Client Alert | Construction

Contractor not liable following tunnel collapse

January 2017

Authors: Julian Bailey, Michael Turrini, Luke Robottom, Nadia Paliwalla

A recent Scottish case absolved a contractor from liability for the collapse of a tunnel as part of a hydroelectric scheme. This was because the contractor exercised reasonable skill and care, and did not guarantee the fitness for purpose of its works including the tunnel.

SSE Generation Ltd v Hochtief Solutions AG [2016] CSOH 177

The Glendoe Hydro Scheme, located above Loch Ness in the Highlands of Scotland, is the biggest scheme for the generation of hydro-electric power to be built in Scotland for many years.

In 2009, only eight months after take over, a collapse occurred in the main tunnel. This put the scheme out of commission resulting in a significant loss of revenue whilst the parties were in dispute over responsibility for the remedial works.

The collapse was caused because the contractor had assumed the existence of a certain type and quantity of rock in the tunnel, and so did not install adequate support to prevent it from collapsing. A main point in the dispute was whether the contractor's obligation was:

- One under which it warranted the fitness for purpose of the works as completed. If so, the contractor would be liable for the tunnel collapse. The employer argued that the contract (an NEC2 form) imposed a fitness for purpose obligation because "defect" was defined as "a part of the works which is not in accordance with the Works Information", and the contractor was liable for "defects" in its works. The tunnel collapse meant that a part of the works was not in accordance with the Works Information.

- One under which the contractor promised only to use reasonable skill and care in performing its works. In this scenario, the contractor would not be liable for the failure of the scheme without more. The employer would need to prove that the contractor failed to use reasonable skill and care in performing the works. The contractor argued that it was only obliged to use reasonable skill and care, on the basis that the Contract provided that "The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that it complied with the Works Information".

The judge (Lord Woolman) decided that:

- The contractor did not guarantee that the works would be fit for purpose, but had assumed a lesser obligation of reasonable skill and care.

- Based on the information available to it at the time, the contractor satisfied its obligation of reasonable skill and care. The contractor's assumptions regarding the condition of the ground were reasonable in the circumstances, even though the ground conditions turned out to be worse than anticipated.

Comment

This case highlights two important matters under common law contracts.

First, it brings into sharp focus the critical distinction between "strict" fitness for purpose obligations and the less onerous obligation of using reasonable skill and care. On the facts of this case, if a fitness for purpose obligation was agreed, it would render the contractor liable for the effects of ground conditions that it could not reasonably have anticipated. Some procurement models may require a contractor to take the risk of such matters, but often contractors are reluctant to accept the risk, especially in projects that involve tunnelling where there are many "unknowns". Fitness for purpose obligations are often prohibitively expensive to insure for contractors too.

Secondly, if a contractor is subject to an obligation to use reasonable skill and care in performing its works, it will be judged according to the information available at the time it performed the works. In this case, the employer sought to rely on evidence of the ground conditions obtained *after* the tunnel collapse to try to demonstrate what the contractor ought to have anticipated. But judging what the contractor ought to have anticipated is not undertaken with the benefit of 20/20 hindsight. It is determined according to contemporary knowledge, technology and practices.

A contrast with other legal systems

SSE v Hochtief provides an illustration of the workings of the common law in relation to construction contracts, and demonstrates how the parties' agreement on risk allocation is paramount. By contrast, in many other jurisdictions contractors, engineers and architects are sometimes subject to strict obligations imposed by statute or general law that cannot be avoided.

For example, UAE Civil Code Article 880 imposes a mandatory obligation that a contractor and supervising architect (and/or engineer) are jointly liable to compensate an employer for a period of ten years where a building suffers a total or partial collapse, or there is a defect which threatens the safety and stability of the building. This obligation to compensate the employer will arise even if the defect or collapse arises out of a defect in the land. Therefore, where the collapse is a result of unanticipated ground conditions, there is no consideration of reasonable skill and care, nor does it matter whether the contractor could have expected the adverse conditions. Thus, if the UAE Civil Code applied to the facts in SSE v Hochtief, the contractor would have been held liable to the employer simply because there had been a tunnel collapse. This highlights, yet again, the necessity of considering construction and engineering contracts in their particular legal context.

White & Case LLP
Level 6, Burj Daman, Al Sa'ada Street, DIFC
PO Box 9705, Dubai
United Arab Emirates

T +971 4 381 6200

White & Case LLP
16th Floor, Al Sila Tower, Abu Dhabi Global Market Square
P.O. Box # 128616, Abu Dhabi
United Arab Emirates

T +971 2 611 3400

White & Case LLP
Alfardan Office Tower, 7th Floor, P.O. Box 22027
West Bay, Doha
Qatar

T +974 440 64300

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000