Claims in tort for pure economic loss struck out

Sainsbury's Supermarkets Ltd. v Condek Holdings Ltd. & Ors [2014] EWHC 2016 (TCC)

Where an employer discovers defects in a building, but the contractor lacks sufficient funds to make it worth suing, the employer may consider bringing an action against someone else involved in the project instead. Often, liability will be asserted on the basis that there was a duty of care in tort to prevent the employer suffering pure economic loss. In this case the Claimant (Sainsbury's) unsuccessfully attempted to bring such a claim. **Alex Hickey** appeared on behalf of Sainsbury's and **Claire Packman** appeared on behalf of the Fourth Party, Capita Symonds Ltd.

In 2006, Sainsbury's procured the construction of a car park at one of its stores. The car park involved a "*novel*" design which had been invented by the Third Defendant, Mr Andreas Pashouros. Although no formal contract to design and build the car park was ever agreed, the First Defendant (the company through which Mr Pashouros carried on business and of which he was managing director) had successfully tendered for the work and subsequently entered into a letter of intent with Sainsbury's to carry out certain preparatory tasks. The project reached practical completion in late 2006. However, the car park later began to manifest defects which allegedly necessitated re-building it. It was common ground that those defects constituted pure economic loss.

When it was carrying out work for the project, the First Defendant engaged another company ("NRM") to assist it with certain aspects of the design. NRM's design work subsequently formed part of the tender submitted to Sainsbury's. NRM was also alleged to have undertaken inspections of the car park after completion and attended meetings with the First Defendant and Sainsbury's, providing design advice. Subsequently, in 2008, NRM transferred its business and assets to Capita Symonds. NRM continued to exist as a separate company but, because of the transfer, it was effectively an 'empty shell', having little in the way of assets.

Due to the financial state of his companies, Sainsbury's decided to join Mr Pashouros to the action, arguing that he had, as director, assumed a personal duty of care to (amongst other things) ensure that the materials supplied for the project were of satisfactory quality and to use reasonable care to ensure that work carried out by others was done in a good and workmanlike manner. Mr Pashouros applied to strike out the claim on the basis that he owed no such duty of care. Before Stuart-Smith J, his application was successful.

Stuart-Smith J said that, to establish that there was a duty of care to guard against pure economic loss on Mr Pashouros' part, "*it will not be sufficient* [that]*…the director does no more than act in a way that is consistent with his position as a director*". In essence, in order to be liable, Mr Pashouros had to have done something over and above what could be expected of him as a director. However, the "*mere fact*" he had created "*a novel design does not impose an obligation upon the designer if he attends site in any capacity to check that the construction is in accordance with the design*". That he had promoted the use of his design through the First Defendant was not sufficient to establish liability either. If liability was imposed simply because Mr Pashouros had used the First Defendant to commercially exploit his invention for his own financial gain, then "*the main benefits of incorporation*

would be lost". Further, Sainsbury's could have also taken steps to safeguard its position by, for example, entering into a duty of care deed. It had made a "*commercial choice*" not to do so and now had to bear the consequences. The claim against Mr Pashouros therefore failed.

To succeed against Capita Symonds, Sainsbury's had to establish that, first, NRM owed it a duty of care which had been breached and, secondly, NRM's consequent liabilities had been transferred to Capita Symonds when it purchased NRM's business. On Capita Symonds' application, Stuart-Smith J again struck the claim out.

First, he held that Sainsbury's could not establish that NRM had owed it a duty of care. That could only be done if Sainsbury's had reasonably relied on NRM's advice, and NRM knew of this. However, as pleaded, Sainsbury's case was "*silent*" on the issue of whether NRM knew it would be relied on by Sainsbury's. Also, there was no evidence about, for example, what questions Sainsbury's had asked NRM at the meetings they had both attended and what advice had been given in response by NRM.

