Insight 192

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on:

The Court of Appeal's approach to the potential civil liability of a UK domiciled ship broker for the death of a worker in a third party shipyard in Bangladesh. If the claimant can overcome the limitation hurdle and the claim is ultimately successful, this could have far reaching implications for the development of the law of tort.

Malcom Henké
Partner & Head of LACIG
malcolm.henke@h-f.co.uk

London based ship broker's civil liability for death of a shipyard worker in Bangladesh?

Begum v Maran (UK) Limited (2021) EWCA Civ 326

Background

The claimant/respondent was the widow of Mohammed Khalil Mollah ("the deceased") who had worked in shipyards in Chattogram, Bangladesh ("the yard") for approximately nine years. On 30 March 2018, whilst working on the demolition of an oil tanker ("the vessel") he fell to his death.

The defendant/appellant was not the owner of the yard and/or the deceased's employer but a company registered in the UK who provided agency and shipbroking services in respect of the vessel and 28 other ships. One of the Defendant's services was the negotiation and agreement of contracts of sale as and when ships reached the end of their working lives.

In short, the claimant argues, and the defendant disputes, that the defendant had complete control over the sale of any of the vessels, including who it was sold to and the price, and that the defendant knew that achieving a high price for the vessel meant that it would end up in Bangladesh at a yard in highly dangerous working conditions.

The defendant resists the claim, arguing that the seller of a ship owes no duty in respect of dangerous practices that might later occur in relation to her, and over which they have no control.

Procedural position

The proceedings, commenced on 11 April 2019, were brought for damages for negligence under the Law Reform (Miscellaneous Provisions Act) 1934 and the Fatal Accidents Act 1976; alternatively, under Bangladeshi law. Amended particulars of claim advance a cause of action in restitution for unjust enrichment.

There is no dispute that the proceedings were commenced outside the one year limitation period under Bangladeshi law, and that issue may ultimately be the end of the claimant's case. However, the appeal is in relation to the decision of Jay J handed down on 13 July 2020, where he refused the defendant's application for reverse summary judgment under CPR Part 24.2, and a related application to strike out the claim under CPR Part 3.4.

Decision of the High Court

It is important to note that, solely for the purpose of the applications, the defendant was content to proceeded on the basis that the "beaching" method of demolition carried out in India, Pakistan and Bangladesh is an inherently dangerous working practice, and English Law principles should be applied to the duty of care owed to the claimant.

In declining to strike out the claim, the Judge found that it could not be said that the duty of care alleged on behalf of the claimant would certainly fail. In so doing, he regarded it as an arguable case that the defendants had created a foreseeable risk of harm and that it was arguable that there was a duty of care owed to the worker concerned and the case should be allowed to proceed to trial.

In relation to limitation, applying the Bangladeshi law which imposed a strict limitation period of one year which had not been complied with, he decided there were arguments available to the claimant under Articles 7 and 26 of Rome II which he could not resolve by way of interim application, which meant that he could not say that the claim was definitely statute barred.

Decision of Court of Appeal

Summary Judgment

The claimant argued either that the defendant had owed her husband a duty of care on the principle of *Donoghue v Stevenson* [1932] AC 562, or that their sale of the vessel, when it should have known that it was likely to be demolished dangerously, had created an immediate danger to her husband's life and thus engendered a duty in respect of the bad practices of his employers.

The Court of Appeal looked at the case in a three-stage test and concluded that:

- The widow's claim could not be dismissed as "fanciful"
- This was not a case where there was no realistic prospect of success
- It was arguable that the defendant owed a "duty of care" to the deceased

Realistic vs fanciful:

Does the claimant have a "realistic" as opposed to a "fanciful" prospect of success? A realistic claim was one that carried some degree of conviction but that should not be taken too far. The court was determining whether or not the claim was "bound to fail".

Taking the first argument, the claimant would need to establish that the defendant had a duty to take reasonable care to avoid acts or omissions which it could reasonably foresee would be likely to injure the deceased, and that the deceased was his 'neighbour' because he was "so closely and directly affected by [the defendant's] act that [the defendant] ought reasonably to have him in contemplation as being so affected when [it] was directing its mind to the acts or omissions which were called in question".

The Court of Appeal took the view that foreseeability alone could not create a duty of care.

