Big bang theory

Ian Pease reviews a case revolving around a beneficial owner's right to claim for economic loss

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On 11 December 2005 the biggest peacetime explosion in western Europe occurred just outside Hemel Hempstead in Hertfordshire. The legal conseqences of the Buncefield event are still being felt. On 4 March 2010 the Court of Appeal gave its judgment on two appeals by Total and Shell.

Background

The Buncefield depot was a large and strategically important fuel storage site used by a number of oil companies. The explosion affected not only the local (and not so local) community but also Total, BP, Shell and Chevron, all of which used the site. In *Shell UK Ltd & ors v Total UK Ltd & ors* [2010] Total argued at first instance that the relevant defendant was a company called HOSL (a Total-Chevron joint venture) that ran the part of the Buncefield site on which the main explosion occurred. If Total had succeeded the losses would have been split between it and Chevron 60:40, in accordance with the joint venture agreements. Chevron, on the other hand, argued that Total was solely vicariously liable.

Judge David Steel found for Chevron on that point, and Total did not appeal that finding. However, it did seek to reverse the judge on the applicability of the indemnity provisions in the various agreements between Total and Chevron. That appeal depended on the proper construction of the various agreements between the parties.

Of greater general interest was the appeal by Shell, in which the judge found that the economic losses Shell suffered because of the unavailability of parts of the terminal were not recoverable.

Shell's claim for economic loss

Shell had three heads of claim:

- the loss of aviation fuel stored immediately before the explosion in tanks on a part of the site owned and operated by WLPS and UKOP;
- losses suffered as a result of Shell's inability to supply aviation fuel to various airports (or supplying it only in reduced volumes and/or at increased cost) from the WLPS/UKOP part of the site; and
- losses as a result of Shell's inability to supply vehicular fuel by tanker from HOSL's part of the site (or supplying it only in reduced volumes and/or at increased cost).

The first of these claims, not being a claim for pure economic loss, was not contested at first instance. The judge noted:

> Subject only to the issue of whether Total or HOSL were vicariously liable for the admitted negligence... it was accepted that there was no defence to the lost fuel claim advanced in negligence.

The other two claims were consequential claims, and Total's position was set out as follows in the list of issues:

> ... if and insofar as physical damage has been caused to assets of which WLPS/UKOP (as the case may be) is the legal owner, then that owner is entitled to bring claims in respect thereof (and any recoverable consequential losses) in its own name against those legally responsible for causing such loss and/or damage. Insofar as such claims are brought in respect of or as a consequence of damage to assets which WLPS/UKOP (as the case may be) holds on trust, then any damages recovered are to be

held on trust for the beneficiaries, and apportioned in accordance with the beneficiaries' respective interests. It is not appropriate for a party with a mere beneficial interest, such as Shell alleges it has, itself to bring a claim against the alleged tortfeasor(s) in respect of loss due to physical damage to assets of which it is a beneficial owner, or loss and damage consequential thereto.

The bottom line was that Shell was not the legal owner of the WLPS/UKOP part of the site. It was, however, part of the consortium that owned the site, so it had a beneficial interest. Before the judge, Shell partly accepted the established legal principle that to have a right of action the claimant has to have more than a mere contractual interest in the damaged property. The cited authorities go back to *Cattle v Stockton Waterworks* [1875] and *Simpson & Co v Thompson* [1877] and have been more recently endorsed in *Leigh & Sillavan v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986]. See Lord Brandon at p809:

> My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.

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Shell therefore claimed either that:

- it was entitled to immediate possession of the WLPS/UKOP site;
- its claims fell within two exceptions to the general rule (*Morrison Steamship Co Ltd v Greystoke Castle* [1947] and *Caltex Oil (Australia) Pty v The Dredge 'Willemstad'* [1976]); or
- the above rule was no longer good law.

The outcome

At first instance, given the weight of authority, the last contention was going to be a non-starter, and so it proved. The possessory title was also going to be difficult to show, as WLPS and UKOP had actual possession of the facilities. Hence Shell was forced into saying that it had a 'right to' possession, but was that sufficient to found a claim? Having reviewed the authorities the judge found that:

> ... an *immediate* right to possession... does afford a sufficient interest in

> property to allow recovery for losses flowing from damage to or loss of the property. [Emphasis added.]

Did Shell have such a right?

