

## **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

Typical Content <sup>1</sup>	Is this necessary?	More info
(1) the employer has entered into a building	Its function is to narrate history	-
contract with the contractor for the	and/or express intention in general	
project; and	terms. It is not operative and not	
(2) by an agreement dated X the contractor	essential.	
has appointed the warrantor to provide		
the goods, works and services described		
in the project contract.		
In consideration of the payment of £10 of	This entitles beneficiary to specific	Chapter 5
which receipt is acknowledged.	performance <sup>2</sup> . Consideration exists	
	from the rights granted by the	
	warranty.	
The warrantor has complied with and will	Yes. It is the minimum requirement	Chapter 9
continue to carry out its duties under the	for the warranty.	
project contract.		
The warrantor warrants that it has exercised	No. It is already in project contract.	Chapter 10
and will continue to exercise reasonable skill		
and care in the performance of the project		
contract.		
Promise to neither specify nor use specific	No. It is both in the project contract	Chapter 10
materials <sup>3</sup> and to notify the beneficiary if the	and an extension of the duty of care.	
warrantor becomes aware of such		
specification/use.		
The warrantor shall take out and maintain	No. It is in project contract. This	Chapter 7
professional indemnity insurance in an	clause provides no remedies to	
amount of X million pounds for any	beneficiary as the warrantor will	
occurrence or series of occurrences for a	maintain PII in any event.	
period of 12 years from the date of Practical		
Completion of the Works under the Building		
Contract.		
Grant of a licence for the beneficiary to use	No. The beneficiary can get	Chapter 7
and copy certain materials.	copyright licence under its own	
	agreement.	
The warrantor owes no greater obligations	No. As secondary liability, this is	Chapter 11
to the beneficiary than it owes to the	implied. Any extension of liability	
employer under the project contract.	may not be covered by insurance.	0
The warrantor will be entitled in any action	No. As secondary liability, this is	Chapter 11
or proceedings by the beneficiary to rely on	implied.	
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.		



# 500 WORDS LTD

Ash Cottage, Hawthorn Lane, Wilmslow, SK9 5DG Company Registration: 08893252

Sarah@500words.co.uk +44(0)7767 342747 500words.co.uk









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Typical Content <sup>1</sup>	Is this necessary?	More info
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.	No, unless it is a condition of the warrantor's professional indemnity insurance.	Chapter 12
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 subconsultants 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.	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
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	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
Limit on liability for all claims under the warranty.	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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Typical Content <sup>1</sup>	Is this necessary?	More info
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	Beneficiaries with an interest before completion may require it. Beneficiaries with an interest after completion do not need it.	Chapter 9
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.	No. It is extremely unlikely that there would be any other remedies, especially in negligence under English law.	Chapter 3
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.	No. The parties never meet and rarely correspond.	Chapter 12
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.	No. A warranty does not confer any rights on anyone other than the parties.	Chapter 12
This agreement is governed by English law and the English courts have jurisdiction and enforcement powers.	No. This will depend on and should be set by the project contract.	Chapter 12
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.	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. <sup>4</sup>	Chapter 11

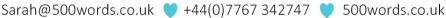
Specific drafting is adapted from the documents in Glasgow Airport v Kirkman & Bradford, above, Safeway Stores Limited v Interserve Project Services Limited [2005] EWHC 3085, Office Depot International (UK) Ltd v UBS Asset Management (UK) Ltd & Ors [2018] EWHC 1494 and Hurley Palmer Flatt Ltd v Barclays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



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

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