FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Single joint experts

Stellantis Auto SAS & Ors v Autoliv AB & Ors

[2024] EWCA Civ 609

This was a case where the Competition Appeal Tribunal ("**CAT**") ruled that the defendants' economic expert evidence should be given by a single expert shared between the three (now two) groups of defendants involved. The CA rejected an appeal against that ruling on the grounds that there was a conflict of interest between the defendant groups.

Even though the single joint expert ("**SJE**") is rarely used in construction cases, often because experts are instructed at an early stage of any dispute, the case is interesting for the comments made by the CA about the principles applying to the use of the SJE.

The parties both proceeded on the basis that there was no relevant difference between the principles applicable to expert evidence in the CAT and the civil courts of England and Wales under the CPR. SJEs can be instructed by both sides or, as here, an SJE can be instructed by distinct groups of defendants. Birss LJ considered that a court direction for an SJE to give evidence in place of separate experts from distinct parties in the proceedings, like any other direction giving permission for expert evidence, was governed by two primary dimensions. One is the overriding objective – namely, that the court will seek to ensure that the case is dealt with justly and at proportionate cost. The other is the duty to restrict expert evidence – in other words, to limit it to that which is reasonably required to resolve the proceedings in issue.

Often, SJEs are considered in the context of low value cases when proportionality is important. However, the same principles apply irrespective of the value at stake. The SJE will often be appointed where the claimant and the defendant have what the judge described as a "manifest" conflict of interest, not just in the case overall but in relation to the very matter on which the single joint expert will express an opinion. However, ultimately, the SJE, whose overriding duty is to the court, will come to their own view of the issue.

Birss LJ noted that the "stance" of the court was always that it has a duty to restrict expert evidence to that reasonably necessary to decide the case. The fact a party requires expert evidence to advance its case does not necessarily justify separate experts. The expert's overriding duty to help the court means that experts are required to, and do, express views on matters which the party calling them would rather were put in a different way or not put at all. That is why the duty is an overriding one. It is not a justification for separate experts.

Birss LJ noted that the power to order a single joint expert "*will more usually*" be capable of being exercised when it appears to the court that "*the issue falls squarely within a substantially established area of knowledge and where it is not necessary for the court to sample a range of opinion or where the issue is uncontroversial*". That said, single joint expert evidence is not confined to uncontroversial matters.

The judge also accepted that proportionality, which is one aspect of the overriding objective and governing principles, is not the only consideration. The fact that the value of the case means that the cost of separate evidence would not be disproportionate to what is at stake does not on its own rule out a direction for a single joint expert. The just disposal of the case is also a vital consideration.

When it comes to the use of the SJE, the judge agreed that they tend to be used in smaller claims, with the use of the SJE in "*heavy and complex cases*" being more limited, although that was not to say that the scope for using the SJE was necessarily more limited in those cases. Indeed, in the case here, one reason for the use of the SJE was the potential for a "*multiplicity of economic models and sets of parameters*".

Debt claims & the deemed fulfilment of conditions precedent

King Crude Carriers SA & Ors v Ridgebury November LLC & Ors

[2024] EWCA Civ 719

There is an old legal principle rising out of the Scottish case of *Mackay v Dick & Stevenson* (1881) 6 App Cas 251, which says that where a party wrongfully prevented the fulfilment of a condition precedent to a debt, the condition would be deemed fulfilled, with the result that the debt accrues. In other words, a party which, in breach of contract, prevents the fulfilment of a condition precedent to their obligation to pay a debt cannot rely on the unfulfilled condition to escape their liability to pay.

The issue arose here in a dispute about the ship purchases. The buyers were supposed to provide certain documents to enable lawyers to open an escrow account ready to receive deposit payments. The lawyers could not do this because, in two cases, the buyers failed to provide them with the necessary Know Your Client documents, and, in the third case, the buyers failed to sign the Escrow Agreement. The deposits were not paid. The sellers terminated the agreement, and claimed the deposit as a debt, rather than as damages.

