Construction Law Update

Nerys Jefford
Keating Chambers

Pride Park, Derby, 7th October 2005

A Liability Update

A.1 Duties of care: designers

Mirant Asia-Pacific Construction (Hong Kong) v Ove Arup and Partners International (No. 2) [2005] 97 Con LR 1 TCC

This dispute arises out of the design and construction of a power plant in the Philippines. It has already reached the Court of Appeal on the issues of formation of contracts and letters of intent [**92 Con LR 1**].

There were two claimants (CEPAS and SCC, both in the Hopewell group of companies) who were involved in the construction of the plant and two Arup defendant companies (who had undertaken design and supervision). There were two contracts for (a) design and (b) the supervision of site investigations to which only one of the Hopewell companies (CEPAS) was party.

- Arup owed a duty of care to CEPAS not to cause economic loss (the Court applying a test of "assumption of responsibility" and not following the suggestion in *Payne v Setchell* **[2002] BLR 489** that the designer is in the same position as a contractor)
- Arup did not owe a duty of care to SCC (the Court applying a test of proximity and whether it is fair that any duty should extend to one not to cause economic loss)
- The standard of care was that of reasonable care and skill
- What that involved under the 2 contracts involved analysing what Arup has agreed to do. Arup's obligations extended to determining the proper design assumptions and being satisfied that the design could be achieved on the basis of the investigations carried out. If they could not be satisfied, then it was obliged to say so.

A.2 Duties of care: sub-consultant

Architype Projects Ltd v Dewhurst Macfarlane & Partners [2004] 96 Con LR 3 TCC

Held not to be arguable that it was fair and reasonable to impose on a sub-consultant (engineer engaged by an architect) a duty of care in tort owed to the employer. The contracts were structured so that there was no assumption of responsibility. *Junior Books v Veitchi* should only be followed if a case was identical "to its own particular unique facts."

See paragraph 47 for the 8 “unique” facts.

A.3 Liability in Construction Management

Great Eastern Hotel Co Ltd v John Laing Co Ltd [2005] 99 Con LR 45 TCC

This is thought to be the first reported case on breach of obligation under a Construction Management Agreement. The Employer alleged that Laing had so misconducted itself that it had caused 44 weeks delay to the project so that the Employer lost revenue and was required to pay large additional sums to its professional team and trade contractors.

- The Construction Manager was expressly required to exercise reasonable care and skill. As a matter of construction, that was the standard to be applied despite provisions in the CMA which required it to “procure” the compliance and “ensure the full compliance” of the Trade Contractors with their obligations.
- If the Construction Manager’s breach materially contributed to the Employer’s loss then the Employer could recover the whole loss even if there was an other effective contributory cause. If the Employer eliminated from claims elements for which the Construction Manager was not responsible, it could recover sums paid to trade contractors against global claims.

Criticism of an expert witness for expressing opinions without knowledge of the facts, for failing to revise his opinions in the light of the objective facts, for uncritically accepting his client’s case and for failing adequately to research the documentation/evidence available.

A.4 Limitation and design liability

Abbott v Will Gannon & Smith Ltd [2005] BLR 195 CA

This is a significant decision on limitation in negligence. Design work to a hotel by the defendant structural engineers was completed in March 1997. Cracking had occurred by late 1999 and a claim was issued in contract and tort in September 2003. The contract claim was agreed to be statute barred, but the (County Court) first instance judge held that “if cracks first appeared within six years of the issue of proceedings [the claim] is not statute barred”. The defendants’ appeal was based on the contention that *Pirelli v Oscar Faber* and *Ketteman v Hansel Properties* ought not to be followed as they were inconsistent with *Murphy v. Brentwood* (all House of Lords decisions).

- The Court of Appeal, dismissing the appeal, held that both *Pirelli* and *Ketteman* remain good law and binding in such cases as this, until the

House of Lords overrules them. The cause of action accrued not when the defectively designed work was completed but when the defect manifested itself in some way which would affect the value of the building.

B Construction and Engineering Contract Update

B.1 Duty of impartiality of project managers

Costain Ltd v Bechtel Ltd [2005] CILL 2239 TCC

Following a meeting with the project managers on the Channel Tunnel Rail Link project, contract administrators increased disallowance of items in contractors' claims. The contractors alleged the project manager had acted in the interest of the employer and not impartially, causing the client to breach the contract and sought interim injunctions. The project managers argued that under the (amended) NEC contract there was no duty of impartiality on the project managers. The court reached no final decision but found it difficult to see how this could be the case. The injunctions were refused, since on the balance of convenience, damages would be an adequate remedy.

B.2 Reliance on liability cap

Decoma UK Ltd v Haden Drysys International Ltd [2005] All ER (D) 401 TCC

The issue was whether the party in breach of contract in failing to complete on time and to specification could rely on a contract clause capping its liability. The claimant sought to argue that the defendant contractor would be taking advantage of its own wrong if it was allowed to do so. The court rejected this argument: it had been clearly agreed that the defendant's liability would be limited to 5% of contract price and the nature and extent of the breaches of contract were irrelevant.

B.3 Certificate as condition precedent to payment

Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ. 814 CA

Under the ICE 6th edition, the contractor's right to payment accrued not when the work was done but when an interim certificate was issued or ought to have been issued. The right to payment under the final certificate gave rise to a further cause of action.

