

## Construction Law Update

### Contractor's Liability for Design

In *SSE Generation Ltd ("SSE") v Hochtief Solutions AG ("Hochtief")* the Inner House of the Court of Session in Scotland considered the liability arising out of the collapse of a tunnel at a hydro-electric scheme. Although this decision is not binding on the courts of England and Wales, it is likely to be persuasive and has the potential for an appeal to the Supreme Court. This case re-considers the issues of liability for design and the ambit of exclusions under NEC2.

#### Background

SSE engaged Hochtief to design and build a hydro-electric scheme at Fort Augustus in Scotland under an amended form of NEC2 Option A. The scheme included a tunnel extending over 8km from a reservoir formed at the head of Glen Tarff to Loch Ness. The works were taken over by SSE in December 2008 and by April 2009 a catastrophic collapse had occurred in a substantial section of the tunnel resulting in the closure of the power station. Hochtief declined to carry out the remedial works without being paid. SSE therefore instructed another contractor to carry out those works at a cost of around £137 million.

#### Where in the contract did the risk for collapse lie?

Clause 80.1 of the contract provided that the risk of loss or damage to the works after take over rested with SSE unless that loss or damage occurred before the issue of the Defects Certificate, and was due to a Defect which existed at take over. Therefore, if the collapse was not due to a Defect, the risk remained with SSE. However, if it was caused by a Defect, the risk lay with Hochtief. The contract defined a Defect as either a part of the works which is not in accordance with the Works Information, or a part of the works designed by the Contractor which is not in accordance with the Contractor's design accepted by the Project Manager.

#### Limb one: 75 year design life

The Works Information required a design life of 75 years. Applying the decision in *Mt Hojgaard v E.ON*, the

Court concluded that this did not amount to a warranty that the works would have a lifetime of 75 years, but rather that they had been *designed* to last for 75 years. The majority of the judges hearing the case held that SSE had the whole of the two year defects period to determine if the works did indeed have that design life. If, during that period, SSE discovered that the works did not have a design life of 75 years, the works would not have been in accordance with the Works Information and there would have been a Defect. The Court found that the collapse of the tunnel after less than six months was conclusive evidence that the works, as built, did not have a design life of 75 years and this was a Defect under the first limb.

#### Limb two: the contractor's accepted design

The design documents accepted by the Project Manager provided that erodible rock encountered in the tunnel was to be shotcreted if not already covered/protected by steel rib support. The absence of shotcreting in areas of erodible rock meant that that part of the works was not in accordance with the design accepted by the Project Manager and was therefore a Defect under the contract.

#### Did Option M protect Hochtief?

Option M of the contract provided:

*"The contractor's liability for defects due to his design that are not listed on the defects certificate is limited so far as he proves he used reasonable skill and care to ensure it complied with the works information."*

Having established that the collapse resulted from a Defect existing at take-over, the question was whether Hochtief could rely on Option M of the contract to escape liability.

The Court held that the collapse of the tunnel was due to the failure to shotcrete areas of erodible rock. However, that was a failure in the *implementation* of the design, not in the design itself. Option M therefore

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did not engage and Hochtief was liable for the cost of repairs.

The Court held:

*“The Defect was not one of design but rather implementation of design. It was that failure in implementation of the design which resulted in the fact that the tunnel on hand over did not have a design life of 75 years. Option M therefore does not come in to play at all. It does not relieve the defenders from liability.”*

Accordingly, Hochtief was found liable for the cost of repairing the collapsed section of tunnel in the sum of £107m.

### Analysis

The contractual definition of Defect was crucial to this case and shows how detailed drafting allows the parties to allocate risk and apportion liability as they see fit. However, the judgment touches on a difficult distinction between design and workmanship and arguably adds further complexity to that issue with the introduction of the concept of “implementing the design”. The fact that Hochtief had exercised reasonable skill and care in implementing the design was irrelevant as it was not covered by Option M. NEC3 Option X15 and NEC4 Option X15.1 provide similar exclusions to Option M and this decision clearly raises questions about the scope of protection they afford to contractors.

It is anticipated that, given the £107million liability that follows this judgment, Hochtief will seek to appeal the decision to the Supreme Court.

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