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Strike-it unlucky: negligence liability for damage affecting services

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It is all-too-common for a contractor or a subcontractor, whilst excavating, to strike an underground service such as a power cable or a water pipe. The consequences of this happening can be serious, and may affect a number of parties. For example:

- The owner of the damaged cable or pipe will suffer a loss. Repair work will need to be performed, plus there may be a loss of revenue due to end-user customers not being supplied with electricity, water etc.
- The end-user itself may suffer a loss. For example, local businesses who rely on a power source may be blacked out for a significant period of time, losing revenue and potentially suffering damage to equipment and/or perishable stock.

Similar scenarios exist where property in the vicinity of services is damaged, resulting in the services being out-of-action for some period of time.

In each case: is the contractor or subcontractor liable for the damage or loss that it has caused, and if so to whom? Is liability strict, or will a contractor or subcontractor only be liable if it struck the underground service, or otherwise damaged property, through want of care? Surprisingly, the answers to these questions vary from jurisdiction-to-jurisdiction. Two recent cases, from Australia and Singapore, illustrate some of the approaches taken to these issues.

D&V Services Pty Ltd v SA Power Networks [2018] SASCFC 92

Liability to the owner of the damaged underground asset was established in the South Australian case of *D&V Services Pty Ltd v SA Power Networks* [2018] SASCFC 92. Here, an employee of D&V Services Pty Ltd ('D&V'), a subcontractor, disturbed an 11kV cable ('the Cable') owned by SA Power Networks ('SA Power') whilst excavating a trench.

D&V obtained a copy of a 'Dial Before You Dig' plan ('DBYD plan') to locate SA Power's underground services, including the Cable. D&V did not contact Dial Before Your Dig in order to obtain a precise location for the Cable, but instead obtained the DBYD plan from another contractor onsite who had not provided it with the accompanying disclaimer and header sheet. The disclaimer stated that the DBYD plan was 'indicative only' and recommended that if a contractor intended to dig within 5 metres of the indicated location of a high voltage cable they should locate the cable accurately first.

D&V did not dispute that it owed SA Power a duty to exercise reasonable care not to cause damage to the Cable. However, D&V argued that it had not breached this duty. Thus, the key question before the Supreme Court of South Australia was whether D&V had taken reasonable care to reduce the risk of damaging the Cable.

The Court applied the objective test of whether D&V had taken reasonable precautions to reduce the not insignificant risk that digging in the relevant area might result in damage to the Cable. The Court found that D&V had failed to take such reasonable precautions which included contacting the DBYD service to precisely locate the Cable. Such precautions did not place a heavy burden on D&V, particularly in proportion to the seriousness of the harm which might have resulted from damage to the Cable.

The decision in *D&V Services* may be unsurprising in that it demonstrates that where a contractor negligently damages the property of the owner of the service, then it will be liable for the losses arising from such damage. Notably, although the test applied by the Supreme Court of South Australia in *D&V Services* was based on the South Australian Civil Liability Act 1936, English law adopts a similar objective test as to whether the defendant failed to exercise reasonable care in determining whether a duty of care has been breached.

NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd [2018] SCGA 41

The second case, from Singapore, considered the liability of a contractor to the end-user of an affected service.

NTUC Foodfare Co-operative Ltd ('NTUC') operated a kiosk on the second level of Changi Airport, Singapore. An employee of SIA Engineering Co Ltd ('SIAEC'), Mr Yap, drove an airtug into a pillar at Changi Airport damaging the floor on the second level but not the kiosk itself. As a result of the collision, the affected area of the airport was closed and the electricity supply to the kiosk was stopped, damaging some of NTUC's equipment. NTUC claimed damages from SIAEC for, among other things, its (i) losses due to the need to repair its damaged equipment; and (ii) loss of profits arising from the closure of the kiosk (together, 'NTUC's Losses').

The issues which the Court of Appeal of Singapore determined included whether Mr Yap, and, therefore, his employer, SIAEC, owed NTUC a duty of care, even though NTUC was not the owner/operator of the damaged asset (the Airport), but the end-user thereof. There was no contract between SIAEC and NTUC, so any liability of SIAEC would need to be founded in the tort of negligence.

In deciding this question, the Court found that it was reasonably foreseeable that Mr Yap's negligent driving could cause NTUC to suffer loss. Further, the Court held that legal proximity was established: NTUC was so directly affected by Mr Yap's actions that he ought to have had NTUC in his contemplation when driving the airtug. As such, it was found that Mr Yap, and therefore SIAEC, owed NTUC a duty of care which had been breached and NTUC was awarded NTUC's Losses.

Interestingly, however, it is unlikely that, even presented with the same facts, an English court would have reached the same conclusion as the Singaporean court in *NTUC Foodfare*. Unlike Singaporean law which applies, irrespective of the type of loss being claimed, a single test of factual foreseeability and legal proximity to the question of whether a duty of care exists, English law distinguishes between: (a) physical harm or injury to person; (b) physical damage to other property; and (c) pure economic loss in this regard. NTUC's Losses would likely be categorised by English law as pure economic loss, i.e. loss which is purely financial in nature and not consequential to physical damage to its property caused by SIAEC. English law generally excludes the recovery of pure economic losses from a negligent defendant in such cases: *Conarken Group Ltd v Network Rail Infrastructure Ltd* [2011] BLR 462.

Comment

In the realm of the law of negligence the same, or similar, factual scenarios may well lead to very different results depending on the applicable law. This is especially the case when considering whether a negligent contractor who damages an underground asset will be liable to the end-user of that asset, whose losses may be significant. Cases of this nature involve damage to property that has a knock-on or ripple effect, leading to a small or perhaps even a very large group of "victims". All legal systems will hold a careless contractor or subcontractor liable for its actions, but there is great variety as to where liability to affected parties stops.

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