B.4 Liquidated damages

Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] BLR 271 TCC

This case contains a useful review of the modern law on the distinction between liquidated damages and penalties. On the facts, the liquidated damages provision in the JCT WCD 1998 for £45,000 per week was a genuine pre-estimate of loss and the actual loss suffered by the developer, Tilebox, was higher. The contractor therefore failed to obtain a declaration that the provision was a penalty.

- the pre-estimate of loss does not have to be right to be reasonable
- whether a pre-estimate of loss is genuine is a matter to be judged objectively

B.5 Liquidated damages

Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2004] All ER (D) 204 TCC

On the facts of the case, the liquidated damages provisions of a modified JCT contract were void for uncertainty. The date upon which any particular section of the works was to be completed was neither defined nor ascertainable, nor could any sectional work be valued.

C Dispute Resolution

C.1 TCC Guide 2nd edition

Following lengthy consultation, the new Guide was formally launched on 3 October 2005, giving clear and detailed guidance on practice in the TCC.

C.2 Challenge to arbitrator's award

Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43 House of Lords

The House of Lords delivered a major statement on challenges to arbitration awards in reversing the decision of the Court of Appeal. Lord Steyn, giving the principal speech, referred to the far-reaching changes made by the Arbitration Act 1996 to the prospects of challenge. In this case, being an ICC arbitration, challenge on a point of law was excluded. The majority (Lord Phillips dissenting) held that there was no excess of jurisdiction by the arbitrators:

"the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under Section 68(2)(b)".

C.3 Scope of arbitration clause

X Ltd. V. Y Ltd. [20005] BLR 341 TCC

An arbitration was commenced under a contract between X and Y. X made a claim for contribution under the Civil Liability (Contribution) Act 1978, alleging that Y was liable to A (under a contract with A) in respect of the same damage as X was liable. As a matter of construction and on the facts, this dispute was not within the arbitration clause – it was not "any matter of thing arising out of or relating to the contract".

C.4 New Expert Witness Protocol

Protocol for the Instruction of Experts to give evidence in civil claims

The new Protocol for the Instruction of Experts to give Evidence in Civil Claims can be obtained from the Civil Justice Council web-site at http://www.civiljusticecouncil.gov.uk. It offers guidance to expert witnesses and those who instruct them on interpretation of and compliance with Part 35 of the CPR.

The launch of the Protocol coincides with the Code of Practice for Experts agreed jointly by the Academy of Experts and the Expert Witness Institute.

C.5 Evaluation of expert evidence

EPI Environmental Technologies Inc. v Symphony Plastic Technologies plc [2005] Times Law Reports Jan 14 Ch. Div.

The evidence of witnesses (expert and non-expert) should be evaluated in its entirety. Even lies in evidence would not automatically deprive the evidence of the witness of all its value.

It is also essential that witnesses are challenged with the other side's case. Failure to put a point forward should usually disentitle the point from being taken in a closing address.

A judge is rarely helped by competing experts' reports which express opinions not tested or not maintainable by reference to supporting material. Particularly where evidence is not heard in chief, it is not useful simply to leave the judge to make his own analysis of experts' reports without them being put to the test of cross-examination.

C.6 Burden of proof in expert evidence

Stephens v Cannon [2005] EWCA Civ. 222 CA

Following the appointment of a single joint expert (SJE) on valuation, one of the parties got permission to instruct their own expert witness. The SJE valued at £1.9m and the party-appointed expert at £1.5m, a building which existed only in the form of plans. The master hearing the case stated that he found it impossible to prefer one to the other, since he would be setting himself up as an expert and usurping their role. He therefore fell back on the burden of proof; since neither expert's evidence was preferred, the claimants had failed to discharge the burden of proof and the defendants' view must succeed.

The CA criticised this approach and allowed the appeal. They took the view that the master should have worked his way through the differences between the experts and "found his way to a conclusion, one way or another, without resort to the burden of proof". They also noted that he seemed to believe that he had to adopt one figure or the other, whereas he was not precluded from adopting an intermediate figure.

C.7 Meaning of 'dispute'

AMEC Civil Engineering Ltd v Secretary of State for Transport [2005] BLR 227 CA

This is the Court of Appeal's dismissal of the contractor's appeal in the 'Thelwall Viaduct' case. The contractor had argued that there was no dispute or difference capable of reference to arbitration.

- ICE (5th Edition) Clause 66 should not be construed legalistically so as to preclude timely commencement of arbitration proceedings.
- The Judge's analysis was correct, given the claimant's resistance to the defective work allegations.
- The Court of Appeal was content to accept Jackson J's 'seven propositions' on the dispute/no dispute issue.

C.8 Meaning of 'dispute'

Collins (Contractors) Ltd v Baltic Quay Management [2005] 99 Con LR 1 CA

Decision on the issue of existence and meaning of 'dispute' in arbitration, although there are obvious linkages to adjudication. Under a JCT Minor Works Contract, an issue arose concerning payment. The contractor issued TCC proceedings, but the employer obtained a stay under s.9 Arbitration Act 1996. The Court of Appeal dismissed the contractor's appeal: it would be no answer to an application for a stay to say that the defendant had no arguable defence. Nor is there anything in s.111 HGCR Act to entitle the court to refuse a stay it should otherwise grant. The court approved the criteria for deciding on the existence/meaning of 'dispute' issue from Jackson J.'s decision in AMEC Civil Engineering v Secretary of State for Transport.