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Energy Decommissioning: a potential route to civil liability considered

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

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

The defendant/appellant agreed to provide agency and shipbroking services in respect of the vessel and 28 other ships. It was common ground that one of these services was the negotiation and agreement of contracts of sale as and when the ships reached the end of their working lives. It was the claimant's case, on the disputed but currently uncontroverted evidence, that the defendant had complete control over the sale of any of the vessels, including who it was sold to and for what price. The question of price was particularly important because, on the claimant's case, a high price meant that the defendant would have known that the vessel in question would be broken up in Bangladesh at a yard with negligible safety standards.

IN BRIEF

While not underestimating the difficulties faced by the claimant, the Court of Appeal has left open for argument that a London based ship broker might have civil liability for a the death of a worker in shipyard in Bangladesh.

The claimant also faces problems with limitation.

The proceedings were commenced on 11 April 2019. The claimant's claim against the defendant was based on the existence of a duty of care arising out of the defendant’s autonomous control of the sale of the vessel and its knowledge that, as a result of that sale, the vessel would be broken up in Bangladesh in highly dangerous working conditions.

By a judgment dated 13 July 2020, a High Court Judge 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. He found that it could not be said that the duty of care alleged on behalf of the claimant would certainly fail, and that it should be allowed to proceed to trial. In addition, although he found that, on the face of it, the law of Bangladesh applied to the claim, and that this imposed a strict limitation period of one year which had not been complied with, the judge considered that 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.

The Court of Appeal summarised the applicable test as:

(a) The court must consider whether the claimant had 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 carried too far: in essence, the court was determining whether or not the claim was "bound to fail".

(b) 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.

The other principle relevant to the present appeal was that it was not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence.

Having reviewed the factual assumptions made by the judge in the court below, the appellate court considered the way in which the claimant’s case was pleaded.

First, it was alleged that there was a common law duty of care which required the defendant to take all reasonable steps to ensure that its negotiated and agreed end of life sale and the consequent disposal of the vessel for demolition would not and did not endanger human health, damage the environment and/or breach international regulations for the protection of human health and the environment.

On this primary way of putting the duty, 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 the claimant's first way of putting the duty hung its metaphorical hat very firmly on foreseeability. But foreseeability alone could not create a duty of care. Was there really such a close connection between a shipbroker in London and a worker in the shipyards in question, that the former should have regarded the latter as its 'neighbour'?

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. But 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.

The second basis on which the claim was put was 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 rule that there was generally no liability in tort for the harm caused by the intervention of third parties). 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.

Accordingly, the appellate court upheld the judge's conclusion that the alleged duty of care in the present case was not susceptible to being struck out, or was so fanciful that it should lead to summary judgment in favour of the defendant.

In order to avoid the striking out of the claim, the claimant also had to show that it was not statute-barred. On the judge's findings, that meant that she had to persuade the court that she had an arguable case to disapply the one-year limitation period under Article 7 of the Rome II Regulation and/or to disapply the one-year limitation period under Article 26, 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.

The Court of Appeal took the view that, subject to an undue hardship argument under Article 26, the claim was statute barred. The claimant would need to establish, within the confines identified in the judgment, the undue hardship argument under Article 26. Article 7 did not apply to this case.