Law Now on Hunt v ASME

Damages: recoverability of settlements

The High Court has recently analysed the authorities on the circumstances in which amounts paid by way of settlement to third parties can form the basis of a claim for recovery from **[other?]** third parties and should be taken as the measure of damages. In a decision handed down on 27 June 2007, the Court held that:

- provided that a settlement is reasonable on the facts, it can be recovered from a third party even in the absence of liability in law; however,

- in the event of an unreasonable settlement on the facts, recovery will be limited to the true measure of loss.

The case (*John F Hunt Demolition Limited v ASME Engineering Limited*) clarifies the proper application of the principles set down in *Biggin & Co Limited v Permanite Limited*, and provides useful guidance both to professionals seeking to recover, from their sub-agents or other third parties, sums paid to a principal, and to liability insurers acquiring rights of subrogation from their professional insureds, on the vexed issues of what is a reasonable settlement and what sums can properly be recovered from third parties following the settlement of an underlying claim.

For more details on the decision and its implications, click here.

Further reading: *John F Hunt Demolition Limited v ASME Engineering Limited* [2007] EWHC 1507
Biggin & Co Limited v Permanite Limited [1951] 2 KB 314

For further information please contact Liam O'Connell [details] or Oli Shestopal [details]. In the same case, the Court also considered the issues of joint names insurance and risk allocation in construction projects – to read a Law Now article on this aspect of the judgment, click here – **insert link to Jenny Savage/WSE article**.

Law Now on Hunt v ASME

Damages: recoverability of settlements

John F Hunt Demolition Limited v ASME Engineering Limited[1], a recent case in the Technology and Construction Court, considered the recoverability from third parties of sums paid in settlement to a claimant. It was held that whether a settlement is reasonable will depend on the facts of each case but, if a settlement is deemed reasonable, the amount paid can, in principle, be recovered in full. Further, to demonstrate that a settlement is reasonable, it is not necessary to show that the claim settled would probably have succeeded; it is enough to show that the claim had "*sufficient substance*" for a settlement of it to be regarded as reasonable. On the other hand, if, on the facts, the settlement is deemed unreasonable, the settlement becomes irrelevant in the calculation of the true measure of loss.

Background

On 30 June 2002, Kier (Whitehall Place) Limited (**"**KW**"**) appointed Kier Build Limited (**"**KB**"**) to design and construct commercial office premises, requiring the demolition of a number of existing buildings, whilst retaining certain facades of the existing property. By a sub-contract dated 27 March 2003, KB retained John F Hunt Demolition Limited ("Hunt") to carry out demolition works. By a sub-sub-contract made in December 2002, Hunt had engaged ASME Engineering Limited ("ASME") to construct temporary supports for the existing facades of the property. On 22 April 2003, sparks from welding work being carried out by ASME set light to the facades, causing significant fire damage.

KW and KB initiated a joint claim against Hunt for the damage and the subsequent repair work, claiming £248,145.04 in total. In August 2005, a quantity surveyor advised that the claim was only worth about £151,545 exclusive of interest. In the summer of 2006, Hunt offered to settle the claim for £152,500. This offer was accepted by KW and KB. Hunt then sought to recover the £152,500 from ASME (together with other legal costs and fees).

The parties agreed that, of the £152,500 settlement figure, £108,987.12 constituted the losses suffered by KW. The remaining part of the settlement (£43,512.88) represented KB's losses. ASME contended that, under the terms of the contract and sub-contract, Hunt owed no duty of care to KW in respect of the repair and reinstatement required following the fire damage; since Hunt had no liability in law to KW, the maximum for which Hunt could be liable to both Kier companies was £43,512.88 (i.e. KB's own losses), making the £152,500 settlement unreasonable. Hunt, on the other hand, sought to argue that it did owe a duty of care to KW under the terms of the contract and that, even if it did not (which the Judge found to be the case), Hunt ought to be able to recover the full £152,500 from ASME, based on their understanding at the time that the duty did exist or, alternatively, some lesser amount, still exceeding £43,512.88, which the Court considered might have represented a more reasonable settlement.

Authorities

In his judgment, HHJ Peter Coulson QC referred to authorities on the question of whether it is necessary to show that a settlement is reasonable. In *Biggin & Co Limited v Permanite Limited*[2], the Court of Appeal held that, if a settlement is reasonable, even if at the upper limit, it should be taken as the measure of damages. In *The Sargasso*[3], Clarke J stated that *Biggin v Permanite* is authority for the proposition that "the plaintiffs must establish that the amount for which they settled was reasonable and that, if they do, they are entitled to recover that sum from the defendants provided that the loss is not too remote to be recoverable."

[1] [2007] EWHC 1507
[2] [1951] 2 KB 314
[3] [1994] 1 Lloyd's Rep 412

In *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia*[4], Colman J noted: "In order to recover in respect of a settlement, it is not necessary to prove that the claim settled would have succeeded or would probably have succeeded. It is enough to establish that it had sufficient substance for the settlement of it to be regarded as reasonable."

A claim will usually have to be obviously hopeless before it could be said that settlement was unreasonable – the settlement of even an intrinsically weak claim may be reasonable if it avoids the uncertainty and expense of litigation. In *Comyn Ching & Co Limited v Oriental Tube Co Limited*[5], it was held that: "It is not necessary to prove that the claim settled...would probably have succeeded…it is enough to establish that [the claim] had sufficient substance for the settlement of it to be regarded as reasonable."

