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The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Case update: interpreting insurance policies

University of Exeter v Allianz Insurance PLC
[2023] EWCA Civ 1484

We discussed this case in Dispatch 274. In 1942, a bomb was dropped on Exeter. The bomb did not explode but lay undiscovered until 2021 when it was unearthed during building works. Bomb disposal experts were called in who determined that the bomb should be exploded as it could not be safely transported away. UoE submitted an insurance claim in relation to the damage caused by the controlled detonation. At first instance, HHJ Bird held that the damage in respect of which the claim was made fell within the scope of the War Exclusion Clause being loss or damage "*occasioned by war*". UoE appealed.

HHJ Bird had concluded that the "*proximate cause*" of the loss was the dropping of the bomb, which was an act of war, and not the deliberate act of the bomb disposal team 79 years later in detonating the bomb.

Coulson LJ noted that proximate cause does not mean the last in time. It means that which is proximate in efficiency; what matters is the dominant, effective, or efficient cause of the loss. The judge also noted that there was no authority where potential cause X occurred almost 80 years before the damage it was said to have caused, or where it was, in fact, impossible for the loss and damage now the subject of the claim to have been caused when potential cause X occurred (because the buildings that were damaged had not even been built in 1942). There were, however, a number of cases in which the proximate cause was found to be the first event in time, even when the later event might have been said to trigger the damage complained of.

Allianz also said that, even if it was wrong to say that the dropping of the bomb was the proximate cause, it was a concurrent proximate cause of the loss and damage, and therefore, the loss was still excluded. UoE said that if the court was persuaded that the proximate cause of the damage was the controlled detonation in 2021, then there was no other cause of "*approximately equal efficacy*".

Coulson LJ agreed with HHJ Bird. The loss and damage in February 2021 resulted from two concurrent causes of approximately equal efficacy. One was the dropping of the bomb in 1942. The other was its controlled detonation almost 80 years later. It was the combination of these two causes which made the loss inevitable, or at least in the ordinary course of events. Neither would have caused the loss without the other.

It was a "classic" case where there were two concurrent causes of the loss and damage: the act of war in 1942 and the detonation of the bomb as a result of the attempted LOT in 2021. They were of approximately equal efficacy. One of those concurrent causes was expressly excluded from cover under the policy. The appeal was dismissed.

Duties of Engineers

Glover & Anr v Fluid Structural Engineers & Technical Designers Ltd
[2023] EWHC 3219 (TCC)

The Glovers were homeowners and wanted to undertake extensive works to refurbish and extend their property, including the construction of a new basement and construction of a full loft space at roof level. Fluid, the structural engineers, were appointed under a written appointment which incorporating the terms of the Association of Consulting Engineers (ACE) Agreement 1 (Design) 2009.

The works commenced in September 2016. During the works, damage and cracking was caused to the property and adjoining properties on both sides. The cracking led to the works being paused and recommenced on a few occasions. Fluid undertook a number of inspections and produced a number of reports in relation to the extent of any movement and the progress of the works. The works should have been completed by February 2018, but were not. In June 2019, Fluid produced a report which contained, as Fluid admits, an incorrect statement as to the way in which the works had been undertaken and what the contractor should have done, but did not do. In July 2019, the contractor's employment was terminated and, shortly afterwards, it went into liquidation. Another contractor completed the works on 6 May 2021.

The Glovers incurred costs and also faced claims made by the owners of the neighbouring properties which they were seeking to direct at insurers. Having issued a protective claim form against Fluid and the contractor and four insurance companies, including one which provided non-negligent damage insurance cover to the claimants ("XL"), the Glovers served proceedings against Fluid and XL.

The Glovers alleged that Fluid had acted in breach of duty in such a way that they did not have a clear picture of how the works were performed. As a result, the Glovers incurred considerable costs investigating matters (primarily relating to negligent design/construction by members of the project team) which turned out to be unsustainable. Those costs included solicitors and expert fees for work done in relation to the claims made against the potential defendants, the cost of opening up works, and the cost liability to the insurance company against whom it discontinued. These costs were said to be "*wasted and incurred due to and/or materially contributed to by Fluid's breaches*".

Fluid brought an application to strike out or dismiss the Glovers' claim saying that neither of their claims could succeed as a matter of law. HHJ Davies noted that the relevant test for the application was that set out in the case of *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 where it was said that: "*If the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better*".

Fluid said that the costs incurred and claimed were not losses which fell within the scope of the duty agreed or assumed by Fluid in respect of the services they carried out pursuant to the appointment. Fluid said that there was nothing in either their appointment or in their reports which suggested that Fluid had agreed to or had provided any information on the basis that it should be relied on by the Glovers when deciding how to investigate and/or litigate the claims. The losses claimed were simply not recoverable, as a matter of principle, because they were not "*conventional construction losses*"; that is to say remedial and professional costs directly associated with remedial works required as a result of alleged breach by a structural engineer undertaking a conventional appointment.

