

Sense-Checklist for Collateral Warranties

If you haven't read the book, this checklist will convince you that the standard warranty clauses are not all *necessary*. If you have read the book, this checklist acts as a reminder.



Typical Content ¹	Is this necessary?	More info
(1) <i>the employer has entered into a building contract with the contractor for the project; and</i> (2) <i>by an agreement dated X the contractor has appointed the warrantor to provide the goods, works and services described in the project contract.</i>	Its function is to narrate history and/or express intention in general terms. It is not operative and not essential.	-
<i>In consideration of the payment of £10 of which receipt is acknowledged.</i>	This entitles beneficiary to specific performance ² . Consideration exists from the rights granted by the warranty.	Chapter 5
<i>The warrantor has complied with and will continue to carry out its duties under the project contract.</i>	Yes. It is the minimum requirement for the warranty.	Chapter 9
<i>The warrantor warrants that it has exercised and will continue to exercise reasonable skill and care in the performance of the project contract.</i>	No. It is already in project contract.	Chapter 10
<i>Promise to neither specify nor use specific materials³ and to notify the beneficiary if the warrantor becomes aware of such specification/use.</i>	No. It is both in the project contract and an extension of the duty of care.	Chapter 10
<i>The warrantor shall take out and maintain professional indemnity insurance in an amount of X million pounds for any occurrence or series of occurrences for a period of 12 years from the date of Practical Completion of the Works under the Building Contract.</i>	No. It is in project contract. This clause provides no remedies to beneficiary as the warrantor will maintain PII in any event.	Chapter 7
<i>Grant of a licence for the beneficiary to use and copy certain materials.</i>	No. The beneficiary can get copyright licence under its own agreement.	Chapter 7
<i>The warrantor owes no greater obligations to the beneficiary than it owes to the employer under the project contract.</i>	No. As secondary liability, this is implied. Any extension of liability may not be covered by insurance.	Chapter 11
<i>The warrantor will be entitled in any action or proceedings by the beneficiary to rely on any limitation in the project contract and to raise the equivalent rights in defence of liability as it would have against the employer under the project contract.</i>	No. As secondary liability, this is implied.	Chapter 11



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<i>This warranty may be assigned twice by the beneficiary to another person taking an assignment of the beneficiary's interest in the project without the consent of the warrantor being required. That assignment shall be effective upon written notice being given to the warrantor. No further or other assignment of this warranty shall be permitted.</i>	No, unless it is a condition of the warrantor's professional indemnity insurance.	Chapter 12
<i>In the event of any claim, the warrantor's liability shall be limited to that proportion of the beneficiary's losses which it would be just and equitable to require the warrantor to pay having regard to the extent of the warrantor's responsibility for the same and on the basis that the contractor and its sub-consultants and sub-contractors are deemed to have (1) provided contractual undertakings on terms no less onerous than this clause to the beneficiary in respect of the performance of their obligations in connection with the project and (2) paid to the beneficiary such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility.</i>	No, unless it is a condition of the warrantor's professional indemnity insurance. It is simpler to use a limit on the warrantor's liability.	Chapter 11
<i>In the event of any breach of this agreement, the warrantor shall be liable for the reasonable costs of repair, renewal and/or reinstatement of any part or parts of the project to the extent that the beneficiary incurs or is liable (whether directly or by way of financial contribution) for such costs ...</i>	No. It is simpler to use a limit on the warrantor's liability. It avoids any debate about whether the losses suffered are 'consequential loss' under the relevant cases or costs of repair or renewal.	Chapter 11
<i>Limit on liability for all claims under the warranty.</i>	Although it is not essential, it helps to manage the warrantor's risk and provides a simpler alternative to a net contribution clause or other limits.	Chapter 11



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<i>The warrantor will not exercise any right which it has to terminate the project contract or discontinue performance of any of its obligations under the project contract without first giving to the beneficiary at least 28 days' prior written notice of its intention so to do and its grounds ...</i>	Beneficiaries with an interest before completion may require it. Beneficiaries with an interest after completion do not need it.	Chapter 9
<i>The rights and benefits conferred upon the beneficiary by this agreement are in addition to any other rights and remedies it may have against the warrantor including, without limitation, any remedies in negligence.</i>	No. It is extremely unlikely that there would be any other remedies, especially in negligence under English law.	Chapter 3
<i>The warrantor's liabilities under this agreement will not be reduced or extinguished as a result of any inspection, approval or attendance made by or on behalf of the beneficiary.</i>	No. The parties never meet and rarely correspond.	Chapter 12
<i>Unless otherwise expressly stated, nothing in this agreement confers or is intended to confer any rights on any third party under the Contracts (Rights of Third Parties) Act 1999.</i>	No. A warranty does not confer any rights on anyone other than the parties.	Chapter 12
<i>This agreement is governed by English law and the English courts have jurisdiction and enforcement powers.</i>	No. This will depend on and should be set by the project contract.	Chapter 12
<i>No action or proceedings for any breach of this warranty shall be commenced against the warrantor after the expiry of 12 years from completion of the project.</i>	No. As secondary liability, the limitation period under the warranty is the same as that under the project contract. However it is possible to shorten that liability. ⁴	Chapter 11

¹ Specific drafting is adapted from the documents in *Glasgow Airport v Kirkman & Bradford*, above, *Safeway Stores Limited v Interserve Project Services Limited* [2005] EWHC 3085, *Office Depot International (UK) Ltd v UBS Asset Management (UK) Ltd & Ors* [2018] EWHC 1494 and *Hurley Palmer Flatt Ltd v Barclays Bank Plc* [2014] EWHC 3042.

² See *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd & Anor* [2013] EWHC 4110.

³ Often cited by reference to the British Council for Offices' publication *Good Practice in the Selection of Construction Materials*, 2011 edition now available. Originally published in 1997, as an alternative to "blacklists" of inappropriate, prohibited or deleterious materials or products, which can quickly become out of date. Now contains an increased emphasis on the environmental impact of construction materials.



⁴ *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156.



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