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### **Promises, assurances, and collateral warranties**

New judicial observations

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## Promises, assurances, and collateral warranties: new judicial observations

Posted on September 17, 2013 by mhogg

The Inner House of the Court of Session has recently delivered (12th September) its decision in the case of [Royal Bank of Scotland plc v Carlyle](#) [2013] CSIH 75. In its judgment, the Inner House held that an oral representation by an employee of the pursuers, made during the course of a telephone call with the defender, to the effect that the pursuers had approved funding for a development proposed by the defender did not give rise to any binding voluntary obligation on the pursuers' part (the precise words used were "It's all approved. Edinburgh are going for it for both houses" – see para 56 of the judgment). In particular, the employee's statement did not constitute a 'collateral warranty' on the bank's part. The decision reached by the Court – that the Royal Bank did not undertake any binding obligation by virtue of what its employee said, whether of a freestanding or collateral nature – seems the right one. In reaching its decision, the court made some interesting remarks on the nature of so-called "collateral warranties" in Scots law. It will be suggested below that some of what was said by the Court is too limiting as regards the nature of warranties in Scots law.

### Collateral warranties – what are they?

The defender's case was premised on the argument that, in speaking as she had done on the telephone, the pursuer's employee had made a "collateral warranty" in respect of the funding assurance. This led the Inner House to ponder at some length what the nature of a "collateral warranty" might be in Scots law (and whether, for instance, it is contractual in nature, or has some other basis in law). The term is encountered less frequently in Scotland than it is in England.

In pondering what, if anything, might be indicated by something being referred to as a 'collateral warranty' in Scots law, the Court prefaced its consideration of this by noting that voluntary obligations can, in Scotland, be undertaken in one of two ways: consensually, in a contract, or unilaterally, through a promise (see para 51). Such obligations fall to be distinguished from mere representations not intended to have obligatory force. These points were well made, though it is suggested that this is only part of the background to 'collateral warranties'. Warranties, in the broad sense in which they are often used in commercial contracts (and there are narrower senses, as discussed below), encompass both undertakings made by a party, but also statements/assurances held out as true but which do not, of themselves, expressly state any undertaking. So, in a construction contract, a collateral warranty document might include assurances made by a heritable proprietor of land, to a contractor, about the nature of the land, e.g. that it is not polluted, that the substructure of the land is clay and not limestone, and so forth. Such statements are frequently referred to as 'collateral warranties' though they do not of themselves state any obligation, even if obligations to be implemented if the statements are not true (e.g. the payment of damages) may appear alongside such statements. The answer to this point may be that it is only the statement held out as true *coupled with* the obligation to be undertaken if the statement is untrue which, together, fall to be considered as the 'warranty', but it is not clear that this would be an accurate reflection of the use of the term 'warranty' in practice.

Leaving that point to one side, the Court continued by analysing the term 'collateral warranty', saying that the legal meaning of both of its component words were 'well known' (para 52). A warranty was said by the Inner House to be "a term of a contract" (para 52). This is true as far as it goes: warranties *may* be contract terms, but a warranty may also be constituted by a unilateral promise, and the Court's failure to acknowledge this is somewhat surprising at this point, given that the Court's later consideration of whether the words spoken during the

telephone conversation might amount to a promise seems to suggest that the Court *did* consider that a warranty might be constituted in promissory form. (One of the authorities cited for the nature of a warranty as a term is McBryde. Contract, 3rd edition, para 20-93, yet in this paragraph McBryde is merely making the point that what in English law are considered either ‘warranties’ or ‘conditions’ are both in Scots law simply contract terms – but this is a meaning of warranty in English law distinct from the more general usage of warranty to mean an assurance, so this passage of McBryde does not support the idea that warranties must be contract terms.) This being so, doubt must be expressed about the Court’s subsequent statement that a warranty is

“not something which exists as a free standing legal entity outwith a contract. It is not the same as an “assurance”, which may or may not be a term of a contract”

On the contrary, I would suggest that a warranty may indeed be a free-standing legal entity outwith a contract: were that not so, a warranty issued by manufacturer C in respect of its goods could not exist separately of a contract for the sale of the goods by supplier B to customer A without giving such a warranty the forced construction of an offer impliedly accepted by the owner of the goods, yet such warranties do exist apart from the contract of sale under which they are sold and in Scots law it is entirely possible to see such warranties as unilateral promises issued by the manufacturer to the owner of the goods. The fact that *some* collateral undertakings have been analysed as contractual in nature (as appears to have been so in *British Workman’s and General Assurance Co v Wilkinson* (1900) 8 SLT 67, a case cited by the Inner House) does not entail that *all* collateral undertakings must be contractual in nature. The Court’s suggestion that warranties must be contractual looks all the more odd given that, following its discussion of the nature of warranties as contractual, it proceeds to state (para 55) that “the obligation arising may be involve a unilateral obligation created by promise or a unilateral or mutual one created by contract”. It is hard to square this with its earlier assertion that warranties must be contractual in nature.