Secondly, Stuart-Smith J considered in the alternative whether, if NRM had incurred a liability to Sainsbury's, it could have transferred it to Capita Symonds. He held that it could not. Sainsbury's argued that the principle of vicarious liability, the shared responsibility of partners for the acts of other partners and the doctrine of subrogation demonstrated that it was possible in law to transfer a liability. Stuart-Smith J rejected these analogies. Properly analysed, they were not examples of the liabilities of one person being transferred to another. In addition, policy considerations also supported the conclusion that it was not open to a tortfeasor to transfer its liability to someone else. If such a transfer were possible, it might lead to the undesirable situation that "*an unscrupulous but solvent tortfeasor* [could]…*transfer his tortious liabilities to an insolvent third party*" to a claimant's detriment. Therefore, NRM could not have transferred any of its tortious liabilities to Capita. In any event, the terms of the business transfer agreement between Capita Symonds and NRM did not have this effect as a matter of construction.

This case is a useful reminder that a court is unlikely to look favourably on an employer who, faced with a contractual counterparty of limited funds, attempts to establish liability against someone else instead. Stuart-Smith J rejected the suggestion that there was a legal "*black hole which the law of tort should fill*" simply because of the financial position of those whom Sainsbury's had (contractual) claims against. Employers who wish to take steps to guard against such risks need to make suitable arrangements to protect themselves (such as through collateral warranties, duty of care deeds or insurance). The alternative option of trying to frame a claim for pure economic loss in tort will be difficult.

Limitation and Extensions of Time for Service

Lincolnshire County Council v Mouchel Business Services Ltd & anr [2014] EWHC 352 (TCC)

Even before the tougher approach to compliance with rules and practice directions recently adopted by the Courts, limitation was the area of the law most likely to cause practitioners sleepless nights. A recent decision of Mr Justice Stuart-Smith has re-enforced the Courts' lack of sympathy for Claimants who fail to progress their claim expeditiously. **James Leabeater** represented the Claimant (the Council); **Lynne McCafferty** represented the Defendant (Mouchel).

The Facts

In summary the Council wished to bring a claim against its former architect (Mouchel) and contractor in relation to allegedly defective damp proofing at a school extension completed in March 2002. The agreement between Mouchel and the Council was a deed, meaning that the Council had 12 years

from the date of breach to bring proceedings. Correspondence between the parties began in late 2009 and continued (without reaching any resolution) for several years. In August 2012, the Council referred the matter to its Legal Services Department. The Department instructed expert consulting engineers who investigated and concluded in February 2013 that the design of the extension had been "*fundamentally flawed*".

Conscious of limitation, the Council issued proceedings on 19 July 2013. By that time it had not (as it was required to) complied with the Pre-Action Protocol for Construction and Engineering Disputes. Although the TCC Guide indicated that the appropriate thing to do in such situations was apply to the Court (with notice to the defendant) for directions for the progress of the claim (which would be likely to involve a stay to accommodate the Protocol process), the Council applied without notice for an extension of time for the service of the Claim Form and Particulars of Claim. The extension sought (and granted) was to January 2014 on the express basis that this was to allow the Protocol to be complied with.

Having obtained its extension, the Council did not adopt a proactive approach to the claim. In late October 2013, a joint inspection of the site took place, and the Council received a further expert report. Thereafter it instructed that letters of claim be drafted against both Defendants, which were finally sent on 3 December 2013. Mouchel provided its response on 24 December 2013 and offered to attend a meeting during the week commencing 13 January 2014.

The previous day, however, the Council had applied – again, without notice - for a further extension of time for service of the Claim Form and Particulars of Claim to 18 April 2014 citing the limited time available for a meeting, and a subsequent mediation, should that be considered appropriate. That application was granted (ex parte). When Mouchel learned of the extension, it applied for the order to be set aside.

The Legal Principles

The Court has a discretion as to whether it will extend time for service of a Claim Form. Perhaps unsurprisingly, the Court of Appeal has emphasised that the weaker the reason provided for the Claimant's failure to serve proceedings within the usual period the less likely it is to be granted an extension (*Hashtroodi v Hancock* [2004] 1 WLR 3206).

