



Recent case law developments

The following cases all arise from the construction sector, but the issues involved are equally applicable to all professions. It is often the case that a number of parties are involved in a dispute. The following cases give some guidance as to how the Court will apportion liability and damages between the parties.

1. Excluding Liability for Negligence

Professionals and contractors have, on occasions, endeavoured to contractually exclude their liability to the client for certain losses. The Court of Appeal in *Casson -v- Ostley PJ Limited* have emphasised the importance of using clear words in a contract to exclude liability for a party's negligence. In this case, the claimants were claiming damages against a contractor and its sub-contracted plumber following a fire during renovation work at their home. The contractor accepted that the plumber caused the fire and that it was responsible for the plumber's actions. However, the contractor argued that because the claimants had agreed to insure against damage, including fire started by the contractor, the contract between the contractor and the clients excluded liability for the contractor's negligence. Having considered all of the terms of the contract, it was decided that the contractor's argument failed and that it was liable for its negligence, notwithstanding the claimant may still have a right to claim under the insurance policy, in which its case insurers could have brought a subrogated claim against the contractors (see below). The contract did not specifically provide that the contractor was not to be liable for negligence.

The message of the judgment is clear. Any party intending to exclude liability for its negligence should make sure that there is an express exclusion and that it is in very clear terms. Also the whole of the contract document should be checked to make sure that there are no other ambiguous or inconsistent terms which could call into question the express exclusion. This is a significant reminder from the Court of Appeal to all professionals to check written terms of engagement, whether drafted by the professional or by the client, to ensure that the terms of the contract the professional is entering into properly reflect the liability that the professional is willing to accept.

2. Subrogation and Indemnities in Contracts

The essential principle of subrogation is that if a party, most commonly an insurer, has to indemnify another party then the indemnifier can take action, in the name of the indemnified, against a third party to recover payments made under the indemnity.

This principle was considered in the recent House of Lords Judgment of *Caledonia North Sea Limited -v- British Telecommunications and Others*, which arises out of the Piper Alpha disaster. The dispute was

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between the operators of the oil platform, its insurers and the contractors engaged by the operators. An explosion was caused jointly by an employee of the contractors and an employee of the operators. The contractors' appointment provided that if employees of the contractors claimed against the operators for injuries sustained, then the operators would be indemnified by the contractors if, as in this case, the accident leading to the claim had not been caused entirely by the operators. The operators' insurers wanted to make subrogated claims in the name of the operators against the contractors once they had paid out the claim. The contractors argued that the operators' insurers could not make a subrogated claim against them because both they (the contractors) and the insurers were obliged to indemnify the operators and so the parties should share liability 50:50. However, the House of Lords rejected the contractors' argument and the operators' insurers were entitled to a full recovery under the terms of the contractual indemnity. One factor in the decision was that the contract between the operators and the contractors did not require the operators to insure against liabilities.

The important principle therefore is that contractual indemnities, such as the contractors' indemnity to the operators, will be primary liabilities even though other indemnity arrangements, such as the operators' insurance, may exist. This judgment makes it plain that if a professional is hoping to rely on insurance taken out by a client, the right to do so has to be properly recorded in the professional's appointment document.

3. Contribution Claims

A professional defending a claim may have a right of contribution against another consultant or contractor, if that party is also liable to the client. The House of Lords has recently considered the application of Section 1(1) of the Civil Liability (Contributions) Act 1978 which governs contributions between co-defendants. Section 1(1) states that "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)".

In *Royal Brompton Hospital -v- Hammond and Others*, a claimant client had brought proceedings against its architect, who was the contract administrator, in relation to the construction of a hospital. There had been delays by the contractor but the architect had granted an extension, thereby releasing the contractor from liability for its delays. The client sued the architect claiming that the grant of extension had been negligent. The architect, in turn, brought contribution proceedings against the contractor under the 1978 Act. The simple issue was whether the damage suffered by the client, because of the negligent grant of the extension, was the "same damage" suffered by the client as a result of the contractor's delays in completion. The House of Lords decided that it was different damage and that "same damage" meant a single loss caused by two or more defendants, ie. the same actual harm in question that gives rise to the liability. This contrasts with the approach previously adopted by the Court, whereby a causal link between the two breaches of duty was not required. The architect therefore failed to obtain a contribution from the contractor.

This case can be considered to be both good and bad news for professionals, depending on whether the professional is seeking to avoid being joined to an action by another professional/contractor or seeking to join another professional/contractor. In any event, this case will limit the scope for successful contribution claims.

Applying the case to insurance brokers, the consequence is that if a broker fails to place insurance for, say, an owner of a building, and a builder causes a fire, if the broker is found liable (for the loss of indemnity under the policy), he may have no right to seek contribution from the builders for the loss (the cost of remedial work). The House of Lords in *Royal Brompton* overruled the recent Court of Appeal's decision in *Hurstwood* which involved just such a case. If that case were decided now, the brokers may have to meet the entire cost.



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