



CONSTRUCTION PROFESSIONALS – A REVIEW OF RECENT DEVELOPMENTS

David Sears QC
Crown Office Chambers

Remoteness

John Grimes Partnership Ltd v Walter Gubbins [2013] EWCA 37

Held: (1) If the type or kind of loss was, at the time of contract, reasonably foreseeable by the defendant as not unlikely to result from his breach (had he contemplated a breach), then such a type or kind of loss was not too remote. What was known to defendant at the time of contract will clearly be relevant to what was reasonably foreseeable. (2) What was reasonably foreseeable might sometime not prevail as the test if there were particular circumstances demonstrating that the parties could not have contracted on the basis that the defendant was to bear the liability of a particular kind of loss, even though reasonably foreseeable as a “not unlikely” consequence of breach

Hadley v Baxendale (1854) 9 Exch 341

Held: Damages recoverable for a breach of contract should be such as might fairly and reasonably be considered as arising naturally from the breach or might reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. If there were special circumstances which had been communicated by one party to the other, the damages resulting from the breach would be the amount as might have been reasonably contemplated as flowing from such a breach in those circumstances. If those circumstances were unknown to the party alleged to have breached the contract, that party could only be supposed to have contemplated the amount of damages arising generally from such a breach.



Koufos v C Czarnikow Ltd (The Heron II) [1969] 1 AC 350

Where a party is in breach of a contract for the carriage of commodities, the price of which commodities is liable to fluctuate, he ought to have foreseen such fluctuation; accordingly if the price falls this is reflected in the measure of damages. The appellant shipowner entered into a charterparty with the respondents, who were merchants. Under the terms of the charterparty the ship was to be loaded with sugar at Constanza on or after October 27, 1960, and was to proceed therefrom with all convenient speed to Basrah. In fact the ship called at several ports en route to Basrah thus taking some nine days longer to arrive than it would have done had it sailed directly to Basrah. The price of sugar at Basrah fell during those nine days, and in the result the respondents' sugar was sold for GBP 4,183 16s. 8d. less than it would have been had it arrived promptly. Disputes having arisen an umpire found as facts, inter alia, (a) that sugar was regularly bought and sold at Basrah, which fact was known to the appellant; (b) that the price of sugar there fluctuated from time to time; (c) that shipowners generally knew that there was some urgency in carrying sugar, a perishable commodity, to its destination; and (d) that the appellant did not know that the respondents intended to sell the sugar promptly on arrival. The appellant admitted that the delay was in breach of the charterparty.

As to the measure of damages, held (1) that on the facts the appellant ought to have foreseen that delay would involve a serious possibility of a real danger that the price of sugar would decline; and (2) that the proper damages were therefore GBP 4,183 16s. 8d., the difference between the price which the sugar ought to have fetched if it had arrived on time and the price which it in fact fetched. (The "serious possibility of real danger," per Lords Upjohn and Pearce, was expressed in differing terms by Lords Reid, Morris of Borth-y-Gest, and Hodson.)

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 AC 61

Held: In accepting the shipowner's submission that what mattered was that the type of loss claimed was foreseeable, the majority arbitrators had applied too crude a test, and it was an error of law to adopt it. The common basis on which the parties had contracted was essential to the rule in *Hadley v Baxendale* as a whole. In *Koufos v C Czarnikow Ltd (The Heron II) [1969] 1 A.C. 350* their Lordships had had well in mind that it was not simply a question of probability but also of what the contracting



parties had to be taken to have had in mind, having regard to the nature and object of their business transaction. What mattered was whether the common intention of reasonable parties to a charterparty of this sort would have been that, in the event of a relatively short delay in redelivery, an extraordinary loss, measured over the whole term of the renewed fixture, was, in the words of Lord Reid in *The Heron II*, "sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within [the defaulting party's] contemplation". That would not have been the common intention of reasonable contracting parties. It was contrary to the principle stated in *Victoria Laundry (Windsor) v Newman Industries [1949] 2 K.B. 528*, and reaffirmed in *The Heron II*, to suppose that the parties were contracting on the basis that the charterer would be liable for any loss, however large, occasioned by a delay in redelivery in circumstances where it had no knowledge of, or control over, the new fixture entered into by M, *Hadley v Baxendale*, *The Heron II* and *Victoria Laundry* applied.

Supershield Ltd v Siemens Building technologies Ltd [2010] EWCA Civ 7; [2010] 2 All E.R. (Comm) 1185; [2010] 1 Lloyd's Rep. 349

Held: A contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach, *Hadley v Baxendale* 156 E.R. 145 considered and *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350 followed. However, there were cases in which the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely, *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 and *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61 considered. Logically the same principle might have an inclusionary rather than an exclusionary effect so that if, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it could not be regarded as too remote, even if it would not have occurred in ordinary circumstances. The instant case was one in which there had been simultaneous failure of two protection devices, the valve and the drains. Where that happened it should be no defence for the person responsible for one of them to say that what had happened was unlikely. It was always possible that the second means of protection, the drains, might also fail. The flood which resulted from the escape of water from the sprinkler tank, even if it was unlikely, was within the scope of S's contractual duty to prevent. (4) The



judge was entitled to conclude that S had shown that it was reasonable to settle the claims made against it as it did.

Earl's Terrace Properties Ltd v Nillson Design Ltd [2004] EWHC 136 (TCC)

Held: (1) Where the architect's scope of the duty was defined as encompassing architectural services for a commercial residential development of houses at the top end of the market in terms of price, luxury, location and facilities, the recoverable consequential loss naturally and foreseeably linked to that scope of duty would obviously extend to the direct costs associated with the delay in completion caused by the defects in their repair. (2) This loss would not, however, normally extend to losses occurring after completion including losses arising out of the sale of the properties as a result of the downward movement in property prices unless the scope of the architect's duty had been defined so as to include this loss and the possibility of its occurring had been brought to the architect's attention at the time of contract so as to bring it within the second limb of the *Hadley v Baxendale* rules.

Limitation of liability

Trustees of Ampleforth Abbey Trust v Turner & Townsend [2012] EWHC 2137 (TCC)

Held: (1) P owed T a duty to exercise reasonable care and skill for the purpose of procuring an executed building contract and P was in breach of that duty by failing to execute the contract or exert sufficient pressure on K to finalise the contract (paras 72-77, 97-126 of judgment). That breach of duty caused T loss because if P had not been in breach of duty, T would have taken steps to ensure that it procured a contract and there would have been a real and substantial chance that K would have executed a contract that contained a provision for liquidated damages (paras 129-134 and 141). (2) With regard to the quantum of T's loss, if a contract had been in existence, T and K would have negotiated a reasonable settlement of the dispute. The value of the settlement to T would have been £340,000, taking into account the price that T would have paid to achieve the execution of the contract (paras 187 -191). T was entitled to recover two-thirds of that amount, having regard to the size of the chance that K would have signed the contract. Although the terms of P's contract with T included a limitation clause, P was not entitled to rely on that clause to limit its liability for damages to T (paras 193-202).