What can we learn from the Supreme Court about scope of duty and causation of loss?

BPE Solicitors-v-Hughes-Holland (a.k.a. Gabriel-v-Little) & Globalia Business Travel SAU-v-Fulton Shipping Inc.

Gavin Hamilton

3PB

Introduction

1. These two cases were decided by the same panel of 5 Supreme Court judges[1] and judgment given on 22.3.17 and 28.6.17.

2. *BPE Solicitors-v-Hughes-Holland* is concerned with scope of duty and causation of loss in a claim against a solicitor and *Globalia-v-Fulton* with the issue of when it is necessary for the claimant to give credit for a benefit received "in connection with" the defendant's breach of contract.

3. Both claims arose out of the 2008 recession and confirm the slow workings of our legal system when taken to the last appeal, as the core events for each case occurred in 2007 and the ultimate decision has been arrived at nearly 10 years later.

4. Although the cases concern discrete topics, they illustrate aspects of the answer to the same question: for what loss can the claimant in a contractual claim hold the defendant accountable?

5. The cases each provide clear re-statements of principle in a single judgment[2] and show interesting applications of principle to facts that are unusual and challenging.

BPE Solicitors-v-Hughes-Holland [2017] UKSC 21

6. Mr Richard Gabriel was a very successful businessman: as long ago as 1991 he had sold his parcel distribution business for £50 million. The trial judge described him as *"astute"* and *"a hard-headed businessman"*. 23 years later he was bankrupt.

7. He became involved with an acquaintance, Mr Peter Little, back in 2007 on a proposed deal, conceived in a pub. Mr Little's company A owned a water tower on an old airfield. It was not quite clear what had been paid for it. There was planning permission to convert the property into offices. Mr Gabriel believed that the money he was being asked to provide was going to be used to fund the development of the property. He understood that he was to receive back his £200,000, plus £70,000 return, after 18 months. On the face of it, it would be a great investment.

[1] Lords Neuberger, Mance, Clarke, Sumption & Hodge.
[2] Lord Sumption and Lord Clarke respectively.

8. In fact, Mr Little's plan was always different: the £200,000 was to be used to re-finance the property by a sale from company A, enabling it to discharge its secured loan, to company B. Mr Gabriel took virtually no steps to investigate the value of the property or the feasibility of the plan.

9. It did not help that (a) it was Mr Little who gave the instructions, or that they were comprised in a voice-mail, to Mr Spencer, the solicitor at BPE Solicitors ("BPE") acting for Mr Gabriel, and (b) Mr Spencer inadvertently used a draft agreement from an earlier aborted transaction with Mr Little, the terms of which, bizarrely, accorded with and, it was said, fuelled Mr Gabriel's mistaken understanding of the use to which his money would be put: i.e. development not purchase.

10. The advance of £200,000 was made and ownership of the property was transferred from company A to company B. There was in fact no money available for the development and so it never happened.

11. Mr Gabriel exercised his chargee's power of sale in 2009 and the property eventually sold at auction in 2010 for £13,000, all of which was consumed by expenses of sale. He received a mere £8,191.56 from Mr Little on account of his return.

The Claim

12. Mr Gabriel then sued Mr Little, company A and company B for fraud and misrepresentation and BPE for breach of contract, negligence and dishonest assistance in a breach of trust. The first 3 claims all failed.

13. On 10.5.12 the deputy judge, Robert Englehart QC, gave judgment for Mr Gabriel against BPE [2012] EWHC 1193 (Ch).

14. In paragraph 86 he held that there was no duty on the solicitor to advise as to the commercial risk, but that Mr Spencer should have explained to Mr Gabriel that his £200,000 was being paid primarily for Mr Little's benefit by discharging the debt of his company A. Mr Gabriel had accepted in cross-examination that he had not received any advice as to the commercial wisdom of the transaction.

15. In paragraph 88 the judge stated:

"Mr Gabriel was adamant that he would not have lent the money at all if he had known that it was in major part to be used on acquisition of a property for one of Mr Little's companies. I have no doubt that this was so."

