

NEC Secondary Option X8: Undertakings to (the Client or) Others

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Disclaimer: the legal information given on the following slides does not constitute legal advice and is presented as the interpretation and opinion of the presenter on such matters.

About Us




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2



Reminder

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3



Contract Assurance

Many construction projects have a potentially complex structure of contract relationships and multiple participants, with inherent commercial risks.

Specific contract tools are frequently used to safeguard against these risks by providing some form of assurance, including the following;

- Bonds,
- Guarantees,
- Warranties,
- Indemnities,
- Payment security,
- Third party rights,
- Direct agreements,
- Insurances.

Further reminder that these are specialised subjects.

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4




Definitions

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5



Undertaking

It is a formal promise to either do, or not to do, something.

Where an undertaking is included in a contract, if it is not performed then it would constitute a breach of contract.

An undertaking may be compared with the following 'types' of promise;

A vow
A declaration in public, usually in a religious context.

An oath
A formal announcement of affirmation, usually sworn to a divine being.

A covenant
An assurance of future action or inaction.

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6

Warranty



An assurance given by one party that specific facts or conditions are true.

Where a party to a contract relies upon such an assurance, then they have the right to claim damages if it is not true.

The Consumer Rights Act 2015 provides rights for consumer's and protection of their interests by imposing certain warranties within an agreement between a trader and a consumer.

Despite the above Act, warranties remain in common use for the sale of goods and services.

Where a consumer warranty is extended this is effectively a guarantee.

Under the NEC ECC form, a 'warranty' is made regarding the consistency of Site Information at clause 60.3.

There is a corresponding 'contractual' remedy where this is not the case.

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7



Third Party Rights

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8

Privity of Contract



This is a common law principle and provides that a contract cannot give rights to or impose obligations on anyone who is not a party to the original agreement.

The intention is that only the parties to a contract can enforce contractual rights.

This was not always the case, although the law changed in the late 19th and early 20th century with the following cases;

- Tweddle v Atkinson (1861),
- Dunlop Pneumatic Tyre v Selfridge and Co Ltd (1915).

This change meant that where there was no contractual link, any remedies sought by 3rd parties were required to be pursued under the law of tort.

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9

Law of Tort



This is a branch of law that imposes civil liability for breach of an obligation imposed by the law rather than a contract.

For construction, the tort of negligence is the most obvious route.

The courts are willing to accept liability in tort for injury to persons or damage to property, but not where the loss is 'purely economic'.

- D&F Estates v Church Commissioners for England and Wales (1989),
- Murphy v Brentwood District Council (1991).

In the 'Murphy' case, Lord Bridge said;

'... economic losses are recoverable if they flow from breach of a relevant contractual duty, but ... in the absence (of a contractual duty) they are not recoverable in tort.'

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10

Alternative



Privity of contract was widely seen as unfair, certainly where a contract intends for a third party to be able to enforce terms.

Privity of contract gave rise to numerous 'unfair' outcomes which meant that 'exceptions' and 'loopholes' were pursued.

In 1937 the Law Revision Committee recommended that the doctrine should be abolished by an act of parliament.

Consequent to the court rulings on actions via tort, in 1991 the Law Commission published another consultation paper similar to the one of 1937.

This time it culminated in an act of parliament;

- The Contracts (Rights of Third Parties) Act 1999.

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11



Collateral Warranty

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12

What is it?



It is a contract between somebody who has an interest in a project (beneficiary) and a person or party who contributed to the project.

If a beneficiary to a collateral warranty incurs losses it may be able to recover these via a contractual remedy rather than relying on tort.

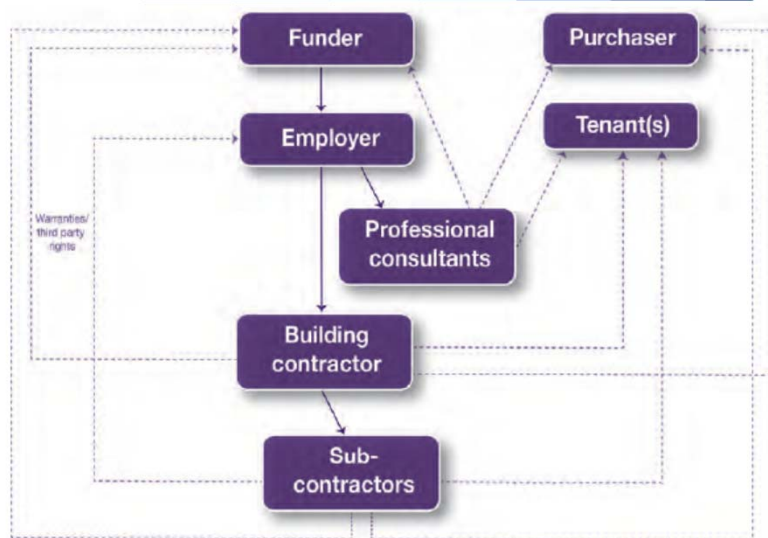
Who is a party to a collateral warranty will depend on the interests of a beneficiary and the contractual arrangements during the development and construction of a project, which may typically include;

- Project funder to Contractor / Designer / Subcontractor,
- Client to Subcontractor,
- Facility operator to Contractor / Designer / Subcontractor.

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13

Contractual arrangement



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14

X8 – Undertakings to (the Client or) Others

NEC Suite

Secondary option X8 can be found in the following NEC forms of contract;

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Professional Services Contract (PSC),
- Professional Services Subcontract (PSS),
- Term Service Contract (TSC),
- Term Service Subcontract (TSS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Design Build and Operate Contract (DBO).

Note: the Supply Contract (SC) includes X25 - Supplier warranties.

NEC3 to NEC4



Under NEC3 Option X8 only applied to the PSC form and was titled 'Collateral warranty agreements', providing as follows;

'The Consultant enters into the collateral warranty agreements.'

Under NEC4, Option X8 has been re-named 'Undertakings to (the Client or) Others' and now applies to numerous NEC forms.

The NEC User Guide documentation provides an explanation for the change in wording to 'undertakings' as it is 'a more generic term'.

The User Guides further explain that this Option essentially provides for the giving of 'collateral warranties', which were a common amendment via 'z-clauses'.

This option detail has been expanded under NEC4 to further include procedural requirements.

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17

Content



For all NEC forms undertakings are required to be given to Others.

Most forms also require undertakings to be given to the Client.

The undertakings are in the form set out in the Scope.

The Client (Contractor) prepares the undertaking and sends them to the other party for signature and return within 3 weeks, or 2 weeks under the Subcontract forms.


There are no stated timescales relating to when the Client (Contractor) sends an undertaking to the other party.

There is no stated remedy to the Client (Contractor) where an undertaking is not signed and returned.

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18

(Sub)Contract Data




The undertakings to Others are provided to

The Subcontractor undertaking to Others are works provided to

The Subcontractor undertaking to the Client are works

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19

Things to Consider...



A collateral warranty should be drafted consistently with the requirements under the main contract, including;

- limitation period,
- Standard of duty,
- Intellectual Property Rights and copyright,
- Assignment,
- Step in rights,
- 'No greater liability' clause,
- Equivalent right of defence,
- Net contribution clause,
- Dispute resolution.

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Things to Consider...



- Does the collateral warranty need to be executed as a deed?
- Does the collateral warranty need to be executed by the beneficiary?
- Is the collateral warranty a 'construction contract'?
- What if a party fails to sign a collateral warranty?
- What if a 'Client' changes the terms of a collateral warranty?
- Can a 3rd party right achieve the same intention?
- Does your PI insurance cover the obligations under a collateral warranty?

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21

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22