Mr Justice Stuart-Smith reviewed a line of authority that the Courts will take an even firmer line where limitation on the underlying action has expired after the date for service that the claimant is applying to extend. In such a situation, the Court of Appeal had concluded that it would be a matter of "*considerable importance*" if an extension might "*disturb a Defendant who is by now entitled to assume that he rights can no longer be disputed*" (*Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806). The Judge identified that there are sound principles of legal certainty underpinning limitation periods, and these should not lightly be undermined by allowing Claimants in effect to extend limitation through successive applications to extend time for service.

The Judge also noted the well-known recent decision of the Court of Appeal in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, emphasising the tougher line now adopted by the Courts towards failures to comply with rules and time limits generally.

The Decision

The Judge subjected the Council's use of the time afforded by the original extension which it had obtained to close scrutiny. He was critical of the failure to take steps between July and September 2013, holding that the excuse offered (essentially, lack of resources in the Legal Services Department) was "*no good reason at all*": a view repeatedly expressed in the post-Mitchell cases. He held that the failure to arrange a joint inspection before late October displayed a lack of urgency, and there was no evidence that experts or counsel (who drafted the letters of claim) had been notified of extreme urgency in completing their tasks.

The Judge rejected the submission that there was a tension between the Courts' reluctance to extend time for service and the TCC Guide's emphasis on the importance of compliance with the Pre-Action Protocol. His view was that the Council should have adopted the course recommended in the TCC Guide and applied for directions, rather than applying without notice for an extension of time. Accordingly, the Judge set aside the second extension which had been granted and struck out the claim as it had not been served in time.

Conclusion

Although it may be tempting to view this case as a further 'post-Mitchell' example of the Courts' tough approach to compliance with the rules, extensions of time to serve Claim Forms were always subjected to close scrutiny, and it is likely that the same result would have been reached on these facts before the Jackson Reforms. It illustrates once again, however, the heavy price which a litigant can pay for delay in progressing its claim at any stage.

Assignment – non-assignment clause – warranty – whether failed assignment can give rise to a trust of the benefit of the warranty

Co-operative Group Limited v Birse Developments Limited (in Liquidation) [2014] EWHC 530 (TCC)

In a judgment of Mr Justice Stuart-Smith, the TCC considered the effect of a purported assignment of the benefit of a contract which contained non-assignment provisions. **Benjamin Pilling** represented the sub-contractor (Jubb). This judgment followed shortly after *Stopjoin Projects Limited v Balfour Beatty Engineering Services (HY) Limited*, in which **Duncan McCall QC** represented an applicant seeking summary judgment against a claim similarly brought under a contract with a non-assignment provision.

Birse was a design and build main contractor for the construction of a large warehouse. Jubb was a subcontracted firm providing engineering consultancy services. Jubb, together with Birse and other subcontractors, provided collateral warranties to the original leaseholder. The warranties permitted assignment only twice without the consent of the warrantor, and thereafter required consent for further assignments. Three assignments of the warranties in fact took place; but consent was not obtained for the third, which was an assignment to Co-op, the claimant, as leaseholder of the property.

The Court considered two preliminary issues: (a) whether a claim in tort by Birse against Jubb, brought 12 years after practical completion, was time-barred; and (b) whether the attempt to assign the benefit of Jubb's warranty without consent gave rise to a trust of the benefit of that warranty in favour of Co-op.

As to the first point, the Court held that Birse's claim was time-barred: Loss to Birse had occurred, at the latest, by practical completion, which was therefore the latest date on which the limitation period commenced. Birse's loss was to be found in its own liability on practical completion, and also in the financial detriment of constructing a development in accordance with a defective design.

As to the second point, the Court held that no trust was created by the attempted assignment: although ineffective, the parties clearly intended the transactions to operate as assignments, and there was no language suggestive of a trust.

Importantly, Mr Justice Stuart-Smith distilled four principles from previous authorities relevant to determining whether or not a failed assignment will operate as a trust:

- The existence of a trust is dependent upon the intention of the parties;
- When deciding whether a failed contract of assignment gives rise to a trust, the intention of the parties is to be derived from that contract and the admissible factual matrix;
- If there is a manifest intention to transfer the benefit of a contract and that cannot legally be achieved except by virtue of a trust, that will be a factor in favour of a conclusion that there should be a declaration of trust; and
- Assignments and declarations of trust are different legal creatures, not least because an assignment transfers the legal and beneficial interest but a trust does not.

