Sloan Plumb Wood

SOLICITORS

Legal Update

Contents

SPW114

Introduction

Welcome to the Autumn edition of the Sloan Plumb Wood LLP legal update.

In this issue we cover:

1. Case Law Updates
2. Local Democracy, Economic Development and Construction Act 2009

If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

Martin Wood
martin.wood@spw-law.co.uk
Philip Sloan
philip.sloan@spw-law.co.uk
Philip Vickers
philip.vickers@spw-law.co.uk.

Sloan Plumb Wood LLP
Apollo House
Isis Way
Minerva Business Park
Lynch Wood
Peterborough
PE2 6QR

Telephone:
01733 302410

Email:
enquiries@spw-law.co.uk

www.spw-law.co.uk

Case Law Updates

Damages, Indemnity and Apportionment

Carillion J M Limited –v- PHI Group Limited –v- Robert West Consulting
[2011 EWHC 1379 (June 2011)]

Mr Justice Akenhead recently decided a complex dispute relating to the Chiltern Trains depot situated near Wembley Football Stadium. The depot was designed and built between 2004 and 2006 by Carillion. Substantial excavations had to be made into the clay to provide space for the depot which left a number of slopes. Carillion employed PHI as the specialist design and build contractor for soiling nailing work to restrain the slopes and Robert West as the lead consulting engineer.

During the course of the works there were problems with the stability of the slopes and remedial works were carried out. However after completion of the works substantial problems arose in respect of the stability of the slopes and proceedings were issued by Carillion against PHI and Robert West for a sum in the region of £7 million. PHI settled the Carillion claim for £3.8 million but Robert West defended the claim at trial and also sought a contribution from PHI.

This interesting albeit lengthy judgment covers a wide range of issues but of particular interest is the analysis of indemnity damages and apportionment. Robert West argued that its breaches of duty did not cause the loss as it had limited involvement and Carillion relied on others such as PHI and should have instructed a wholly independent specialist engineer.

Mr Justice Akenhead said that to establish causation the court has to find what the effective or dominant cause of the loss or damage is and that ultimately the court applies common sense. He rejected Robert West's argument that there had been some break in the chain of causation because of the involvement of others and said that Robert West should not escape liability simply because others might have also failed to pick up on the problem.

In respect of indemnity Robert West's appointment contained a contractual indemnity as commonly found in professional appointments. Mr Justice Akenhead considered making a declaration to the effect that Carillion was entitled to be indemnified by Robert West against liability to M40 trains to avoid the need of a future trial regarding quantification of damages for the remedial works which had not yet been carried out. However on balance he decided not to do so having regard to the overriding objective of the CPR as he thought that deferring assessment of costs and losses would involve substantial costs and uncertainty.

When he turned to consider quantum whilst there was general agreement on the remedial works required there was a dispute about the impact on the claim of expensive restrictions imposed by Chiltern Trains on when and how the remedial works could be carried out within the area of an operational train depot. Mr Justice Akenhead reviewed the authorities starting with the well known decision in Hadley –v- Baxendale and noted that the question of reasonableness arises in a number of different ways. He said that it was generally incumbent upon the claimant to demonstrate that not only was the loss within one of the Hadley and Baxendale limbs but it was reasonable to recover damages of the type and extent claimed. The broad propositions he took from the authorities were as follows:

Case Law Updates Continued

Damages, Indemnity and Apportionment

Carillion J M Limited –v- PHI Group Limited –v- Robert West Consulting
[2011 EWHC 1379 (June 2011)]

(a) Damages are awarded to compensate an innocent claimant so as to put it in the same position as it would have been in if he had not sustained the wrong.

(b) Damages for breach of contract must fall within one or other of the two limbs of Hadley v Baxendale.

(c) The innocent claimant must establish that it is reasonable to recover damages of the type and extent claimed.

(d) The burden of proving a failure to mitigate is on the unsuccessful defendant. If the innocent claimant has not acted unreasonably in all the circumstances, particularly examined at the time, there will be no failure to mitigate.

(e) In considering reasonableness or unreasonableness both in the context of a failure to mitigate as well as the reasonableness of the type and extent of damages claim, the Court will not be unsympathetic to the predicament in which the innocent claimant finds itself as a result of the unsuccessful defendant's breaches of contract.

Applying those principles Carillion was generally successful in respect of much of their claim and were awarded in excess of £6.7million.

Mr Justice Akenhead went on to consider apportionment between Robert West Consulting and PHI and having reviewed the authorities decided that PHI carried relatively greater responsibility. Although PHI had already settled with Carillion that still left open the possibility of RWC seeking a contribution from PHI as it did. The prior settlement with Carillion was not determinative of the ultimate apportionment by the court. In the event PHI lost the gamble that its settlement figure would represent what its contribution would be and had to pay further damages to RWC representing the difference between the amount already paid to Carillion and the amount the court decided should be PHI's contribution to the £6.7 million odd judgment in favour of Carillion.