16. In paragraph 90 he stated:

"BPE would not be liable if what Mr Gabriel had in mind, that is expenditure of about £200,000 on a property which would not have an acquisition cost, was unviable and bound to fail so that Mr Gabriel would never have recovered his loan."

17. The deputy judge awarded damages of £191,808.44, being £200,000, less interest received of £8,191.56. He did not find there to be any contributory negligence. There was an all-encompassing appeal.

The Court of Appeal [2013] EWCA Civ 1513

18. Judgement was given on 22.11.13[3]. Mr Gabriel's appeals all failed.

19. On BPE's appeal, the deputy judge's finding on liability in relation to there being an obligation to point out that Mr Little was not contributing anything to the venture was overturned. BPE's appeal on causation succeeded on the basis that Mr Gabriel was unable to prove that the venture would have been successful and the judge had been wrong to have put the onus of proving that it would have failed onto BPE.

20. At para. 85, Gloster LJ stated:

"I conclude that, whether one approaches the matter by asking the question whether the losses fell within the scope of BPE's duty, or were caused by breaches of such duty, the judge was wrong to hold BPE responsible for Mr Gabriel's losses in relation to the loan."

21. Further, the Court of Appeal found that if Mr Gabriel had been entitled to recover damages, he was contributorily negligent to the extent of 75%.

The Supreme Court

22. Mr Gabriel was made bankrupt in 3.14 and the case was continued by Mr Hughes-Holland, his trustee in bankruptcy, who appealed to the Supreme Court.

23. There is one very clear and eminently readable judgment from Lord Sumption dismissing the appeal.

Is it Simple or More Nuanced?

24. You might think that Mr Gabriel's claim was very straightforward: his solicitors' errors in not explaining the actual position to him had caused him to make an advance, which the judge expressly accepted that he would not otherwise have made. He had therefore lost the whole of the money advanced and he should have it all back, giving credit only for what he had received. He could never expect to recover the return of £70,000, because to do so would of course require the success of the development.

25. But it was not that simple, because the solicitors were not responsible for Mr Gabriel's prior decision to make the advance. That was something which he had agreed beforehand directly with Mr Little and without any input at all from BPE.

26. Put another way, the investment failed because it was always a bad investment and Mr Gabriel could not use BPE's breach of duty to turn BPE into a guarantor that he would not lose his investment, notwithstanding that that would have been the effect.

[3] Maurice Kay V-P, Gloster, Fulford LJJ. Main judgment: Gloster LJ.

Legal Analysis

27. The decision:

27.1 Upholds the analysis of Lord Hoffman in *SAAMCO*[4] that legal liability does not depend simply on proof of causation in fact and foreseeability of loss.

27.2 Re-states the distinction between the provision of advice and the provision of information, as a key to identifying the consequences for which the adviser or informer will be liable to the recipient of the advice or information.

27.3 Lord Sumption stated at para. 35:

"…where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of his risk, the defendant has no legal responsibility for his decision."

27.4 At para. 36 he stated:

"…the principle has nothing to do with the causation of loss as that expression is usually understood in the law."

and in para. 38:

"…The question which it poses is rather whether the loss flowed from the right thing, ie from the particular feature of the defendant's conduct which made it wrongful. That turns on an analysis of what made it wrongful. Whether one describes the principle in SAAMCO and Nykredit as turning on the scope of duty or the extent of the liability for the breach of it does not alter the way in which the principle applies."

27.5 In para. 42:

"…the fact that the material contributed by the defendant is known to be critical to the claimant's decision whether to enter into the transaction does not itself turn it in an "advice" case."

and in para. 44:

"…every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated."

27.6 The decision of Chadwick J in *Bristol & West Building Society-v-Steggles Palmer* [1997] 4 All ER 582 that the solicitors were liable for all of the consequences of the loan was overruled because *"…of the error….that the mere fact that the breach of duty caused the lender to proceed when he would otherwise have withdrawn was enough to make the solicitors legally responsible for the lender's decision and all its financial consequences. All "no transaction" cases have this characteristic, whether or not the fact withheld or misrepresented goes to the viability of the transaction or the honesty of the counterparty, because in all of them the fact withheld or misrepresented is ex hypothesi sufficiently fundamental to have caused the lender to walk away had he known the truth."*

[4] *South Australia Asset Management Corporation-v-York Montague* [1997] AC 191.

