided.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PETER GODWIN
REGIONAL HEAD OF
PRACTICE - DISPUTE
RESOLUTION, ASIA.
MANAGING PARTNER,
KUALA LUMPUR,
KUALA LUMPUR
+60 3 2777 5104
Peter.Godwin@hsf.com



DAVID GILMORE
MANAGING PARTNER,
JAPAN & SOUTH
KOREA, TOKYO
+81 3 5412 5415
David.Gilmore@hsf.com



**EMMA SCHAAFSMA
(KRATOCHVILOVA)**
PARTNER, LONDON
+44 207 466 2597
Emma.Kratochvilova@hsf.com



MICHAEL LAKE
SENIOR ASSOCIATE,
SYDNEY
+61 2 9322 4318
Michael.Lake@hsf.com

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