Limitation of Time by Contract

Inframatrix Investments Limited v Dean Construction Limited [2011] EWHC 1947 (TCC)

In this case DCL, specialist roofing contractors, contracted with IIL to carry out works at a project to construct a camera factory in Consett, County Durham. The works were finished in December 2008.

The contract agreed by the parties included a clause as follows:

"17.4 No action or proceedings under or in respect of this Agreement shall be brought against the Contractor after:

(a) The expiry of 1 year from the date of Practical Completion of the Services or;

(b) Where such date does not occur, the expiry of 1 year from the date the Contractor last performed Services in relation to the Project."

IIL complained of snagging works and a certificate of Practical Completion was not issued. IIL later claimed that the works performed by DCL were defective and procured an expert's report in about July 2009 estimating that remedial works would cost between £105,000 and £107,500. DCL denied that its works were defective. The parties engaged in the Pre-Action Protocol for Construction and Engineering Disputes, exchanging correspondence through the remainder of 2009 and into 2010 and finally meeting on a "without prejudice" basis in March 2010.

DCL offered to return to site to carry out some minor remedial works, however, this offer was rejected. IIL issued court proceedings on 29 December 2010. On 1 February 2011 DCL raised the issue that the claim was barred by the provisions of clause 17.4(b).

Case Law Updates Continued

Limitation of Time by Contract Continued

IIL argued that the clause should be interpreted in such a way as to render it ineffective as Practical Completion was not unachievable and 17(b) only operated where Practical Completion "does not occur". The Court held that such an interpretation flouts business common sense.

IIL also argued that DCL performed "Services" in relation to the Project on 31 March 2010 when it attended the meeting on site on that date. DCL had inspected the defects complained of and this could be interpreted as performance of a "Service" in respect of the "Project". The court held that the inspection on 31 March 2010 had to be considered in the context of a meeting as part of "without prejudice" negotiations and not as part of the "Services". Had DCL performed the further remedial works that it had offered to carry out, this might have been the performance of "Services", however, the court held that the meeting and inspection on 31 March 2010 were part of without prejudice negotiations conducted in accordance with the Pre-Action Protocol and as part of an attempt to avoid litigation. The claim was accordingly struck out as it was time barred.

It is often the case that defective work takes time to become apparent. Also, dealing with the requirements of Pre-Action Protocols can be time consuming. This 12 month period is perhaps a little unusual but where a contract includes a limitation provision it is important to minimise the risk that the period will be exceeded and the claim lost.

Terms & Conditions, Causation, Contributory Negligence

Trebor Bassett Holdings Ltd & Anor v ADT Fire and Security Plc [2011] EWHC 1936 (TCC)

This claim arises out of a catastrophic fire started by burning popcorn which destroyed the claimants' large confectionery factory in Pontefract on the evening of 8 June 2005. That fire caused damage allegedly in excess of £100 million.

The Defendant had been commissioned to install a fire prevention system in the Claimant's factory.

The court was required to consider a wide range of issues including incorporation of standard terms and conditions of business; liability; causation and contributory negligence. The Judgment was over 100 pages.

Incorporation of Standard Terms and Conditions of Business

The Defendant's quotation was based on their terms and conditions which included a limitation clause limiting the Defendant's liability to 20 times the amount of the yearly service charge (although the court noted that there was no service charge in this instance, the contract was supply only). In accordance with the "last shot" doctrine the court concluded that the Defendant's quotation was an offer. The Claimant's purchase order was based on its standard terms and conditions and whilst it referred to the Defendant's quotation, the court considered, in part applying the "last shot" principle (see SPW legal Update Autumn 2010), that the Claimant's terms and conditions were those that applied.

The Defendant argued that the purchase order was not a separate counter-offer, but an acceptance of the defendant's quotation and hence its terms and conditions. Mr Justice Coulson held that this was a straightforward purchase order from the buyer which, in the time-honoured way, was a successful attempt by the buyer to replace the seller's terms and conditions with his own.

Liability

Determining the likely cause of a fire can be very difficult for the court. It is not unusual for each party to produce expert witnesses that will have very different views as to the likely cause(s) of the fire.

In this case, on the evening of the fire, an operative filling large plastic containers with popcorn at the hopper suddenly became aware that the sleeve that he was filling was melting because of burning popcorn. He raised the alarm. The shift manager climbed a ladder, looked down into the hopper and saw that the popcorn was on fire. Flames were coming to the top of the hopper. He shouted for the fire hose and the conveyor was switched off. He doused the hopper with water and, within a few seconds, he put out the fire.

Meanwhile, following a procedure which the operatives had used before (and which had been approved by managers), some of the burning popcorn was released from the bottom of the hopper on the floor. It is estimated that a total of about three sleeves of burning popcorn were deposited on the floor before the hatch jammed, which may have been as much as 180 litres of popcorn. The operatives then endeavoured to stamp out the burning popcorn. When the fire alarm sounded, the operatives thought that the fire had been put out, and they left the factory.