This judgment will be very helpful to professionals in the typical construction case, where a professional has given a warranty which is subsequently the subject of an assignment which fails for want of consent. In that case, there will not normally be anything in the language of the attempted assignment which is indicative of an intention to create a trust. What has normally happened is that the parties have overlooked the need for consent. However, different considerations will arise where there is actually some indication in the language of the assignment that the parties were aware that they had a problem with assignment, and were looking to get round that by using the law of trusts.

Applying for an injunction to restrain termination – adequacy of damages where damages limited under the contract

AB v CD [2014] EWHC 1 (QB); ([2014] EWCA Civ 229

As contractual relationships break down amid claim, counter-claim and mutual recrimination, an aggrieved party will frequently try to go to Court to prevent the other from terminating the agreement between them. A recent IT case has illustrated an important issue in the Courts' approach to such applications. The issue was whether a party applying for an injunction to restrain the other from breaching (in this case, terminating) a contract was able to rely upon the fact that damages would be an inadequate remedy in its favour, even though it had agreed damages of the relevant sort would be limited or irrecoverable altogether pursuant to a limitation or exclusion clause. The case came before the TCC at first instance, and was recently the subject of an appeal. **Michael Taylor** represented the Claimant (AB); **Terry Bergin** represented the Defendant (CD). (The identities of the parties were removed from the judgment by agreement.)

The Facts

The parties had entered into a licencing agreement which permitted AB to sell CD's eMarketplace trading platform in the Middle East, together with training and support. The agreement contained detailed termination provisions, and CD sought to exercise its right to terminate the agreement on 180 days' notice. AB disputed its entitlement to do so and, near the end of the notice period, commenced an arbitration to resolve the issue, simultaneously applying for an interim injunction from the Court to restrain the intended termination.

Decision at First Instance

The injunction hearing at first instance came before Mr Justice Stuart-Smith on New Year's Eve. He approached the application on the basis of the well-known *American Cyanamid* principles, a key component of which is whether damages would be an adequate remedy for an applicant should the respondent's termination proceed and subsequently be held to have been unlawful.

AB sought to argue that damages would be an inadequate remedy. It argued that, were the termination to proceed, its business would be destroyed, and it would not be in a financial position to pursue its claim for damages in the forthcoming arbitration. The Judge rejected this as a basis on

which to hold that damages would be an inadequate remedy, but was troubled by the fact that the agreement between AB and CD contained a clause in the following terms:

"… *in no event will either party be liable to the other Party or any third party for… lost profits, … or any … indirect, special, consequential or incidental damages, under any cause of action*…"

In addition to these exclusions, the clause severely limited the total amount of damages which either party could recover from the other by reference to the amount earned under the agreement in the six months preceding termination.

That clause clearly had the potential severely to limit what AB could recover in damages from CD in any future action for wrongful termination. But could that weigh in the balance when such a limitation had been accepted as part of the contractual bargain?

Stuart Smith J considered the decision in *Bath and North East Somerset District Council v Mowlem Plc* [2004] EWCA Civ 115, where the Court of Appeal held that a liquidated damages clause would always be a rough and ready pre-estimate of loss, and that the Court should not shut its eyes to the fact that loss in excess of such pre-estimate would be suffered unless avoided by the grant of an injunction. The Court had stated that a liquidated damages provision was not an 'agreed price' to permit one party to breach the agreement. Against this were two first instance decisions: *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340 (Comm) and *Ericsson AB v Eads Defence and Security Systems Ltd* [2009] EWHC 2598 (TCC). In the latter it was held that "*I cannot see that it is unjust that a party is confined to the recovery of such damages as the contract, which it has entered into freely, permits it to recover.*"

Stuart-Smith J stated that he believed the difference in approach between the *Bath* and *Ericsson* cases to be based on a distinction between a liquidated damages provision, which has as its objective full compensation of a claimant's loss as can best be pre-estimated, and a limitation provision which seeks to remove categories of loss from the scope of recovery. To the extent that AB would receive compensation for any breach which was less than the loss actually suffered "… *that is part of the price that the Claimant agreed to pay when executing the Licensing Agreement*". Accordingly, he held that he was not satisfied that damages could be said to be an inadequate remedy (albeit they were likely to fall far short of the losses which would actually be suffered) and refused to grant AB an injunction.

