Personal Injury: CA gives green light to exemplary damages in insurance fraud cases AXA Insurance UK plc v Financial Claims Solutions Ltd and others [2018] EWCA Civ 1330

David Willink

Exemplary damages are a narrow exception to the rule that damages are compensatory, not punitive. This case is a paradigm example of when they are appropriate.

Axa found bailiffs at its door, instructed by solicitors to enforce default judgments under s.151 RTA amounting to £85,000. How had this happened?

The "solicitors" (the respondents) were not solicitors; the claimants, accidents, medico-legal expert and credit-hire company were all fictitious. Service of documents had consisted of sending bundles of junk mail by registered post, to create evidence of "service".

Once the fraud was unraveled, Axa claimed the costs of defeating it (£25,000), and exemplary damages. At first instance, the costs were recovered, but the claim for exemplary damages was dismissed.

Exemplary damages are appropriate when:

> "…the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff …" *Rookes v Barnard* [1964] AC 1129.

The court had interpreted this to say that exemplary damages were:

> "available for the case where compensatory damages are inadequate to remove the wrongful gain achieved by the tort - where paying compensation in accordance with the normal principle would leave the tortfeasor 'up on the deal'."

In this case, the looked-for profit (the £85,000) would all come from Axa; and if successful, the fraudsters would have been liable to Axa for the full amount. There would have been, therefore, no "unreachable" profits, and so exemplary damages were inappropriate.

The Court of Appeal disagreed.

The test was not whether there would have been unreachable profits had the fraud succeeded. Rather:

> "What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty." *Broome v Cassell* [1972] AC 1027

In other words, the hoped-for profit if successful must outweigh the potential cost if unsuccessful.

This was a paradigm case for exemplary damages. The cost at risk was far less than the hoped-for profit; the fraud was sophisticated and sustained; and there is a need to deter insurance fraudsters. Each respondent was ordered to pay exemplary damages of £20,000.

Insurance companies will note the Court of Appeal's clear green light to claims for exemplary damages against insurance fraudsters.

Administrators

Graeme Kirk

Administration is an alternative to liquidation, for which legislation is now contained in Schedule B1 to the Insolvency Act 1986.

Custody and control of a company's assets is handed to an Administrator (a suitably qualified Insolvency Practitioner) for a period of one year which may be extended. The Administrator must act quickly and efficiently to give effect to the interest of the creditors, and may do anything *"necessary or expedient for the management of the affairs, business and property of the company"*.

Administration has a prescribed list of objectives: to rescue the company as a going concern, to achieve a better result than winding up and, only if those priorities cannot be achieved, to realise property for distribution to creditors.

A company may be placed into administration by the Court on an application by the company, its directors or creditors, or by a Magistrates Court recovering fines. A creditor with a qualifying floating charge may appoint an administrator without the Court's intervention if the charge itself permits it.

In Re. TPS Investments (UK) Ltd [2018] EWHC 360 (Ch), HHJ Stephen Davies emphasised that an application to remove an Administrator should only be made after careful consideration, deprecating the application before him as tactical and precipitate. Consistent with the overriding objective, he concluded that *"such applications should never be made without careful consideration of the position and an attempt made, by both sides acting co-operatively, to proceed in a constructive and time and cost-efficient manner. Instead the application has served only to waste time and costs and make the resolution of matters generally more difficult"*.

A minor defect in giving notice of appointment to creditors was waived in Re. BXL Services Ltd [2012] EWHC 1877 (Ch), the Court adopting a purposive approach. This was contrary to the earlier stricter view taken in Minmar Ltd v Khalastchi [2011] EWHC 1159 (Ch).

Re. Care People [2013] EWHC 1734 (Ch), concerned the slightly premature appointment of an Administrator according to the terms of a floating charge. HHJ Purle QC concluded that this *"is properly characterised as a defective exercise of an undoubted power of appointment, which is procedural in nature but not fundamental to the existence of the power … I do not consider that the requirement … is of such fundamental importance as to render the appointment a nullity"*.

