Causation and the 'but for' test

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Construction analysis: Under what circumstances will the court depart from the 'but for' test to determine the cause responsible for loss? Will Buckby and Andrew Croft of Beale and Company, discusses the judgment in Greenwich Millennium Village v Essex Services where the court abandoned the 'but for' test in pursuit of a 'fair result'.

Original news

Greenwich Millennium Village Ltd and another v Essex Services Group plc and another  [2013] EWHC 3059 (TCC), [2013] All ER (D) 328 (Oct)

Greenwich Millennium Village Ltd brought subrogated claims against the parties who originally designed certain flats that were destroyed as a result of a water leak. No single organisation had overall control of the design, installation, supervision, inspection, testing and acceptance of the boosted mains cold water system. The various different contracts and subcontracts resulted in pipework systems which, on completion, varied markedly from core to core, even though they should have been the same in each. The litigation involved five parties, with different defences and claims up and down the line, depending precisely on where the parties sat in the contractual chain. The Technology and Construction Court determined the claim on the facts.

To what extent is the judgment helpful in clarifying the law in this area?

This case concerned a situation where concurrent and equally effective causes were responsible for the relevant losses and either cause would independently have resulted in the relevant losses being suffered. In such circumstances the traditional 'but for' test would lead to a conclusion that neither cause was responsible because the other cause would still have resulted in the losses being suffered. Prior to this case it was generally considered that the solution to such a 'patently absurd' conclusion was to depart from the 'but for' test and determine that both causes were responsible for the loss. This solution was confirmed by Coulson J in this case.

What are the implications for lawyers and what will they need to be mindful of when advising in this area?

When advising on causation, lawyers need to be aware that in circumstances where the application of the 'but for' test suggests that a particular event (cause A) did not cause the loss because the losses would have been suffered in any event as a result of another, independent cause (cause B), there is a risk that a court would still decide that cause A was responsible for the loss, if cause A on its own, would also have caused the loss.
How does this case fit in with other developments in this area?

There are a number of previous authorities which depart from the 'but for' test in specific circumstances. They talk about the need for common sense, making value judgments on responsibility and the requirements of fairness and reasonableness—for example, Hamblen J in Orient-Express Hotels Ltd v Assicurazioni Generali S.p.a. (UK Branch) t/a Generali Global Risk [2010] EWHC 1186 (Comm), [2010] All ER (D) 282 (May). However, the ‘but for’ test remains good law. Judges will not reject the 'but-for' test purely because it does not produce a ‘fair result’ in the particular circumstances and will only depart from it on the basis of clear and proper reasoning.

Interviewed by Laura Cordell.

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