



LEGAL BRIEFING

Carillion JM Ltd v Phi Group Ltd [2011] EWHC 1379 (TCC), Mr Justice Akenhead

In this case the Court considered the meaning of the “same damage” and a “just and equitable” contribution under the Civil Liability (Contribution) Act 1978.

The Facts

The case concerned the design and construction of a train servicing depot near Wembley Football Stadium (the “Works”). The depot was built between 2004 and 2006 as the stadium was being constructed. To create space for the depot, substantial excavations were undertaken to the clay ground which had the effect of leaving 70° and 80° slopes. These slopes became unstable both during and following completion of the Works.

In May 2004 Carillion JM Ltd (“Carillion”) engaged Robert West Consulting Ltd Engineers (“RWC”) as Consulting Engineer and Lead Consultant in respect of the overall Works. RWC’s scope of work involved developing outline proposals into a fully detailed scheme for the depot. This included advising on further site investigations to verify the ground, providing working drawings and specifications and once construction commenced, site visits and attendance at site meetings.

Phi Group Ltd (“Phi”) were formally engaged by Carillion in January 2005 as Carillion’s specialist design and build contractor for the soil nailing works. This was work to restrain and stabilise the slopes around the excavation for the depot. There was no obligation on Phi to review the adequacy of the site investigation documents.

In January 2005, whilst the construction works were progressing, slips occurred in the upper levels of clay. Phi addressed the slips by undertaking remedial works. RWC was not involved in correspondence regarding these slips, although it was aware of them. Further, more substantial slips occurred in October 2005. Phi prepared a report and remedial design, which was commented on by RWC.

Subsequent slope failure and settlement was reported shortly before Christmas 2006. Monitoring was undertaken and in August 2007 Carillion engaged an expert to prepare a report reviewing the design of the works. The report found that there was deep seated instability which had not been adequately accounted for in the design calculations for the soil nailing works. It was the deep seated instability that formed the subject matter of the Court proceedings.

In November 2007, Carillion gave RWC and Phi notice of the potential claims against them. Carillion initially issued proceedings against Phi only on 23 April 2009. The primary complaint was that Phi had been negligent at various stages in its design assumptions. In March 2010 Phi issued contribution proceedings against RWC, on the basis that if it was liable for various losses, so was RWC. Carillion issued direct proceedings against RWC alleging negligence on 30 March 2010.

Carillion and Phi settled the dispute between them by consent. The consent order dated 18 May 2010 provided for a settlement sum of £3.8 million inclusive of interest and costs. Carillion’s claim against RWC continued before the Court.

The Issue

The key issue of interest was the operation of a contribution under the Civil Liability (Contribution) Act 1978 (“Civil Contribution Act”) and the apportionment between RWC and Phi.

The Decision

Judgment was given against RWC finding that the deep seated instability and the need for remedial works was caused by RWC's breaches of duty. Carillion was awarded £6.7 million in damages. The Judge stated that both RWC and Phi were liable to Carillion for 100% of its loss and damage.

The Judge considered the issue of contribution between RWC and Phi under the Civil Contribution Act noting that there was extensive authority regarding apportionment. As to the meaning of "just and equitable" s 2(1) provides:

"2(1) [...] the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

Reference was made to the case of *Davies v Swan Motor Co* [1949] 2 KB 291 in which Denning LJ set out that the exercise of the Court's discretion so as to be "just and equitable" "involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness."

The Judge stated that it was clear that the Court should take into account the relative blameworthiness of the contributing parties and the "causative potency" of their respective acts and omissions.

As to apportionment between RWC and Phi, the Judge stated that in construction defect cases, the conventional approach has been to fix the culpable builder with about 80 % to 2/3 and the culpable supervisor who has failed to pick up on the defects between 20 % and 1/3.

Reference was made to *McKenzie v Potts* (1995) 50 Con. L.R. 40 where two defendants were found to be in breach of their statutory duties, the builder who used inappropriate material and the architect who failed to properly supervise the work. The apportionment was held to be 60/40 as between the builder and architect:

The case of *J Sainsbury v Broadway Malyan* [1999] PNLR 286 was also considered which concerned the negligent design of a supermarket fire compartment wall by the architect and the consulting engineers. HHJ Humphrey LLOYD QC held that the engineer was not under a duty to comment on the fire protection, but had he been, the correct apportionment would be 12.5% to the engineer and 87.5% to the architect. This was on the basis that the architect had overall responsibility for designing the fire protection and the errors were elementary and fundamental.

As to RWC and Phi, the Judge commented that the "poacher/gamekeeper" apportionment will often be in the range of 80-66.6 % and 20-33 % ranges respectively, but where both contributors each have a responsibility towards their mutual client to have regard to the same dangers and difficulties that does not seem to suggest a poacher/gamekeeper scenario. On the facts the Judge found that:

- At all stages pre-construction and after the 2005 slips both RWC and Phi failed to pick up initially on the potential for shallow instability and at all material times deep seated instability;
 - Whilst one could argue that the negligence was in the detail of the design produced by Phi, the deficiencies in the design were in essence fundamental misconceptions in the design approach;
 - Each Phi and RWC had a responsibility to Carillion to pick up the two types of instability and guard against them in design and installation;
 - RWC could not be regarded only as a design checker or 'gamekeeper'. RWC was contractually appointed to design the whole of the Works and was Lead Consultant;
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- RWC had a specific responsibility to advise on the need for further site investigations, which Phi did not;
 - RWC's obligation was intended to precede design work by Phi and in effect assist Phi to perform its obligations, which would otherwise have involved Phi in producing detailed designs which took into account the existing site investigation data; and
 - There was no doubt that Phi was equally responsible at the design stage as RWC.

In conclusion, the Judge stated that:

"Whilst I can see and accept that both Phi and RWC are equally responsible at the pre-construction stage, there is less "causative potency" and less "blameworthiness" at the later stages in relation to RWC when Phi, by its greater involvement, was more to blame than RWC."

The Judge formed the view that the just and equitable apportionment was 60 % Phi and 40 % RWC to allow for their equal responsibility in the pre-construction stage and the relatively greater responsibility of Phi in the post construction stages.

Phi argued that its contribution should only be the sum already paid by way of settlement. This was not accepted and the Judge stated that there was no authority to suggest that prior settlement by one party, even if reasonable, should determine what the ultimate apportionment should be based on the eventual award of damages.

Commentary

The case is a useful reminder of the operation of the Civil Contribution Act in particular the meaning of "just and equitable" under section 2(1). In exercising its discretion the Court should *"take into account relative blameworthiness of the contributing parties and the causative potency of their respective acts and omissions."*

It also demonstrates the Court's robust enforcement of contribution proceedings between parties under the Civil Contribution Act and illustrates that settlement by one party does not cap or in any way limit potential liability for damages to the amount of a commercial settlement.

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