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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

Goldswain & Anr v Beltec Ltd & Anr

[2015] EWHC 556 (TCC)

In 2011, the Claimants acquired a leasehold interest in a ground floor flat, which had a cellar which they decided to convert into living accommodation by underpinning the outer walls to create more height. They retained professional engineers, Beltec, to design the essential structural works and later AIMS Plumbing & Heating Ltd ("AIMS") to carry out the work. AIMS started the work in September 2012 and installed the underpinning. Following increasing amounts of cracking in the superstructure, and a hasty evacuation of the premises, the property collapsed. The Claimants brought a claim against Beltec as well as AIMS but AIMS played no part in the proceedings and at the time of the hearing were believed to be insolvent. The primary matters at issue included:

(i) Whether Beltec, in the original design documentation, should have spelt out or explained any unusual risks not likely to be obvious to a competent contractor.
(ii) Whether Beltec should have checked whether the contractor to be appointed had secured or had the appropriate internal expertise to carry out the job.
(iii) Whether the contract between the Claimants and Beltec was such that Beltec had a continuing obligation after providing the design for the underpinning and floor slab to visit the site and give appropriate advice.
(iv) Whether Beltec was negligent in failing to warn both AIMS and the Claimants about the shortcomings in AIMS' activities.
(v) Whether AIMS would have done any better than it did do even if the risks had been spelt out more precisely than they were or if an appropriate warning had been given to it by Beltec.

Mr Justice Akenhead summarised the duty to warn in this way:

(a) Where there is a contract, the Court must review the scope of the contractual duties and services to determine the scope of the duty to warn and when such a duty may arise.
(b) *"It will, almost invariably, be incumbent upon the professional to exercise reasonable care and skill. That duty must be looked at in the context of what the professional person is engaged to do. The duty to warn is no more than an aspect of the duty of a professional to act with the skill and care of a reasonably competent person in that profession."*
(c) *"Whether, when and to what extent the duty will arise will depend on all the circumstances."*
(d) Whilst the duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property, it can arise *"when a careful professional ought to have known of such danger, having regard to all the facts and circumstances".*
(e) Where it is alleged that the careful professional ought to have known of danger: *"the Court will be unlikely to find liability merely because at the time that the professional sees what is happening there was only a possibility in future of some danger"*. If there is only a possibility then the duty to warn may well not be engaged.

The Judge had no doubt that Beltec was employed to provide the permanent works design for the excavation of the basement, the underpinning of the perimeter walls and the provision of support to the internal walls and structure as necessary. There was no supervision obligation and no requirement to visit the site once work was due to start. The usual position is that an engineer has responsibility for the permanent works and the contractor for the temporary works, the temporary works being the work necessary to achieve the permanent works design. On the evidence, there was nothing in the permanent works design documentation produced by Beltec which would prevent the contractor from doing its work in a reasonably safe way.

A representative from Beltec did visit the site. This was arranged to enable Beltec to see what AIMS had done in relation to the first pin. The engineer looked at it and formed the view that it should be re-done because it appeared to have been constructed in a way which was obviously non-compliant with the drawings. There was no danger at that stage and no evidence to suggest that on any balance of probabilities Beltec should have realised that AIMS was completely out of its depth or not competent to do the job which it had been employed to do. Indeed the response of Beltec was a reasonable one. Beltec considered that at least a major part of the problem had been that the pin had been cast without reference to any drawing available on site. Beltec then handed over their drawings to AIMS and explained how AIMS should go about casting the subjacent floor slab and the pins. In doing this, Beltec were telling AIMS no more than was on the drawings.

Accordingly, in the view of the Judge, the Claimants had not established that there had been any professional negligence with regard to any warning which it is said that Beltec should have given either to AIMS or to the Claimants. A "*sizeable number of engineers in the position of Beltec"* would have done no more and no less than they did, which was to advise the client (AIMS at that stage) to follow the requirements set out on the drawings which they made sure AIMS had, and to orally explain to AIMS what those requirements were. On the other hand, the evidence established the overwhelming probability that AIMS failed to carry out their work with reasonable care and skill. No, or no effective, propping was provided and the specified sequence was, for no good reason, simply not followed; a finding which, unfortunately, was of little help to the Claimants, given the financial status of AIMS.