Whether Administration was likely to achieve a better outcome for creditors than liquidation was considered in Baltic House Developments Ltd v Cheung [2018] EWHC 1525 (Ch). HHJ Eyre QC said: *"I remind myself of the comparatively low hurdle that the Applicant has to surmount, but even in the light of that low hurdle, I am not satisfied that it has shown a real prospect of achieving the better result as is required for an order to be made"*.

COMPANY LAW: The limits of the rule against reflective loss

WINSTON JACOB

Does the rule against reflective loss apply to claims by unsecured creditors who are not shareholders of the relevant company? Yes, said that Court of Appeal in *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468.

If a company (C) has a claim against a party (A) for losses suffered by C, the rule against reflective loss precludes a shareholder of C from suing A directly for any consequent loss in the value of its shares. The loss to the shareholder merely reflects the loss to C. If C were to recover its own losses from A, the value of the shares would be restored. The rule does not bar a cause of action; merely recovery of a particular type of loss.

In attempting to provide more certainty to this area of law, the Court of Appeal decided that the rule against reflective loss precluded a claim by an unsecured creditor of a company just as much as it did a claim by a shareholder. Flaux LJ noted that it was difficult to see why a claim by a creditor who had one share in a company should be barred whereas a claim by a creditor who was not a shareholder should not.

In *Giles v Rhind* [2002] EWCA Civ 1428, the Court of Appeal established an exception to the rule, by allowing a shareholder to bring a claim for loss that reflected the loss to the company in circumstances where the company was unable to pursue the claim itself. The Respondent in *Garcia v Marex* argued that this exception applied, as it alleged that the Appellant had dishonestly stripped two companies of assets, leaving them without funds to pursue a claim against him. The Court of Appeal concluded that this was insufficient to bring it within the exception.

Flaux LJ held that the *Giles v Rhind* exception was a narrow one, applicable only where the consequence of the defendant's wrongdoing was that the company no longer had a cause of action and it was legally impossible for it to bring a claim. It did not apply where the company merely lacked the funds to bring a claim due to the defendant's wrongdoing. If a third party, such as the Respondent, could put the company in funds to enable it to bring a claim, the *Giles v Rhind* exception did not apply.

The Court of Appeal's decision has confirmed both a wide ambit for the rule against reflective loss and a narrow ambit for the *Giles v Rhind* exception. Successful claims for reflective loss are therefore likely to be few and far between in future.

Another Knotty Issue

Adam Swirsky

In an earlier article we looked at the issues arising out of litigation connected to Japanese Knotweed. Generally, there are two types of case. Claims brought by property purchases against vendors' who have failed to disclose its presence and claims by land owners against neighbours where knotweed has spread from adjacent land. This article concentrates on the second category.

In **Williams & Waistell v Network Rail** the owners of two houses brought a claim against Rail Track because knotweed had spread from the Defendant's land into their gardens. The house owners claimed damages based on private nuisance and, at first instance, succeeded on the ground that there had been an unlawful interference with their enjoyment of their property. An alternative claim based on encroachment failed because there was no actual physical damage to their houses.

The Defendant appealed and the decision of the court of appeal has now been published (**Network Rail Infrastructure v Williams & Waistell [2018] EWCA Civ 1514**). The Defendant's principal challenge was against the Recorder's conclusion that pure economic loss (diminution in the value of the Claimants' properties) was actionable in private nuisance on the basis that it interferes with the quiet enjoyment of a Claimant's property.

On this point the Court of Appeal agreed with them, explaining that the purpose of the tort of nuisance is not to protect the value of property as an investment but to protect a land owner's enjoyment of their property and did not extend to pure economic loss. However, the court also reconsidered the Recorder's dismissal of the encroachment claim. Reversing his decision, they found that the presence of knotweed not only carries the risk of future physical damage to buildings and structures but that the mere presence of its rhizomes imposes an immediate burden on the owner of land in terms of an increased difficulty to develop (and in the cost) should the owner wish to do so. The court concluded that there is no reason why the legal position concerning nuisance caused by the encroachment of the branches or roots of trees should undermine the right of the Claimants' to claim damages for nuisance by reason of the encroachment of Japanese knotweed.

The net effect of this decision is that it should now be easier for a landowner to bring a knotweed claim against a neighbour.