Shell submitted, *inter alia*, that it did, because it had a right to use the assets. WLPS and UKOP managed the assets on the participants' (Shell, BP, Total and Chevron) behalf, and was obliged to act on instructions from the participants' co-ordinating committees. Finally, it was open to the participants to terminate the trust and call for transfer of the assets. Hence WLPS and UKOP were no more than bailees of the assets.

The judge could not accept this, finding that WLPS and UKOP were joint venture vehicles established to hold the title of the real estate interests at Buncefield. The immediate possession contention therefore failed.

As to the two legal exceptions to the normal rule, the judge found that they did not apply in the particular circumstances of this case. Hence the Shell consequential loss claims failed at first instance.

On appeal

It is often said that appellate courts, in order to do justice, start with the conclusion that they want to reach and work back to their reasoning. The starting point is almost always to distinguish the authority that stands in their way. So it was here. The Court of Appeal, after considering *The Aliakmon*, concluded:

> 131. It is fair to say that Lord Brandon's speech in *The Aliakmon* does not resolve the question which divides the parties in this case. Nor were we referred in oral argument to any commentators who have precisely addressed it...
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> 132. In the absence of any directly applicable authority, it is necessary to look in a little more detail at the exclusionary rule and the rationale for it.
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> [...]
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> So, on the facts of this case Total, who has admittedly damaged the pipelines owned by UKOP Ltd and WLPS Ltd, submits that it owes no duty to Shell who has a contractual right to have its fuel loaded into, carried and discharged from the pipelines. If Shell was a complete stranger to the transaction that would be understandable but Shell is not a complete stranger. It is the (co-)beneficial owner of the pipelines and the contract to use the pipeline is only an incident of its beneficial ownership (albeit a necessary incident, since it is a co-owner of the pipelines with others who also wish to use it). On the face of things, *it is legalistic to deny Shell a right to recovery* by reference to the exclusionary rule. It is, after all, Shell who is (along with BP, Total and Chevron) the 'real' owner, the 'legal' owner being little more than a bare trustee of the pipelines. [Emphasis added.]

Importantly, the court asked itself what the purpose of the legal rule was, concluding that the rule arose because otherwise many other actions from persons with a mere contractual interest would arise, and that would lead to the law redressing more than 'the proximate and direct consequence of wrongful acts'. This is the 'floodgates argument'. In the words of the editors of *Clerk and Lindsell*:

> To allow all claims for such economic loss would lead to unacceptable indeterminacy because of the ripple effects caused by contracts and expectations. Proximity requires some special relationship between the defendant and the person suffering relational economic loss, one which goes beyond mere contractual or non-contractual dependence on the damaged property.

The court concluded that beneficial ownership of the damaged property goes well beyond contractual or non-contractual dependence on the damaged property, and constitutes a special relationship of the kind required by the editors.

The court prayed in aid *Chappell v Somers & Blake* [2004], decided by Neuberger J (now Master of the Rolls), which concerned an action by an executrix who, in a position analogous to a trustee, sued solicitors both in contract and in tort. The court concluded:

> We do not think *Chappell* was wrongly decided and would be prepared to hold that a duty of care is owed to a beneficial owner of property (just as much as to a legal owner of property) by a defendant, such as Total, who can reasonably foresee that his negligent actions will damage that property. If, therefore, such property is, in breach of duty, damaged by the defendant, that defendant will be liable not merely for the physical loss of that property but also for the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner is put or the loss of profit which he incurs. Provided that the beneficial owner can join the legal owner in the proceedings, it does not matter that the beneficial owner is not himself in possession of the property.

The court in Shell & ors v Total & ors *concluded that beneficial ownership of damaged property goes well beyond contractual or non-contractual dependence on the damaged property.*

Comment

The courts' construction of contractual terms has long emphasised the commercial and business-like (*Lesotho Highlands Development Authority v Impregilo* [2005] being but one example). The aim, of course, is to provide for a result that does justice to the parties' intentions. *Shell v Total* is merely the extrapolation of that desire to cover the cause of action itself. ■

Caltex Oil (Australia) Pty v The Dredge 'Willemstad' (1976) 136 CLR 529

Cattle v Stockton Waterworks (1875) LR 10 QB 453

Chappell v Somers & Blake [2004] Ch 19

Leigh & Sillavan v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] AC 785

Lesotho Highlands Development Authority v Impregilo [2005] UKHL 43

Morrison Steamship Co Ltd v Greystoke Castle [1947] AC 265

Shell UK Ltd & ors v Total UK Ltd & ors [2010] EWCA Civ 180

Simpson & Co v Thompson (1877) 3 App Cas 279