The Court continues (para 52) by analysing the word ‘collateral’, remarking that “if something is to be regarded as “collateral”, it must be linked to a principal item”, which seems an unobjectionable analysis.

The conclusion drawn by the Court of collateral warranty is thus that

“If something is described as a collateral warranty, it must be taken to relate to a term of an existing contract which is collateral to another, different, contract” (para 52).

If one accepts the assumption that all warranties must be contractual in nature (an assumption I have doubted), then this conclusion follows. Whether or not one accepts the point that warranties must be contractual in nature, it seems correct that, whatever the nature of a warranty, for it to be collateral it must be ancillary to a separate obligation, to which it must relate. There must therefore be a clear linkage between the alleged collateral warranty and another specified obligation. Any such link was missing from the facts of this case, so the conclusion of the Court that “[o]ne thing is clear, this is not a case of “collateral warranty”” seems the correct one to have reached.

### **If not collateral warranty, perhaps free-standing promise?**

Even if the statement was not a ‘collateral’ warranty, might it have been a free-standing promise made by the pursuers? (It should be added at this point, that this was not the basis of the defender’s claim, so no such argument could have assisted the defender, but the idea is worth exploring here) Such a statement might possibly have been a promise, though to be such the words would have had objectively to disclose an identifiable unilateral undertaking to which the promisor was unequivocally binding itself. That was highly unlikely here. Insufficient content about the nature of what was promised can be gleaned from the few words spoken on the telephone. What was the amount to be lent? On what terms? As the Inner House noted, “An agreement or a promise to enter into a contract, where the essentials are not ascertainable, cannot be regarded as legally binding” (para 54). Moreover, a promise is not usually considered to be undertaken simply through the recitation of an internal decision made by

a party, as the previous case of *Cawdor v Cawdor* [2007] CSIH 3 indicates. At best, such statements are likely to be considered as non-binding statements of intention (see both *Cawdor v Cawdor* as well as the recent House judgment in *Regus (Maxim) Ltd v Bank of Scotland plc* [2013] CSIH 12). Unsurprisingly, given the words used in the telephone conversation in this case, and the context within which they were spoken, the Court concluded that:

“at most all that the pursuers’ employee was doing was advising the defender of an internal decision of the pursuers, which amounted to approval in principle of the proposal to lend the defender (and his company) funding for the development(s). She was not, in so communicating to the defender, creating a legal obligation on the pursuers to lend to the defender (and his company) several million pounds.” (para 57)

This seems an entirely reasonable interpretation of the nature of the words spoken, and the Court’s conclusion on whether such words were intended to give rise to a unilateral promise (they were not) is to be approved.

### Conclusion

The suggestion that the oral statement made by the pursuers’ employee was a collateral warranty seems to have been a rather feeble attempt (albeit approved by the Commercial judge at first instance) to give such statement obligatory form. It is hard to see what convincingly any undertaking could be argued to have been collateral too, given that no express linkage was made when the statement was made nor was an implied linkage to a specific later contract evident from the circumstances (there were subsequent agreements between the parties, but these defined different levels of funding and different purposes for that funding, so could not be the principal undertakings to which the statement might be collateral). It is a pity that the defender did not try to make an argument that the statement made during the telephone conversation was a freestanding promise (this was not the pled basis of the case), as that would have avoided the difficulty of having to tie the obligation to some other undertaking in order to make it ‘collateral’. However, as has been argued above, the words used by the pursuers’ employee do not seem to disclose any promissory intent at all, so that such a promissory argument would also properly have failed.

The decision on the case aside, however, it is a pity that what the Inner House says about the nature of collateral warranties appears to suggest that warranties can only be contractual: there is no obvious reason why a warranty, collateral or not, may not be a promise, and there is good reason to believe that promise may well be the most appropriate way to view some warranties (e.g. manufacturers’ warranties) in Scots law, whatever their characterisation in other systems.

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## One Response to *Promises, assurances, and collateral warranties: new judicial observations*



**Stephen Bogle** says:

September 18, 2013 at 3:00 pm

Thank you very much for this. It occurred to me, there may be practical advantages in Scots law adopting a promissory analysis of warranties, particularly now that it appears under English law at least, a collateral warranty is now subject to the ADR procedures under the Housing Grants, Construction and Regeneration Act 1996 as per *Parkwood Leisure Ltd v Laing O’Rourke Wales & West Ltd* [2013] EWHC 2665 (TCC). The possibility that a collateral warranty is a construction contract has caused a fair bit of consternation for some. It occurred to me, if it is possible in Scots law to analyse a collateral warranty as a unilateral promise, theoretically at least, in Scotland you could avoid the Housing Grants, Construction and Regeneration Act 1996 – on the premise, that they are not contracts but promises. It might appeal to apply Scots law to your collateral warranty if you do not want to follow the ADR procedure under the 1996 Act. That all being said, as you note, *RBS v Carlyle* isn’t a good starting point in establishing a promise-based analysis of collateral warranties.

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