Fluid said that if the court was to allow such a loss to be classed as a "*conventional loss*", this would have "*seismic consequences on the industry*" including (i) the wording of all standard form appointments, and (ii) the insurance available to professional consultants, where an insurer will expect to provide an indemnity only in respect of professional services it has been told a particular insurer undertakes.

HHJ Davies said that the costs here were at least unusual or did at least stretch the usual boundaries of claims against structural engineers. Here, the alleged breaches were all said to have taken place during the site phase element of Fluid's works. The key contractual obligation was to: "*visit site during the construction of the works to assist the architect to monitor that the works are being executed generally in accordance with the contract documents and with good engineering practice*".

The judge said that it followed in his judgment from the nature and circumstances of the appointment that it was at least arguable that, objectively speaking, Fluid was, or should have been, aware that the purposes of its performance of its duties in the construction phase extended to protecting the Glovers' interests as a whole in relation to the consequences of the risk of damage to adjoining properties from the works. This included the need for site visits by Fluid to monitor compliance and to monitor movement, not only so that action was taken in the event of non-compliance or movement beyond estimated maxima, but also so that: (a) any claims made by the owners of adjoining properties alleging property damage due to movement caused by the works could be properly and effectively investigated and resolved, whether by litigation, adjudication or negotiated dispute resolution, and (b) any claims against the contractors or the professional team (including Fluid itself) or against the clients' insurers or third party insurers could also be properly and effectively investigated and resolved in the same ways.

Further, it also followed that if, as is alleged, the Glovers were exposed to claims made by adjoining owners and needed to investigate and resolve both such claims and/or claims against contractors, the professional team and/or insurers, then it was arguable that losses caused by such investigations and resolution being sent down a wrong track through Fluid's alleged negligent performance of its construction phase duties were not outside the scope of Fluid's duty and were sufficiently connected to the subject matter of Fluid's duty.

It was a question for trial whether or not the Glovers could make out their case in relation to these questions at trial.

There was also a question about the claims made to recover Fluid's fee, namely the 15% of its fee for the services provided under the G2.8 construction phase, invoiced on a monthly basis. Would a finding of negligence disentitle Fluid to their fees? Here, it was common ground that the Glovers were unable to rely upon the defence of abatement. This left the question as to whether the services provided in relation to the relevant part or stage of the work were rendered worthless by reason of Fluid's alleged breach.

HHJ Davies referred to the case of *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd* [2006] EWHC 1341 (TCC), where Jackson J (as he then was) noted that: "*if there are some drawings which were so unsatisfactory that they were discarded altogether and no use was made of them, in my view Multiplex could refuse to make any payment whatsoever in respect of those drawings. However, any defence on this basis or any claim for repayment on this basis would not be a plea of abatement. It would simply be a contention that no payment should be made at all for professional services which were worthless*".

Here, the claim was for repayment of sums paid on the pleaded basis that "*the inadequate and/or lack of performance of these services amounted to a total failure of consideration and/or those services were not performed at all and/or were performed so poorly that they were worthless to the Claimants*". The judge noted that the Glovers would need to show, in relation to the services, the subject of the invoices for the construction phase, and separately in relation to the services the subject of each of the inspection and report invoices, either that the services were not performed at all or were performed so poorly that they were worthless. The Glovers said that these were fact-sensitive issues which could only be determined at trial. In particular, they referred to the "*startling lack of, and lack of explanation for the absence of, invoices for the construction phase*" and the complete lack of documentary evidence of inspections, which was the subject of critical comment from the single joint expert.

The judge noted that the single joint expert report was undoubtedly highly critical of Fluid, in particular as to the apparent failure to undertake fortnightly site visits and the apparent complete absence of site inspection records. It was, therefore, "*at least possible*" that, at the end of the trial, the Glovers may establish an evidential platform for a submission that the services provided by Fluid in relation to inspection and recording were so deficient that they were for all practical purposes worthless.

The judge accepted that the Glovers faced the difficulties of showing that: (a) no services of worth were provided in relation to the construction phase or how any repayment claim in relation to any part of that 15% was to be valued, and (b) no services of worth were provided in relation to each of the separate inspections and reports or how any repayment claim in relation to any part is to be valued. However, the Judge, albeit with "some reluctance given the modest value of the repayment claim and the obstacles which it faced", held that he could not conclude at this stage that it must fail on the law, where there is room for doubt as to the true nature and extent of the applicable legal principles, or on the facts, where there is room for sufficiently damning findings to be made at trial as to render at least possible an entitlement to some right to some repayment.

Again, the result was that Fluid's application was dismissed and the case would go to trial: "*unless it can be resolved at mediation which the court urges the parties to attempt in good faith and with open minds*".

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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