

Legal Briefing

Willmott Dixon Construction Ltd vs Robert West Consulting Ltd.

[2016] EWHC 3291 (TCC) The Hon. Mr Justice Coulson

Ted Lowery
January 2017

The Facts

Willmott Dixon Construction appointed Robert West Consulting (RWC) to provide engineering services for a site in South London.

Willmott Dixon's independent subcontractor Toureen Contractors Ltd carried out underpinning works designed by RWC.

During 2015 Willmott Dixon began proceedings claiming losses allegedly caused by RWC's defective design of the underpinning. In its defence, RWC alleged contributory negligence.

On 4 December 2015 RWC served responses to Willmott Dixon's request for further information. In these responses RWC relied upon one of the limited exceptions to the general rule that a contractor is not liable for the negligence of its independent subcontractor – that Willmott Dixon had had actual knowledge of and condoned negligent acts by Toureen.

On 6 December 2016 RWC applied for leave to amend its responses to also allege that Willmott Dixon was vicariously liable for the actions of Toureen on the grounds that an additional recognised exception to the general rule applied where there was a withdrawal of support from the neighbouring property.

Willmott Dixon opposed the amendments on grounds that this new allegation could not succeed in law and would not therefore satisfy the test set out in CPR Part 24 – that the new allegations must have a real prospect of success.

Willmott Dixon further contended that the court should not otherwise exercise its discretion to allow the amendments as this would necessitate the introduction of new evidence for which there was insufficient time given the imminence of the trial.

The issue

Should RWC be given leave to amend?

The Decision

The judge reviewed the CPR Part 24 test by reference to two sub-issues: was it likely that Willmott Dixon owed a non-delegable duty in respect of the underpinning works carried out by Toureen, and if so, could that duty be relied upon by RWC in an allegation of contributory negligence?

The judge observed that while a non-delegable duty is a recognised exception to the general rule that a contractor is not vicariously liable for the negligence of its independent subcontractor, this exception only arises in specific circumstances.

The judge rejected RWC's argument that the facts fitted within two of the exceptional scenarios previously endorsed by the courts; that the work amounted to "extra hazardous or inherently dangerous operations" and/or, that there had been a withdrawal of support by the owner of one property which had caused damage to an adjoining property.

The judge found that Toureen's works were not so exceptionally hazardous and/or inherently dangerous as to give rise to a non-delegable duty and that a duty of support only arose between neighbouring landowners.

The judge stated that even if Willmott Dixon was subject to a non-delegable duty to procure the careful performance of the underpinning works, this would not have been relevant to any allegations of contributory negligence which arises out of a party's failure to look after itself (and has nothing to do with a duty owed to others). Furthermore, if there had been a non-delegable duty it would not have been owed to RWC but to the owner of the adjoining property.

Accordingly, the judge concluded that the allegations in RWC's amendments had no real prospect of success.

The judge concluded that in any event, he would not have exercised his discretion in favour of RWC's application. Allowing the amendments would have required Willmott Dixon to reconsider its entire case and more than likely necessitate new expert and factual witness evidence which would have undoubtedly jeopardised the trial date.

Commentary

This decision confirms the position that where negligence is alleged, there are limited exceptions to the general rule that a contractor is not vicariously liable for the acts or omissions of its independent subcontractor. While a non-delegable duty may arise when the works in question are inherently dangerous, this exception will only apply in rare cases of extreme hazard. It did not help that RWC failed to offer any explanation as to why its application was made so late. The judge stressed the courts will not usually exercise a discretion in favour of unjustifiably late applications to amend that may prejudice the trial date, irrespective of the amending party's willingness to pay wasted costs.