Where does this leave us?

28. It was not sufficient to make BPE liable that it was Mr Spencer's breach of duty that caused Mr Gabriel to advance the money. If BPE had not assumed responsibility for that decision in the first place, then that responsibility was not imposed on them by the factual causation test being satisfied.

29. The result may or may not seem harsh to Mr Gabriel when, despite his own gross lack of attention to detail, he could identify a specific error by Mr Little which, had it not occurred, would have led to his appreciation that the deal was not what he thought it was.

30. The re-statement of principles is welcome, but how often will such extreme facts be encountered?

Globalia Business Travel SAU-v-Fulton Shipping Inc [2017] UKSC 43

31. Charterers took the *New Flamenco* for 2 years expiring 28.10.07. On 8.6.07 a new agreement was made for an extended hire, to expire on 2.11.09. The charterers disputed the agreement and redelivered the ship to the owners on 28.10.07, the original date, but 2 years too soon, as far as the owners were concerned.

32. The owners accepted the redelivery of the ship as a repudiation of the new contract and terminated the charterparty. They then sold the ship for US$23 million. This decision was partly taken in mitigation of loss, since it relieved the owners of the liability for the ongoing running costs of the ship (wages, fuel etc.). Had the charterers not repudiated the new agreement and redelivered on 2.11 09 at the end of the hire, then at that date the ship would only have been worth US$ 7 million, as a result of the huge fall in prices due to the recession.

33. In their claim for damages for lost profit on the charterparty caused by the charterers' breach, did the owners have to give credit for their receipt of the higher sale price? If they did, then the credit (US$23 million - US$7 million = US$16 million) would extinguish their claim for lost profits.

34. The instinctive reaction of many of us would be that they should indeed have to give credit. Indeed at one point in the arbitration, the principle of some credit was even conceded by the owners. The arbitrator and 3 Court of Appeal judges thought credit should be given. But Popplewell J and the 5 JSC disagreed. So the final score was 6:4 in favour of no credit being required.

35. Why is this the legally correct result?

36. According to Popplewell J [2014] 2 Lloyd's Rep 230] *"it was not a benefit which was legally caused by the breach"* (para. 65). The arbitrator's award was only capable of challenge on legal grounds and the arbitrator had erred in law in his conclusion that credit did need to be given.

37. Popplewell J set out the principles in 11 paragraphs, adopted by Lord Clarke, which I paraphrase as follows:

    37.1 For credit to be required, the benefit must be caused by the breach.

37.2 The causation test requires taking into account all the circumstances, including the nature and effects of the breach, the nature of the benefit and loss and any pre-existing, intervening or collateral factors.

37.3 That the breach should provide the occasion or context for the benefit is not sufficient for the breach to have caused the benefit.

37.4 There is no difference in analysing as mitigation of loss or as measure of damage.

37.5 A step may be reasonably taken in mitigation of loss without being caused by the breach.

37.6 In analysing as mitigation, it is not enough to show a causative nexus between breach and mitigating step and then between mitigating step and benefit. There needs to be a direct link between breach and benefit. *"Benefits flowing from a step taken in reasonable mitigation of loss are to be taken into account only if and to the extent that they are caused by the breach."*

37.7 Where the benefit arises from a transaction of a kind which the innocent party would have been able to undertake for his own account, irrespective of the breach, that suggests that the breach is not sufficiently causative of the benefit.

37.8 The benefit does not need to be of the same kind as the loss, but a difference may be indicative that the benefit is not legally caused by the breach.

37.9 Whether a benefit is caused by the breach is a question of fact and degree, answered by considering all relevant circumstances in order to form a common sense judgment on the sufficiency of the causal nexus between breach and benefit.