Decision

On the facts of the case, HHJ Peter Coulson QC held that, as there was clearly no duty of care owed by Hunt to KW, there was insufficient substance for the settlement of £152,500 to be regarded as reasonable. Since the settlement was unreasonable, the maximum value of the claim against ASME was £43,512.88, namely the maximum value of KB's claim against Hunt.

HHJ Peter Coulson QC rejected Hunt's argument that the Court could identify a hypothetical reasonable figure, greater than the sum actually due from one party to the other, but less than the sum actually paid in settlement, as a recoverable measure of loss. The judge considered that such an approach would be contrary to the existing case law, although particular cases may turn that way on their facts.

Analysis

Even though, in this case, the settlement was deemed unreasonable, it should be emphasised that, even in a case where investigation of the underlying facts demonstrates that there was no liability at all, the settlement of a claim *can* still be found to be reasonable in all the circumstances. For this to be the case, it must be reasonably foreseeable, at the time that the contracts were made between A and C, that A might settle a claim brought by B arising out of the same subject matter, even if, on a detailed analysis, A's legal liability to B might actually be hard or even impossible to establish.

This contrasts with the general insurance law position relating to the recovery by a defendant insured of settlement funds from its liability insurer. In *Structural Polymer Systems Ltd v Brown (The Baltic Universal)*[6], Moore-Bick J held that, in order to reclaim from its insurer amounts paid in a settlement, a claimant must establish that:

- the claimant was legally liable to another party; and,
- that liability was covered by the insurance policy; and,
- the settlement of that liability was reasonable (in that the sum of the settlement was equal to or less than the sum of the liability).

Under the wording of its policy with the claimant, Brown agreed to "indemnify the Assured against all sums which the Assured may become legally liable to pay." As such, legal liability was required to trigger the policy coverage. The settlement would then only be covered by the policy if it was adjudged to be reasonable – i.e. if the insured was actually liable for an amount not less than that paid under the settlement agreement. This is a further point of potential contrast with the decision in *Hunt v ASME*, where it was envisaged that a settlement's reasonableness should be judged on all the circumstances of

[4] [1999] 1 Lloyd's Rep 688
[5] [1979] 17 BLR 47
[6] [1999] CLC 268

the case; under the principle in *Hunt v ASME*, a settlement for an amount much higher than the claimant's actual liability may still be reasonable.

In *Enterprise Oil Ltd v Strand Insurance Co Ltd*[7], Aikens J confirmed that to demonstrate liability to a third party, it is not sufficient simply to rely on the fact that a settlement was reached. In order to recover settlement amounts from its insurer, an insured must prove the presence of both actual liability to the third party and a reasonable settlement (i.e. a settlement that was not in excess of the amount for which the insured would have been liable to the third party).

The apparent contradiction between the two lines of case law can be explained as follows. In the cases of *Structural Polymer v Brown* and *Enterprise Oil v Strand*, the relevance and recoverability of the settlement was determined by reference to the precise wording of the liability policy from which coverage was sought. The policies in question required a "legal liability" in order to trigger coverage (as do most policies of this type) and it is long established law that a settlement containing a non-admission of liability does not establish a legal liability; liability can only be established by virtue of the judgment of a Court or arbitration or an admission of liability. In the cases culminating with *Hunt v ASME*, on the other hand, any insurance coverage issue has been removed, either because there was no relevant policy in the first place, or because the claimant's liability insurers – who subsequently decide to pursue the third party in a subrogated claim brought in the name of the insured – confirm coverage to the claimant prior to the settlement being reached. Whether the legal liability of a claimant to a party with whom it settled must be established in order to succeed in any recovery action against a third party will depend, therefore, upon whether or not that action is made in the context of seeking recovery under an insurance policy (i.e. whether or not the third party is the claimant's liability insurer).

Conclusion

A liability insurer who has confirmed coverage to its insured and given its blessing to a settlement of the claim against its insured in return for rights of subrogation will not need to establish, when bringing a claim against a third party pursuant to such rights, that the underlying claim which was settled would have been successful against the insured, as long as the settlement was reasonable on the facts; however, if the third party is successful in establishing that the settlement was unreasonable on its facts, the liability of the insured to the underlying claimant will become relevant and any subrogated recovery will be limited to the sum of that liability.

To avoid the time and expense involved in seeking to argue the reasonableness of a settlement already reached, insurers should consider the practicalities of seeking to involve the prospective third party defendant in the negotiation of the underlying settlement so as to tie the third party into the deal. In circumstances where this is not possible, insurers should proceed with caution and be aware of the implications in terms of any possible subrogated recovery action, if settling wholly unmeritorious claims on a commercial basis.

However, an insured seeking recovery from its liability insurers in respect of a settlement reached with a third party claimant without the insurers' consent will still have to prove, if it is to succeed in recovering under the policy, that it was truly liable to the third party claimant and that the sum of the settlement reached did not exceed the sum of the insured's liability. An insured that settles an unmeritorious claim for commercial reasons, in the absence of any perceived liability and without the backing of its liability insurers, does so at its own peril.

Further reading: *John F Hunt Demolition Limited v ASME Engineering Limited* [2007] EWHC 1507 (TCC)

For further information please contact Liam O'Connell [details] or Oli Shestopal [details].

[7] [2006] EWHC 58 (Comm)