Reports from the courts

Our regular round up of the court decisions of most interest to construction from Will Buckby and Ibaad Hakim of Beale and Company focuses on a case concerning liability for the failure of an under-designed platform; and another where an adjudicator changed his mind.

Cleightonhills v Bembridge Marine Ltd
[2012] EWHC 3449 (TCC); TCC; Akenhead J

Bembridge Marine Ltd (Bembridge) commissioned the design and construction of a workshop to include a platform that would be used to lift boats.

Following completion of the project, Mr Kevin Cleightonhills (Mr Cleightonhills), an employee of Bembridge, suffered severe traumatic brain injuries when he fell through the platform due to a faulty design. Bembridge settled with Mr Cleightonhills and then brought proceedings against the parties that were involved in the design and construction of the platform.

The designer and the structural engineer settled the proceedings, whilst the remaining three parties – the sub-contractor for the supply and construction of the platform, the sub-sub-contractor for the fabrication of certain platform elements and the draftsman employed by the sub-sub-contractor – accepted that each owed a duty of care to Mr Cleightonhills, but not to Bembridge.

Decision
Akenhead J concluded that each of the three remaining parties exercised all the reasonable care and skill which might reasonably have been expected of them considering what they were employed to do. The platform failed because it had been under-designed by the designer and the structural engineer. Further, on the facts, he decided that the three remaining parties had no duty to warn Bembridge that the platform was under-designed, nor should they be criticised for not realising that there was a potential problem.

Akenhead J stated that in considering the duty of care owed by the three parties to Mr Cleightonhills in tort, regard had to be had to the following:

(a) the court needs to consider the contractual context of the various duties arising;
(b) whilst the scope of the duty of care owed to a third party in tort cannot usually be limited by contractual exclusions or limitations of liability, it is primarily determinable by reference to what the party owing the duty is at least broadly employed to do or actually does;
(c) it does not follow that if a party is in breach of its contract relating to the relevant project, it will be in breach of a duty of care owed to someone who is not a party to that contract; this is because many breaches of contract are breaches of express or even implied terms, which do not themselves require the exercise of reasonable care.

Akenhead J also discussed the duty to warn and noted that while there is a general duty to warn a third party of a potential danger to human beings, ‘there might be circumstances which justify not warning.’ Having regard to the contractual context of this case, it was held that the duty of the three parties concerned only extended to dangers which they became aware of as a result of their involvement in the project. The duty may further be limited to warning ‘the party with whom the person required to warn is in contract or to warning the local authority.’

Significance
The case makes it clear that where multiple parties have been involved in the design and construction of an under-designed piece of work, it is not always
justifiable to apportion some part of the blame for that under-design to each of those involved.

In considering whether a duty of care was owed, in circumstances where parties are only involved by reason of their contracts, the court needs to consider the contractual context and, in particular, what they were employed to do. It does not follow that, merely because a party was in breach of the contract, it would be in breach of a duty of care owed to someone who was not party to that particular contract.

**Vertase FLI Ltd v Squibb Group Ltd**
[2012] EWHC 3194 (TCC); TCC; Edwards-Stuart J

Vertase FLI Ltd (the contractor) (Vertase) appointed Squibb Group Ltd (the sub-contractor) (Squibb) under a sub-contract to carry out asbestos removal and demolition works at a site in Leamington Spa. The sub-contract works were completed late and the parties were unable to agree who was responsible for the delay.

The sub-contractor referred the dispute to adjudication and the adjudicator decided that the sub-contractor was entitled to an extension of time and additional costs incurred (First Adjudication). The sub-contract works were completed late and the parties were unable to agree who was responsible for the delay.

The sub-contractor issued proceedings in court in order to enforce the adjudicator’s decision. The court ordered the contractor to pay the sub-contractor on the basis of the adjudicator’s decision. The court held that the contractor was not entitled to deduct or set-off the same amount for liquidated damages. The sub-contractor agreed to pay the damages, save for the liquidated damages.

The contractor issued court proceedings to enforce the part of the adjudicator’s decision in the Second Adjudication relating to liquidated damages.

**Held**

Edwards-Stuart J held that the contractor’s enforcement proceedings failed as the adjudicator had purported to decide the same issue twice. He stated that it is universally accepted that once a dispute has been determined by adjudication, there cannot be another adjudication on the same issue.

In the First Adjudication the adjudicator had decided that as the contractor had not served an appropriate withholding notice it was not entitled to set-off its cross-claim for liquidated damages from the adjudicator’s decision.

The adjudicator revisited its decision in the First Adjudication relating to liquidated damages and, in fact, stated in his decision in the Second Adjudication that

‘... I am persuaded by Vertase’s arguments on the legal position sufficiently to change the view that I took in my Decision in the first adjudication’ (emphasis added).

This was sufficient for Edwards-Stuart J to hold that the adjudicator had purported to decide the same issue again and, therefore, to that extent his decision in the Second Adjudication was unenforceable.

**Significance**

This case reiterates that an adjudicator is not permitted to change his/her mind or decide on the same issues which he/she adjudicated on in an earlier adjudication.

For the employer, it demonstrates the importance of issuing withholding/pay less notices in the time frames prescribed in the relevant contract. The timing of the notice could mean the difference between the paying party having to comply with an adjudicator’s decision or being able to rely on a notice. **CL**