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## Design defects. Who pays?

Who pays the employer when a consultant and a subcontractor are both partially responsible for a design defect? The "joint and several liability" rule means that in this situation the innocent employer can pursue either or both of them for 100 per cent. of the damages it is claiming, which is particularly useful if one of them has become insolvent. Assuming that the consultant and the subcontractor are both able to pay, how are the costs of rectifying the defect apportioned between them?

There was a rule of thumb that a consultant would never pay more than in the range of 20 to 33 per cent. when it was a question of failure to discover defective workmanship on an inspection of the works. Where both the consultant and the subcontractor have responsibility for some aspect of the design, a more sophisticated analysis is now called for, as in a recent case concerning the construction of a train servicing depot close to Wembley Stadium. To create the space for the depot, substantial excavations were made in clay, leaving slopes of 70 to 80 degrees which became unstable. This problem arose both during and after the excavation, although the problem during excavation of the slope seems to have been instability at high level whereas that after excavation was at a much deeper level. Carillion engaged a consultant engineer, RWC, which was responsible for the "detail of design" and later became the lead consultant. The design of the specialist retained walls was carried out by the specialist contractor, Phi, with a review by the consultant, who was to "ensure that the specialist designers have addressed slip circle issues adequately".

There were discussions among the main contractor, consultant and specialist contractor about the details of the design, which was to have a life of 120 years. Unfortunately, the design was entirely unsuccessful in this respect; there were three failures before the completion of the overall works and following the third failure extensive monitoring was put in place, and legal proceedings followed. Carillion and Phi settled their claims. Phi had also brought a claim against RWC for a contribution.

As far as RWC was concerned, the essential problem seemed to be that even though it was the lead consultant and there were two failures during the course of excavation of the slope, it never considered the fact that there could be instability at a deeper level. There was also a discrepancy in Phi's figures which they had failed to notice. The judge clearly thought that, when an incident of this nature occurred, RWC should have gone back and reviewed the early design and calculations. The judge said that if it had done so, the deep seated instability would have been identified. RWC had suggested to the employer at one point that it may be a good idea to consult an independent specialist, but when the employer did not respond, it never followed this up, and this also was criticised by the judge.

The contribution between a consultant and subcontractor in these circumstances is based on what is rather pompously known as the "causative potency" of the parties (i.e., how far their acts or omissions have caused the problem which has arisen) and also their relative blameworthiness. In this case RWC was not merely involved in commenting on Phi's design. It was also lead consultant for the whole of the works and had a specific responsibility to advise on the need for further site investigation. The judge thought that this last obligation must have meant RWC considering in detail the available site investigation reports and also the visible signs of surface movement. Therefore it was wrong to say that RWC had

simply a checking or reviewing function. The judge decided that the "just and equitable apportionment" should be 60 per cent. to Phi and 40 per cent. to RWC, to take into account their equal responsibility in the pre-construction stage and the greater responsibility of Phi at the construction stage.■

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## A matter of corporate life and death

Breaking health and safety law is no longer just a possible matter of life and death for individuals – it can be fatal for companies too. The courts have sent a clear signal that they are prepared to put companies out of business if they are convicted of causing death by breaching health and safety legislation. In the first case to test the new corporate manslaughter law and the related sentencing guidelines, the Court of Appeal has acknowledged that it is "unavoidable and inevitable" that Cotswold Geotechnical Holdings (**Cotswold**) will go into liquidation as a result of the fine that it has been ordered to pay following its conviction. Cotswold was prosecuted after one of its employees, a 27 year old geologist, was killed when the pit he was working in collapsed.

The new offence of corporate manslaughter was introduced in the Corporate Manslaughter and Corporate Homicide Act 2007. A company is guilty of the offence if the way in which its activities are managed by its senior management causes a person's death and represents a gross breach of the company's duty of care to that person. It remains to be seen whether this makes it easier to convict companies that cause death, and the prosecution of Cotswold was relatively straightforward, bearing in mind the "open and shut" nature of the case and the fact that there was only one director of the company.

There is a perception that, historically, the penalties for companies that were convicted of causing fatal accidents have been too low. This may have been caused by the courts applying the same approach to sentencing companies that they used for sentencing people – where the punishment is a fine, there is a strong connection between the level of the fine and the convicted party's means, and the courts would not set a fine that the defendant could not possibly pay. However, new sentencing guidelines for corporate manslaughter and other health and safety offences that cause death were issued in 2010. The guidance retains a link between the means of the convicted company and the amount of the fine, but also says that the appropriate level will rarely be less than:

- £500,000 for a conviction for corporate manslaughter; and
- £100,000 for other health and safety offences that cause death.

This represents a significant increase on the levels of the fines that have previously been considered normal. The guidance makes it clear that the effect of a fine on the shareholders and directors of the guilty company is not a relevant consideration in determining the amount of the fine, and acknowledges that there may be some cases where it is appropriate that the defendant will go out of business as a result.

In sentencing Cotswold, the judge took account of the new guidelines, and also considered the size and financial standing of the company. He set the fine at £385,000. Cotswold was also given permission to pay the fine in instalments over ten years. Notwithstanding this, the judge acknowledged that the company could still go out of business as a result. The Court of Appeal upheld the level of the fine and Cotswold is now likely to go into liquidation.

The Crown Prosecution Service says that there are a number of further prosecutions "in the pipeline". Given that Cotswold is a small company with a very simple management structure, this case suggests that bigger companies can expect even larger fines. Whilst corporate manslaughter cases are very widely publicised, the new approach to the level of fines applies to all incidents where a company is convicted of causing death by breaching health and safety law.

Most companies will put health and safety policies in place because they feel that it is both morally right to do so and also good business practice, not just to avoid prosecutions and fines. However, with the courts' new found willingness to use their sentencing powers, the incentive to comply with the law is stronger than ever. ■

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