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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Duty to warn

Cleightonhills v Bembridge Marine Ltd & Others

[2012] EWHC 3449 (TCC)

This case arose out of a serious accident at a boating yard. A young employee was asked to assist in manhandling a boat from an external grated first floor gantry platform into the adjacent workshop. The platform and the workshop had recently been designed and constructed. As the employee pushed the boat in on its trolley, the floor grating moved beneath him and he fell beneath the gantry onto the floor some 11 to 12 feet below; the loose grating panel fell onto him. He suffered very severe traumatic brain injuries. Damages for personal injury in excess of £7million were agreed against the boatyard owner who then brought proceedings against those who were involved to a greater or lesser extent in the design, construction or supply of the building of which, as the Judge noted, the first floor external gantry platform was a relatively minor element in structural terms.

Proceedings against the designer and the structural engineer were settled by agreement for £2 million and £1.8 million respectively plus costs. This left claims against the subcontractor for the supply and construction of the platform, the subsub-contractor for the fabrication of certain platform elements and the draughtsman who prepared detailed fabrication and working drawings. These third parties accepted that they owed a duty of care to the injured employee. When it came to the scope of that duty, Mr Justice Akenhead noted that:

(i) When one is concerned with a duty of care, particularly in a construction context involving duties owed by parties who are only involved at all by reason of the contracts which they have entered into, the Court needs to consider the contractual context in which such parties were involved in the first place.

(ii) Whilst the scope of the duty of care can be limited by contractual exclusions or limitations of liability, the Court needs to consider what the scope of a tortious duty of care is. That scope is primarily determinable by reference to what the party owing the duty is at least broadly employed to do or actually does.

(iii) It does not follow that if a party is in breach of the contract pursuant to which it is involved in the project in question, it will be in breach of a duty of care owed to someone who is not a party to that contract.

Here, the complaint against each of the third parties was that they failed to appreciate that the actual intended uses to which the platform was to be put were such that, without more than was expressly specified, the platform could fail and thus foreseeably cause injury to anyone who happened to be on it at the time. Mr Justice Akenhead held that all three third parties exercised all the reasonable care and skill which might reasonably have been expected of them in doing what they were employed to do and in what they actually did. The real problem was the failure on the part of the primary designers to understand and provide for the likely horizontal or lateral loads that would be applied by the specific uses to which the platform was to be put. The design did not allow for the foreseeable horizontal movements to which the grating would be subjected both by the weight of the boats, the dynamic loads caused by the boats being dropped onto the trolley and then dragged over the holes in the grating, or for the damage to which the platform would be subjected by the particular forklift truck that was in use.

Further, the Judge said that there could be no criticism of the third parties for not warning those further up the line that there was a potential problem. Indeed, they could not be criticised for failing to appreciate that there was any need to warn at all. There was nothing on the documents which would have alerted otherwise reasonably competent and careful parties to the fact that the platform was under-designed. Where a construction contract does not spell out everything which is to be provided, Mr Justice Akenhead noted that:

"that which is not expressly specified but which is necessary must be reasonably suitable for what can otherwise be gleaned as the purposes for which the building or at least the unspecified element is to be used. Where those purposes are expressly spelt out in the contract documentation or where there is reliable evidence that those purposes (if not so spelt out) were communicated to the contractor prior to the contract, those will be the purposes to which reasonable suitability relates. "

For example, a party might reasonably be expected to pick up an obvious error in the design (i.e. a missing beam or column), they would not be expected to cross check and ascertain what the unexpressed design assumptions (if any) were. There was also a very real doubt that if a "warning" had been given, anything would have been done. A problem with the handrail was specifically raised but there was no change. There was also a discussion about the duty to warn and here the Judge noted that:

"there can be little doubt that a failure to warn in the case of potential danger to human beings may give rise to a breach of any duty of care owed to a third party by a party who knows of the danger. I use the word 'may' because it is necessary always to review all the circumstances and there might be circumstances which justify not warning. Where the parties are in contract, the duty to warn may extend to dangers of which the party in question should have been aware by reason of its involvement…In purely tortious circumstances, any duty to warn may not in fact extend to warning the class of persons who might be affected by the danger; it may be limited to warning the party with whom the person required to warn is in contract or to warning the local authority."