37.10 While causation is generally necessary, it is not always sufficient – see considerations of justice, fairness and public policy.

37.11 Benefits do not fall to be taken into account, even where caused by the breach, where it would be contrary to fairness and justice for the wrongdoer to be allowed to appropriate them for his benefit, because they are the fruits of something the innocent party has done or acquired for his own benefit.

38. Essentially the judge's conclusion was that the dramatic fall in value from 2007 to 2009 was caused by the fall in the market and it was not caused by the charterers' breach of contract.

39. Further, the owners always had the right to sell the ship (para. 66):

"At the moment of the breach, the owners had a choice whether or not to sell the vessel, as they had at any stage over the unexpired period of the charterparty. If and when they chose to sell, market fluctuations in the vessel's value thereafter would no longer affect them, for good or ill. If the market subsequently rose, the decision to sell might with hindsight seem a poor one; if the market fell it would prove to be a wise one. That was a matter for the owners' commercial judgment and involved a commercial risk taken for their own account…The breach merely provided the context or occasion for the owners to realise the capital value of the vessel. It was the trigger not the cause."

40. The Court of Appeal [2015] EWCA Civ 1299 overturned Popplewell J's decision on the grounds that the relevant principle was mitigation: the sale was an act of mitigation and it necessarily followed that credit had to be given for benefits received by reason of the mitigation. Longmore LJ assimilated the step of mitigating by entering into a new charterparty to secure some hire with the step of mitigating by selling to save costs.

41. In allowing the appeal, Lord Clarke's reasoning was as follows:

    41.1 The owners' interest in the capital value of the ship had nothing to do with the interest injured by the charterers' repudiation of the charterparty (i.e. the loss of hire and the profit gained from the hire).

    41.2 The benefit to be brought into account must have been caused either by the breach of charterparty or by a successful act of mitigation.

    41.3 The lack of a connection was underlined by the fact that the owners could have sold the ship at any time.

    41.4 The owners could not have sold in 2007 and, had the market risen, then claimed the difference between the 2007 price and the price that would have been achieved in 2009.

    41.5 The sale of the ship was irrelevant to the mitigation of the loss of profit, because the relevant mitigation was the acquisition of an alternative income stream.

Conclusion

These cases teach us that an instinctive reaction to questions of scope of duty and loss will often be wrong. Causation in fact is central to any legal analysis, but wisdom will teach us that very often it will not be sufficient. The rules that determine when are there to be found and it is for us to find and apply them.

Gavin Hamilton

Barrister
3PB Business & Commercial

020 7583 8055
gavin.hamilton@3pb.co.uk

3pb.co.uk/business

Unfair terms – a review of recent developments

Seb Oram

3PB Barristers

Selected provisions of the Consumer Rights Act 2015

62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) A term is unfair if, ***contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer****.*

(5) Whether a term is fair is to be determined—

(a) taking into account the nature of the subject matter of the contract, and

(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

(6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

(7) Whether a notice is fair is to be determined—

(a) taking into account the nature of the subject matter of the notice, and

(b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.

(8) [Preserves the operation of certain statutory provisions restricting contracting out.]

64 Exclusion from assessment of fairness

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is **expressed in plain and intelligible language** and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.

(6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

68 Requirement for transparency

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

(2) A consumer notice is transparent for the purposes of subsection (1) if it is **expressed in plain and intelligible language** and it is legible.

69 Contract terms that may have different meanings

(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.

…

Selected provisions of the Unfair Terms Directive 1993[5]

Article 3

1. A contractual **term which has not been individually negotiated** shall be regarded as unfair if, **contrary to the requirement of good faith**, it **causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer**.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

   The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

   Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

[5] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Article 4

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. **Assessment of the unfair nature of the terms shall relate neither** to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, **in so far as these terms are in plain intelligible language**.

Article 5

In the case of contracts where all or certain terms offered to the consumer are in **writing**, these **terms must always be drafted in plain, intelligible language**. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail….

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Seb Oram

Barrister
3PB Business & Commercial

020 7583 8055
seb.oram@3pb.co.uk

3pb.co.uk/business