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Main Contractors' Liability towards Third Parties: New Interesting Judgement from the Danish Supreme Court

The Danish Supreme Court recently had the opportunity to consider the liability of a main contractor who had contracted with an independent subcontractor, who had in turn damaged the property of a third party. The third party had no contract with any of the two parties and the question of liability was therefore one of liability in tort or "outside of contract".

Under the Supreme Court's ruling, the main contractor incurred liability for the damage that the subcontractor had caused on the third party's cable in connection with an excavation work, even though the main contractor was not itself at fault towards the third party.

The ruling may be of interest to both employers, contractors and subcontractors in the offshore area, although typically within offshore oil and gas and offshore wind a rigorous regime of mutual hold-harmless and indemnity provisions is contractually agreed.

The Ruling

In a contract with the developer called Ø A/S, the main contractor, Y A/S, had undertaken to establish, among other things, a new pressure line over a distance of approx. 10 km. Y had subsequently entered into an agreement with Z ApS that this company, as a subcontractor, should carry out work consisting of controlled under-drilling for Y. During the work on such steered under-drilling, a cable belonging to a third party, X A/S, was damaged.

For the Supreme Court, the case solely concerned whether Y was liable for the damage that Z had inflicted on X during the work of the drilling (in Danish: "*hæftelsesansvar*").

The subcontractor had originally been found liable towards the owner of the cable in a separate ruling, however the subcontractor was subsequently declared bankrupt, and the cable owner never received its compensation, hence a claim was brought against the main contractor.

In the first instance, the City Court found that the main contractor was liable, as steered under-drilling is notoriously difficult and risky and the main contractor should have limited and controlled these risks, and it was also noted that neither the main contractor nor the subcontractor had obtained the exact locations of cables in the subsoil. In the appeals court, however, the High Court of Eastern Denmark rejected the claim stating that the main contractor had already provided general data on cable locations, the subcontractor was a specialist company, and the main contractor did not have the competences or personnel to carry out under-drilling or control those operations.

The Supreme Court overturned the appeals court's decision. Among other things, the Supreme Court found that in principle a main contractor does not have any liability for a non-contractual damaging act of an independent subcontractor. However, in the present circumstances, where Y had engaged Z to undertake particularly risky work, a different assessment should be made.

Y did have the opportunity, through supervision and control, to limit and manage the risk of the work. This could happen, among other things, by Y making sure that Z had obtained information

about the exact location of cables in the ground at the location of the controlled sub-drilling. Furthermore, Y could have ensured that Z had insurance that covered liability for damage from drilling or that Z was financially solid. The steered under-drilling was carried out in the interest of the main contractor Y.

In those circumstances, Y was the party closest to carrying the risk of damaging X's cable because of Z's drilling, which was considered negligent or reckless. Y was therefore liable for the payment of the expenses incurred by X.

In Summary

The ruling from the Supreme Court confirms the law on liability of the main contractor but also raises a number of interesting aspects, which are too many to cover adequately in this briefing note.

One practical lesson that stands out is that a main contractor should ensure that a subcontractor has adequate liability insurance and that such insurance is sufficient, has not been exhausted by other claims (is “filled up”) and is maintained throughout the relevant operational periods.

From a legal standpoint, the Supreme Court reaffirms that under Danish law there is as a starting point no tort liability for an employer for the damaging acts or omissions of an independently acting subcontractor. Therefore, a separate legal basis must exist in order to deviate from this basic principle.

In Danish jurisprudence, liability is generally distributed through a risk allocation between the parties. If there is work to be carried out, which is subject to considerable risk, and there is a consequent liability with strict professional norms for the party carrying out the work, the courts are hesitant to allow an employer or main contractor to delegate the liability to a subcontractor or collaboration partner.

However, this is always a concrete evaluation and each case will be settled on its own merits. And as stated in the introduction, in oil and gas and in wind, typically an indemnity regime has been adopted which will govern also the allocation of the parties’ liability towards third parties. Furthermore in this case it was probably also of importance that the activity was pressure drilling in an area where cables where present, which was considered a particularly risk-prone operation.

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For questions or comments to this newsletter or energy and offshore in general, please contact Bo Sandroos on +45 4088 5422 or bos@wsco.dk.

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