Unusually, however, the Judge added a postscript to his judgment, admitting to "*a degree of unease*" with the result which he had reached. On the one hand, he could see the justice of approaching the issue on the basis that a party which freely agreed to limit its remedy in damages could not then complain that such a remedy would leave it under-compensated in order to gain an interim injunction. Furthermore he acknowledged that, given the ubiquity of exclusion and/or limitation clauses, to hold otherwise may mean that in almost every case it would be possible for an applicant to rely upon the fact that its remedy in damages would be inadequate, rendering the path to obtaining an interim injunction (which Courts are generally cautious about awarding) a considerably easier one. Leave to appeal was granted.

The Court of Appeal decision

The Court of Appeal overturned the decision of Stuart-Smith J, holding that the existence of such a limitation clause cannot fetter the Court's determination of whether damages will be adequate if a breach occurs. In doing so, it appears to have determined that the previous first instance decisions in the other direction (*Vertex Data Science v Powergen Retail* and *Ericsson AB v Eads Defence and Security Systems*) were incorrect on this point, and followed *Bath and North East Somerset District Council v Mowlem Plc*.

Delivering the leading judgment in the appeal, Lord Justice Underhill held that *Bath* articulated a binding principle which was sufficient to allow AB's appeal. The principle was essentially that a limitation clause was one which applied upon a claim for damages: it would be impermissible to allow it to effectively dictate the availability of an interim injunction to restrain a breach, as this was not part of the agreement of the parties. Lord Justice Underhill also emphasised (as had the Court of Appeal in *Bath*) the injustice of allowing the fact that the parties had agreed to limit remedies for breach of

contract to fetter the Court's role in ensuring that contracts were performed in the first place. To allow otherwise, he held, would be to prevent the Court from intervening even in the face of the most cynical breach of contract where the contract-breaker would have the protection of an exclusion clause. In such a situation the Court should be free to intervene to protect the contractual bargain.

As to CD's submission that this would subvert the commercial agreement of the parties by allowing into the reckoning types of damages which they had agreed to exclude, Lord Justice Underhill countered that the primary expectation was that the contract would be performed, and the Court must protect that expectation: the agreement as to what damages would be available for breach was a separate issue. Lord Ryder stated that he believed the familiar question 'would damages be an adequate remedy' should be re-cast as 'Is it just in all the circumstances that a claimant be confined to his remedy in damages?'

Perhaps of most immediate interest to practitioners is an issue tackled only briefly by the Court: what is the impact of this decision on the availability of interim injunctions generally? It was a part of CD's submissions that to decide as the Court ultimately did would be to expand the availability of interim injunctions, as it would allow an applicant in any case where there was an exclusion or limitation clause (which, in the field of IT contracts, it likely to be almost all of them) to rely upon that clause in establishing that damages would be an inadequate remedy. Lord Justice Underhill emphasised that the impact of the decision should not be overstated: an applicant would need to demonstrate a substantial risk that likely damages would fall within the clause in question, and the Court would wish to assess the scale of any shortfall and the risk of it occurring. Even then, this would only open the door to the Court's exercise of its discretion, not automatically mean that an injunction would be granted.

These limitations are undoubtedly true, but on the facts of most cases seem unlikely to create significant limitations on an applicant's ability to rely on the existence of a limitation clause in support of his application for an injunction. Tackling the issue directly, Lord Justice Laws stated: "*Where a party to a contract stipulates that if he breaches his obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which in justice tends to favour the grant of an injunction to prohibit the breach in the first place.*" With those words ringing in their ears (and subject to any further appeal to the Supreme Court) it seems that applicants for interim injunctions will in many cases have had their positions significantly strengthened by this decision.

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