Bonds and guarantees

Aviva Insurance Ltd v Hackney Empire Ltd

[2012] EWCA Civ 16716

HEL engaged Sunley Turriff Construction Ltd ("STC") to carry out extensive refurbishment work to the theatre. In May 2001, STC started work under a letter of intent authorising it to carry out up to £500,000 of work. On 6 August 2001, Aviva issued a bond in favour of HEL for £1,106,852 to secure the performance of STC under the building contract. That building contract provided for a completion date of 2 September 2002 with liquidated damages at £5,000 per week. By October 2002, disputes had arisen and STC was claiming £4million.

In December 2002, the parties entered into a verbal agreement by which HEL paid £500,000 on account of STC's claims for loss and expense with two further payments of £250,000 to follow. In return STC agreed to provide a programme demonstrating how it could complete the works by 31 May 2003 and agreed to complete them by that date. In February 2003, the parties entered into a side agreement which limited the amount of liquidated damages payable by STC if the target completion date was met, and prevented the parties from referring disputes to adjudication for a period of time. The side agreement also referred to the £500,000 paid in December 2002 and the two further payments of £250,000. The first of these two further payments was made. The agreement provided that if STC did not meet the target date for completion of the works (which was 31 May 2003 but which by correspondence between the parties had been extended to 31 July 2003), it agreed to repay all of the sums paid under the side agreement. On 2 July 2003, STC went into administration and five days later, HEL demanded repayment of the £750,000 paid under the side agreement. On 5 February 2004, HEL wrote to STC's administrator confirming it had suffered losses of £3,154,142 as a result of STC's failure to complete the work. Then on 8 March 2004, HEL made a claim under the bond for the full amount.

Aviva argued that the rule in the Victorian case of *Holme v Brunskill* meant that the payments to STC under the side agreement had discharged its liability under the bond. This rule provides that if there is any agreement between the principals (in this case HEL and STC) to alter the principal contract (i.e. the building contract) then the surety (Aviva) should be consulted and if the surety has not consented to the alteration, or if it is not self-evident that the alteration is unsubstantial or cannot be prejudicial to the surety, then the court will not go into the merits of the alteration or the question of whether it is prejudicial but will instead allow the surety to be discharged from its obligations. At first instance Mr Justice Edwards-Stuart held that the side agreement was a separate free-standing agreement, which did not vary the construction contract save in two immaterial respects. This was not challenged on appeal. Nevertheless, on appeal, LJ Jackson summarised the key principles as follows:

(i) The rule in *Holme v Brunskill* only applies where parties to the contract guaranteed have varied the terms of that contract without the consent of the surety.
(ii) Advance payments of the agreed contract price made by an employer to a contractor may have the effect of discharging the liability of the surety. However, additional payments (for example by means of a gift or loan) made by the employer to the contractor outside the terms of the original contract do not have that effect.
(iii) A surety will not be released from liability if (a) he has specifically consented to what was done or (b) there is an indulgence clause which covers what was done.

This left the question of HEL's conduct, in particular whether the making the two payments totalling £750,000 to STC, was such as to discharge Aviva's liability under the bond. Mr Justice Edwards-Stuart had held that the test which he had to apply in relation to conduct was as follows:

"if an employer acts in a manner in relation to the principal contract which, whilst not amounting to an alteration of its terms, is prima facie prejudicial to the surety who has guaranteed the contractor's obligations under the principal contract, the surety will be discharged (absent any relevant indulgence clause in the guarantee)."

Applying the test, the Judge concluded that HEL had not acted in relation to the construction contract in a manner which was prejudicial to Aviva. Accordingly, Aviva was not discharged from liability under the bond. LJ Jackson noted that the dilemma for HEL was whether it should stand on its contractual rights and leave the contractor struggling with its financial problems or whether it should make additional payments to the contractor in the hope that this would result in improved progress on site. HEL chose the latter course.

The effect of the side agreement was that HEL loaned £750,000 to STC. If STC subsequently substantiated a loss and expense claim for £750,000 or more, then the money paid by HEL would be retained by STC as payment or part payment of that loss and expense. If STC failed to establish any loss and expense claim, then it would repay the £750,000 to HEL. If STC established a loss and expense claim for a sum less than £750,000, then STC would repay the excess to HEL.

The £750,000 which HEL paid to STC in December 2002 and February 2003 was not part of the original contract sum. It was not a sum certified as due by the architect or otherwise falling due under the provisions of the contract. In the view of the Judge, the two payments made totalling £750,000 could only be seen as sums paid outside the contract and for extraneous reasons. Therefore the two payments made by HEL to STC did not have the effect of discharging Aviva from liability under the bond.

However, Aviva's liability as surety only related to the original construction contract and so it had no liability in respect of STC's failure to repay the sum of £750,000 which it owed to HEL under the side agreement.

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