When the Fire Brigade arrived, they were told that the fire had been put out. The Fire Brigade did not immediately begin the fire-fighting operation, but instead sought a key to a door that led into the back of the 'oil pop' area. This involved a security guard being called and, potentially valuable time was lost. When it became apparent that the fire had taken a firm hold, the Fire Brigade would adopt only a defensive attitude towards it. In consequence, the whole building, and the machinery within, was destroyed.

The parties' expert witnesses were criticised by Mr Justice Coulson for their "slapdash", "unhelpful", "unreliable" and "partisan" approach to the case. Unusually, Mr Justice Coulson commented that he was dubious about the reliability of all of the expert evidence that was presented.

The experts produced 3 theories as to the possible causes of the fire which can be outlined briefly as follows:

1. The Claimant's expert concluded that the flames in the hopper set fire to a plastic bucket on the conveyor above that dripped molten plastic eventually leading to a pool fire;

2. The Defendant's expert proposed two possible theories. Either:

    2.1 The cause of the fire was as a result of the discharge from the hopper onto the floor of a large quantity of burning popcorn, which was then displaced by the operatives stamping on the popcorn in an effort to extinguish the burning popcorn; or

    2.2 The cause of the fire was burning popcorn being mistakenly placed into a box before the fire in the hopper was seen and subsequently catching fire when the operatives left the factory.

Having considered each of the various theories put forward by the expert witnesses in detail, Mr Justice Coulson concluded that the most likely cause of the fire was 2.1 above. This probably led to burning popcorn coming into contract with cardboard boxes with the result that the fire spread. This explanation for the fire seemed to accord most closely with the known events.

It had appeared that for the Claimant to succeed, its expert's theory as to the cause of the fire would need to be accepted by the court, however, during the trial the Claimant developed an argument to the effect that, as there was smouldering, burning popcorn at the bottom of the hopper, and flaming popcorn all across the top of the hopper, which flames were large enough to extend to the top of that hopper and which indicated that the hopper had been aflame for somewhere between 8 and 15 minutes before detection by the Claimant's operative, the Defendant's fire prevention system had failed in its design.

Mr Justice Coulson comments:

"If a fire was flaming at the top of the hopper and smouldering at the bottom of the hopper, a developed fire had taken hold in the hopper as a whole, and a properly-designed CO2 suppression system should have been automatically triggered."

The court concluded that the defendant failed to design the fire prevention system with reasonable skill and care and therefore in breach of contract.

Causation

The general rule in litigation is that a Claimant must show that the Defendant's breach caused its loss. That "chain of causation" can however be broken so that an intervening act by the Claimant (or another party) can alleviate the Defendant of liability notwithstanding that its act had a causal effect.

In this case, the court was asked to consider whether the Claimant's failings in not commissioning additional fire prevention systems such as sprinklers or area segregation and in failing to properly train its staff in fire prevention had broken the chain of causation.

In order to consider the issue of causation, the court is required to consider whether the Claimant's act(s) *"constitute an event of such impact that it obliterates the wrongdoing".* Mr Justice Coulson commented:

"Of all the defendant's causation arguments, it was the arguments in respect of the absence of fire segregation and the absence of sprinklers which gave me the greatest pause for thought when considering the issue of causation."

Terms & Conditions, Causation, Contributory Negligence Continued

He concluded however that the Defendant could not demonstrate that these failings by the Claimant broke the chain of causation.

Contributory Negligence

Section 1 of the Law Reform (Contributory Negligence) Act 1945 provides:

"Where any person suffers damage as the result partly of his own fault and partly the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The principle in the Act is limited in cases involving breach of contract but will extend to cases which involve a failure to take reasonable care.

In this case the court considered the failings by the Claimant in not commissioning additional fire prevention systems (sprinklers or segregation) and in failing to properly train its staff in fire prevention and concluded that the Claimant's had systematically failed to ensure that a fire of this type would be prevented and accordingly, the court concluded that it was appropriate to reduce the Claimant's award by 75%.

Therefore whilst succeeding on liability the Claimant will only recover 25% of the damages which will be assessed at a further hearing.

Local Democracy, Economic Development and Construction Act 2009

The Housing Grants Construction and Regeneration Act 1996 ("HGCRA") will be amended by the Local Democracy, Economic Development and Construction Act 2009 which comes into force on 1 October 2011.

In preparation for the LDEDC Act coming into force Sloan Plumb Wood LLP will be giving in-house seminars on the Act. If you would be interested in holding such a seminar please contact Philip Vickers (philip.vickers@spw-law.co.uk).

If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

Martin Wood
martin.wood@spw-law.co.uk
Philip Sloan
philip.sloan@spw-law.co.uk
Philip Vickers
philip.vickers@spw-law.co.uk.

Sloan Plumb Wood
SOLICITORS

Sloan Plumb Wood LLP
Apollo House
Isis Way
Minerva Business Park
Lynch Wood
Peterborough
PE2 6QR

Telephone:
01733 302410

Email:
enquiries@spw-law.co.uk