

The Actuarial Profession
making financial sense of the future

Legal Principles – What can go Wrong? Chris Beanland



Lawyers and Actuaries

- Contact through being sued
- Acting as an expert witness
- Working jointly on deals (share sales/restructuring)
- Advising or reporting to in house legal team
- Personal life

What lawyers do

- Advise on the law
- Advise on commercial matters
- Draft documentation to reflect a deal
- Act for or against litigants

A Duty of Care

- Foreseeability of damage
- Proximity of relationship
- Justice and fairness

Caparo Industries plc v Dickman [1990]

The “*nervous shock*” cases – *Alcock v Chief Constable of South Yorks Police* [1991]

- Persons present who suffer physical injury
- Persons present who suffer psychiatric injury as a result of fear for their own safety
- Persons present who suffer psychiatric injury as a result of fear for someone else’s safety
- Persons not present who suffer psychiatric injury as a result of fear for someone else’s safety

Economic Loss

- Courts fear potential liability “in an indeterminate amount for an indeterminate time to an indeterminate class” per Cardozo CJ in *Ultramares Corporation v Touche* (1931)
- *Weller v Foot & Mouth Institute* [1966] – is FMI liable to auctioneers for lost business as a result of cancelled auctions due to FMI negligently allowing virus to escape?

Negligent Statements

- Can include advice, opinions, evaluations and dissemination of information
- Defendant (D) must have expressly or impliedly assumed responsibility to the claimant (C)
- Assumption of responsibility occurs when:
 - (i) D knows his statement will be communicated to C
 - (ii) D knows C will be very likely to rely on the statement
 - (iii) It was reasonable for C to rely on the statement

Negligent Statements cont..

- Request for advice etc is not necessary. It is enough that advice has been volunteered in circumstances where it is foreseeable that C will make some financial commitment based on its accuracy or truth
- C must show actual reliance to his detriment, thereby suffering economic loss

The standard required

- Not perfection – just the ordinary skill of an ordinary competent actuary (the *Bolam* test)
- A body of professional practice is required to refer to in criticising the standard
- Inexperience is no defence
- Where there are a range of views in a profession as to an acceptable standard, D's competence is to be judged by the *lowest* which would be regarded as acceptable (*Hyde & Assoc. v JD Williams [2001]*)

The average professional...

- Has the corpus of knowledge which forms part of the professional equipment of an ordinary practitioner
- Doesn't lag behind in new advances, methods, developments in his field
- Is aware of deficiencies in his skills and limitations on his skills
- Is alert to risks in any task he undertakes

Expert Evidence

- Expert evidence can be called to determine the standard of skill & care
- Court controls expert evidence
- Experts express an opinion on the facts
- For the duties of an expert see *The Ikarian Reefer* [1993]

Causation

- Damage must not be too remote – *The Wagon Mound* [1963]
- The scope of the defendant's duty must be taken into account when determining proof and causation – *South Australia Asset Management Corp v York Montague Ltd* [1997] – the SAAMCO principle

Alpha & Beta

- Was the purpose for which Beta used the information in the AVR (to calculate the offer price for A's shares) a purpose expressly permitted in the AVR?
- Answer – no. Para 2.2 of the AVR envisages the AVR being used for purposes connected with management of the fund, not a review which third parties might wish to undertake for their own purposes

Alpha & Beta

- Did Kate implicitly agree that the AVR could be used for third party purposes?
- Answer – no. Kate only agreed that the information could be passed on. She could not agree to a third party using the information as she was not aware of the type of transaction for which the information was to be used

Alpha & Beta

- Did Rawsons owe Beta a duty of care when providing the AVR?
- It all depends whether Rawsons can be said to have assumed a responsibility to Beta when providing the report
- Answer – no. (i) Rawsons had no pre-existing relationship with Beta (ii) Rawsons were unaware as to the purpose for which the report was to be used (iii) Rawsons could expect Beta to have their own advisors (but the CFA is not relevant)

Practical Consequences of no Attendance Notes

- One party's word against another
- JM's evidence has more weight
- JM's evidence is more credible
- Evidence of general malaise at Rawsons?

Rawsons & JM

- What was Rawson's breach of duty?
- Answer – it was negligent in respect of the advice relating to the position if S&E became insolvent. The reason JM lost out was not because of S&E's insolvency, but was due to an unrelated legal ruling
- Applying SAAMCO – no liability

Contract

- Very few contracts have to be in writing
- Contract requires agreement (offer and acceptance), consideration and intention (variation requires same)
- Agreement is judged objectively
- Consideration is a legal benefit to the promisor or a detriment to the promisee
- Intention is presumed in commercial cases.

Certainty

- 'Agreement in principle...'
- 'Agreement subject to resolution of points X, Y and Z'
- 'Subject to Contract' – *Rugby Group v Pro-Force* [2005]
- Comfort Letters – *Klienwort Benson v Malaysia Mining Corp* [1989]

Certainty cont...