Looking at the second argument, that the case fell into one of the recognised exceptions to the usual rule that A would not be liable for harm done to C caused by a third-party B. The exception arose where A was responsible for or had created the danger which B had then exploited and that had caused harm to C.

The Court of Appeal held that this way of putting the claim was arguable, and not fanciful. The 'creation of danger' was a recognised exception to the usual rule as to the intervention of third parties which might give rise to a duty of care. The defendant arguably played an active role by sending the vessel to Bangladesh, knowingly exposing workers (such as the deceased) to the significant dangers which working on this large vessel entailed.

The yard's failure to provide any safety harnesses or any other proper equipment, and the tragic consequences of their not doing so, were entirely predictable. This might properly be described as an unusual extension of an existing category of cases where a duty had been found, but it would not be an entirely new basis of tortious liability.

Mini-trial:

The court must not conduct a mini-trial. Although the court should not automatically accept what the claimant said at face value, it would ordinarily do so unless its factual assertions were demonstrably unsupportable. The court should also allow for the possibility that further facts might emerge on discovery or at trial.

It was doubtful whether, at trial, a court would reach a finding of a duty of care in the present case on *Donoghue v Stevenson* principles. However, this was not the trial: it was an interim application for summary judgment by the defendant. This way of putting the case might not be straightforward, might even be unlikely to succeed at trial; but, like the judge, the appellate court could not conclude that it was so fanciful that it should be struck out.

Limitation:

In order to avoid the striking out, the claimant also had to show that the claim was not statute barred. There was a discreet issue relating only to the documents and other information that was available to the defendant's solicitors about the date of the accident between 22 January 2019 (the date of the letter of claim) and the expiry of the limitation period, which was not brough to the attention of the Hight Court.

The claimant had to persuade the court that she had an arguable case to disapply the strict one-year limitation period imposed by Bangladeshi Law, relying on either Article 7 of the Rome II Regulation (which applies to claims arising from environmental damage) and/or Article 26 (that it is manifestly incompatible with the public policy of the forum), or that one or both of those issues should not be decided now, but instead be resolved by way of some form of preliminary issue.

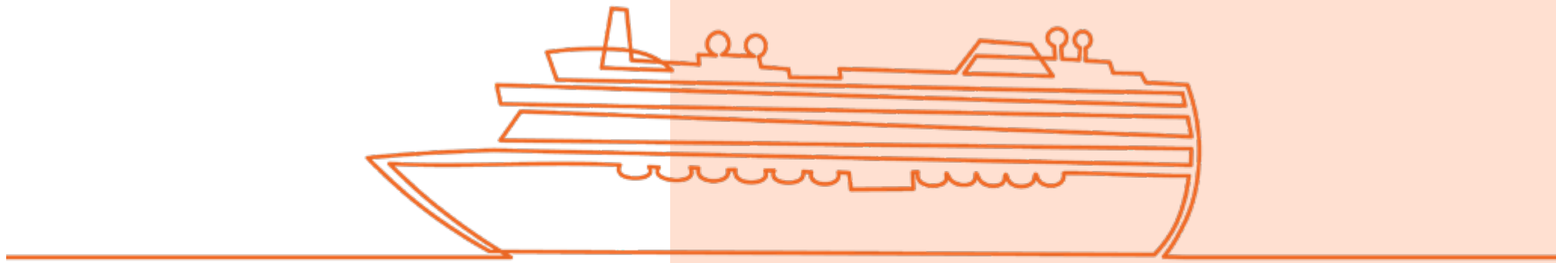
Coulson LJ was clear in his view and concluded that the claim is statute barred; Article 7 does not apply, and that Article 26 does not apply unless the Claimant is able to establish, within the confines of the particular issue above, that undue hardship applies.

Commentary:

If the claimant fails to establish undue hardship and the claim goes no further, there will be sighs of relief in some boardrooms.

If she succeeds, the Court of Appeal has left open for argument that a London based ship broker might have civil liability for the death of a worker in a shipyard in Bangladesh.

However awful the circumstances, the ability to sue a UK-domiciled company as of right disappeared with Brexit. Unless the UK adheres to the Lugano convention any future claimant with no ostensible connection to England will face a forum challenge.



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