Adjudication: appointing adjudicators

CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd

[2015] EWHC 667 (TCC)

In this adjudication enforcement case, a number of defences were unsuccessfully raised. One of these was that the appointment was invalid. Mr Justice Coulson noted that the Eurocom decision had *"shaken public confidence in the adjudication process"*. Here, the adjudicator was appointed by CEDR. The application to CEDR for the appointment, made by the claimant's representatives, included the sentence: *"It is preferred that any of the adjudicators in the attached list are not appointed."* The evidence before the court was that that sentence was included in error, and the Judge suggested that it may be that it came from a template that those representatives habitually used. However, the important thing was that there was no attached list. Therefore, not only was that sentence included in error, but also no list of "*preferred adjudicators not to be appointed*" was ever completed or attached. In those circumstances, therefore, the situation is entirely different to that in *Eurocom*. There was no false statement because there was no list and, since there was no statement, it could not have had any effect.

Adjudication: apparent bias and adjudicators

Paice & Anr v MJ Harding (t/a MJ Harding Contractors)

[2015] EWHC 661 (TCC)

In *Makers UK v Camden*, Mr Justice Akenhead said:

"(1) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent.
(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.
(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions."

Here, there had already been three adjudications. This case was an attempt to enforce the decision in adjudication four. The adjudicator in adjudication four had previously been appointed in two of the first three adjudications. Some two months before the fourth adjudication, an hour-long telephone call had taken place between the claimants and the adjudicator's office manager. The evidence showed that whilst there was some discussion about procedural matters, the call went further, with the claimants noting how dissatisfied they were with their previous advisors, discussing issues related to the first two adjudications as well as the final account which was to be the subject of adjudication four. No file note was made. The adjudicator knew about this conversation but did not disclose details of it either at the time of his appointment or later on when specifically asked about it during adjudication four.

The first question for the Judge was whether the adjudicator should have written to the parties, disclosing the conversations, and asking if they had any objections to his continuing to act. Mr Justice Coulson thought that it was *"self-evident"* that those conversations should have been disclosed.

They were material conversations, which included discussion about the final account with one party, and fairness required that the existence of those conversations should have been disclosed once the adjudicator learnt of his appointment. It did not matter that the call was with the practice manager. Nor did it matter that there was a two-month gap between the call and adjudication. What mattered was not the timing, but what the conversation was about. Finally, the adjudicator had had a second opportunity to reconsider and disclose the conversation but did not do so. This led the Judge to conclude that a fair-minded observer would consider that there was a real possibility that the adjudicator was biased. Accordingly, the claimants' claim for summary judgment failed.

Adjudication: "risk of manifest injustice"

Galliford Try Building Ltd v Estura Ltd

[2015] EWHC 412(TCC)

Here, there was no defence to the application for summary judgment in the sum of £3.9 million; no payment or pay less notices had been served (see *ISG v Seevic* (Issue 174)). Indeed an adjudicator resigned when a counter-adjudication was commenced about the true value of the application in question. However, Mr Justice Edwards-Stuart did order a stay of part of the sum in question on the grounds that the court had jurisdiction to do so where there was a *"risk of manifest injustice"*.

The Judge stressed that the facts were "*unusual*" and "*exceptional*". However, he thought that there were two alternatives. First, to take a robust approach and refuse to grant a stay, as to do otherwise would be contrary to the usual policy of the court. This would leave the contractor with the choice either of insisting on payment of the award in full with the risk of forcing the employer into insolvency, or negotiating a compromise. The second was to order a stay in part, which the Judge did, even though it was a situation of the employer's own making. This reduced the sum that had to be paid immediately to £1.5 million. Why was this case *"unusual"*? Well, the interim application was described as an *"indicative final account and valuation summary"*. Given the 100% recovery, and the fact that the application was only £4K less than the anticipated final account, there was no incentive on the contractor to submit a final account. Without a final account, there could be no dispute for the employer to refer to adjudication or to the courts.

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