- 'Terms to be agreed...' – *Foley v Classique Coaches* [1934] , *Willis v Cable & Wireless* [2005]
- Agreements to negotiate – *Walford v Miles* [1992]
- Best and reasonable endeavours clauses – *Covington Marine v Xiamen Shipping* [2005]

Terms

- Express terms – key issue usually construction – *ICS v West Bromwich Building Society* [1998]
- What do the words '*actually paid*' mean in a reinsurance context – *Charter Reinsurance v Fagan* [1997]
- A term might be implied by statute – e.g. s13 SGSA 1982
- A term might be implied for reasons of business efficacy – *The Moorcock* (1889)
- A term might be implied to complete a contract – *Liverpool CC v Irwin* [1977]

Exclusion Clauses

- Must be incorporated
- Must not be ambiguous – *British Sugar v NEI Power* [1995]
- Must not fall foul of UCTA 1977

UCTA 1977

- s.2 – attempts to exclude liability for death or personal injury arising from negligence are void
- s. 2 attempts to exclude other loss arising from negligence subject to a reasonableness test – *Smith v Eric Bush & Co* [1992]
- s. 3 attempts to exclude/restrict liability, render no or substantially different performance **when dealing on standard written terms** subject to reasonableness test

Reasonableness

- Bargaining position
- Inducement
- Knowledge of existence of term
- On caps – resources to meet a liability and insurance
- Difficulty of task
- Consequences of decision

Discharge of Contract

- By performance
- By frustration
- By agreement
- By breach

Damages

- Compensate for expectation loss
- Must not be too remote – *Hadley v Baxendale* (1854)
- Type not extent of loss must be within reasonable contemplation – *Parsons v Uttley Ingham* [1978]
- Exception is profits – *Victoria Laundries v Newman* [1979]
- Reliance loss – *Anglia TV v Reed* [1973]
- Agreed damages clauses

Misrepresentation

- A false statement of fact which induces another to enter a contract *Peekay v ANZ Banking Group* [2006]
- Can be fraudulent, negligent or innocent
- Rescission is primary remedy
- Damages might be available

Rawsons and Stephen Jones

- Has Stephen Jones got authority to bind the firm? If yes, the letter of engagement is of no effect
- If no agreement as to fees, a reasonable fee can be charged
- You can sue for the balance. The client has provided no consideration for your promise to accept less – *Foakes v Beer*
- Depends whether the parties have dealt with each other before
- Client has terminated. Work is not done pursuant to contract. Does restitution apply?

Rawsons & UG

- The two limbs are to be read together
- Limb one is a positive statement of that for which Rawsons accept liability
- The word 'other' in the second limb means limb one takes precedence.
- 'all other liability' includes losses in limb one which exceed the cap
- Loss and damage are excluded by limb two only if not covered by limb one

Company Law – Capacity of Company

- Capacity unlimited unless there is a restriction in the articles
- s. 39 CA 2006 protects third parties where a company lacks capacity

Directors' Powers

- Model Articles - subject to the Act and the articles, directors exercise all the powers of the company
- s. 40 CA 2006 – in favour of a person dealing in good faith, the power of the board of directors to bind the company or to authorise others to do so shall be deemed to be free of any limitation in the company's constitution

General Duties of Directors

- To act within powers (s. 171 CA 2006)
- To promote the success of the company (s. 172)
- To exercise independent judgment (s. 173)
- To exercise reasonable care and skill (s. 174)
- To avoid conflicts of interest (s. 175)
- Not to accept benefits from third parties (s. 176)
- To declare interests (ss. 177 & 182)

Who is a Director

- De jure directors
- De facto directors (s. 250 CA 2006)
- Shadow directors (s. 251 CA 2006)

Trusts

- Express trusts – settlor settles property on trustee for benefit of beneficiary
- Words, subject matter and objects must be certain
- All types of property can be subject to a trust

Trustees' Duties

- Statutory duty of care under Trustee Act 2000 (this can be restricted by express provision)
- To act in beneficiaries best interests
- No conflict or personal profit
- Not to fetter discretion
- Not to delegate unless authorised
- Not to charge (unless permitted or professional trustee – s. 29 TA 2000)

Trustees' Powers

- Come from trust deed
- Trustees can apply to court to deal/vary (s. 57 TA 1925 & s. 1 VTA 1958)
- Wide powers in TA 2000 to invest, insure, buy UK land, borrow
- Trustees can exempt themselves for liability from a negligence claim – *Armitage v Nurse* [1997]

Eos Corpn.

- The calculation of pension is a once and for all one, carried out at the date upon which the pension first comes into payment (see Rule 7.2)
- Clause 8.5 does not confer a power to reduce pensions already in payment

Standard & equitable

- S & E are in breach of contract as the general discretion in Article 50 is not wide enough to permit variation of policy values
- A term could be implied into the language of the articles to the support its commercial purpose – i.e. to protect a policyholder from a decrease in market rates.