As to the difference between a claim for a debt and one in damages, Popplewell LJ went back to basic principles:

> *"An action in debt is one of the oldest forms of action. It is a claim to enforce a primary obligation comprising the obligor's promise to pay a sum of money. By contrast, a claim for damages is a claim to compensation which arises as a secondary obligation upon breach of a primary contractual obligation. Damages are, with limited exceptions, compensatory. Debts are not."*

Where a claim is made under a debt, a claimant can sue for the full amount and, unlike with a claim for damages, does not have to prove its losses. Here, a claim for damages would have faced a no loss argument, and the damages would also have had to give credit for any market gain benefit made by the sellers on termination. The buyers argued that the principle interfered with freedom of contract and cut across the principles governing remedies for breach of contract such as causation, remoteness, and mitigation.

Popplewell LJ noted that there was a juridical basis for the basic principle, which arose from the concept that a person should not be permitted to take advantage of their own wrong. This was another long-standing principle which had regularly been applied as a matter of construction since at least the early 18th century. However, it is a principle of construction, not of law, and so is subject to a sufficiently clearly expressed contrary intention. If that contrary intention is sufficiently clearly expressed, or can be implied from the circumstances of the case, the principle will not apply.

The legal basis of the rule is that it represents the presumed contractual intention of the parties. In order for it to apply, there must be, firstly, an agreement capable of giving rise to a debt rather than damages; and, secondly, an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent. Finally, and in the view of Popplewell LJ, "crucially", there must be an agreement that the obligor will not do the thing which prevents the condition precedent being fulfilled so as to prevent the debt accruing and/or becoming payable, whether that agreement is an implied or, here, express term of cooperation.

Popplewell LJ, therefore, formulated the basic principle in this way:

> *"An obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, at least where such condition is not the performance of a principal obligation by the obligee, nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action, and save insofar as a contrary intention is sufficiently clearly expressed, or is implicit because the nature of the condition or the circumstances of the case make it inappropriate."*

This does not apply to claims for damages because, the judge said, a claim for damages is not what the parties have bargained for. The parties have bargained for a right in debt and impliedly agreed that in the circumstances in which the principle applies, the obligee should have the benefit of that bargain, namely a claim in debt.

The result in the case here was not that the Sellers obtained a "windfall" US$4.94 million on the assumption that their loss caused by the buyers' breach of contract in a damages claim would be nothing. The effect of the buyers' breach of contract was to avoid a liability to pay US$4.94 million in circumstances where it was contractually agreed to be payable as a forfeitable deposit, irrespective of any damages claim or loss quantified by reference to market movement. To require such payment is not a windfall but rather holding the buyers to their bargain by requiring the buyers to provide the contractual benefit they agreed to provide, of which they have sought to deprive the sellers by their wrongful breach of contract.

Nugee LJ considered the position to be straightforward:

> *"A buyer agrees to buy a ship, and signs a contract. This requires him to pay a 10% deposit. In order to do that an account has to be opened. The buyer agrees to provide the documentation necessary to open the account without delay. This would, I think, be implicit anyway, but in the Norwegian Saleform is an express obligation. The buyer fails to do so. It is not now disputed that that was a breach of contract – indeed, it seems to me a plain and egregious breach. That means the deposit cannot be paid. Is the buyer in those circumstances liable for the unpaid deposit? Or can he say that because in breach of contract he failed to co-operate in opening the account the deposit never became due and hence he only has to pay such damages as the seller can prove?".*

In other words, the principle in *Mackay v Dick* prevents a buyer from relying on the non-fulfilment of the condition precedent that they have brought about by their own breach. Nugee LJ concluded that this did not cut across ordinary contractual principles. Rather, it gave effect to the parties' bargain.

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You may also recall that the *Mackay* case is well known for comments made by Lord Blackburn about the existence of an implied term of cooperation:

> *"as a general rule where parties to a contract agree that something should be done which cannot effectually be done unless both parties concur in doing it, the contract is to be construed as requiring each to do all that is necessary to be done on his part for the thing to be carried out."*

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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