Case No: B2/2014/1555

Neutral Citation Number: [2014] EWCA Civ 1551
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE STOKE ON TRENT COUNTY COURT**
**HHJ P.R. MAIN QC**
**Claim No 21R00842**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2014

**Before :**

**LORD JUSTICE ELIAS**
**LORD JUSTICE PATTEN**
and
**LORD JUSTICE FLOYD**

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**Between :**

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| **LESTER JOHN STACEY trading as THE NEW GAILEY CARAVAN/MOTORHOMES CNENTRE** | **Claimant/ Respondent** |
| **- and -** | |
| **AUTOSLEEPER GROUP LIMITED** | **Defendant/ Appellant** |

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**Timothy Carlisle** (instructed by direct access) for the **Appellant**
**Simon Clegg** (instructed by **Beswicks Legal**) for the **Respondent**

Hearing date: 12 November 2014

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# Judgment

**Lord Justice Floyd :**

1. This appeal is mainly concerned with the principles of causation of damage in a claim for breach of contract. It is an appeal from a decision of HHJ P.R. Main QC dated 24 April 2014 and his consequent order in an action for breach of a contract of sale of a Fiat Ducato Sharky model L2 motor home ("the motor home") by the defendant to the claimant. The judge found that the motor home did not conform to its description in that it had a maximum gross weight of only 3,300kg in contrast to its brochure specification of 3,500kg. He accordingly held the defendant liable for breach of contract and awarded damages in the sum of £54,563.95 exclusive of interest. Those damages represented the cost to the claimant of litigation, ultimately settled by him, and which had been brought against him by a subsequent purchaser of the motor home, a Mr Cope, who had again purchased the motor home on the basis of the incorrect description as to its maximum gross weight.

2. On this appeal there is no challenge to the finding of the defendant's breach of contract. The defendant says instead that the judge was wrong to hold that the breach of contract caused the claimant's loss and that, alternatively, he awarded too much by way of damages by allowing a sum in respect of the ATE insurance taken out by Mr Cope. The appeal on causation is brought with the permission of the judge, who did not deal specifically with this argument on causation. The appeal on quantum is brought with the permission of Aikens LJ.

3. Given the narrow issues on which this appeal is brought, it is not necessary to rehearse much of the factual background. It is sufficient to say that the motor home was sold on by the claimant via an intermediary, a Mr Rose, and a finance company, Paragon Finance, to Mr Cope. The fact that the vehicle had a maximum gross weight of only 3,300kg was clearly stamped on the chassis plate, but the judge rejected the suggestion that this fact was known to the claimant or his employees. The suggestion was based in part on the fact that the motor home was a prototype and in part on the fact that the claimant received a discounted price. Although the vehicle underwent a pre-delivery check, the mismatch between the advertised and actual maximum gross weight was not picked up and in consequence not drawn to the claimant's or Mr Cope's attention. Mr Cope required the vehicle for a European trip he and his wife were planning and considered that the deficiency in gross weight would not permit the required luggage and supplies to be carried. By a letter dated 2 April 2008 Mr Cope rejected the motor home. He also rejected a suggestion made by both the claimant and the defendant that the matter could be resolved by uprating the chassis to a higher specification. No such resolution being possible, on 17 July 2008 Mr Cope began proceedings against Paragon Finance and the claimant. By his claim he sought the cancellation of his finance, the return of his deposit and the finance payments he had made, his storage costs and the cost of hiring a replacement motor home.

4. Despite the fact that the majority of the claims made in Mr Cope's proceedings blamed the claimant for the incorrect weight, by an amended claim dated 8 June 2009 Mr Cope discontinued his claim against the claimant. This proved however to be of no lasting benefit to the claimant, as Paragon brought in Mr Rose as a third party and Mr Rose brought the claimant back in as fourth party. The claimant's response to being sued in this way was to deny any responsibility for the actions of Mr Rose. His case was that Mr Rose was acting as an independent party, for whose actions he, the claimant, was not responsible. In due course, in June 2010, the claimant applied to

join the defendant to Mr Cope's proceedings as fifth party, but he was refused permission on the ground that the trial was imminent and it was too late to do so without jeopardising the trial.

5. In March 2010 all the parties to Mr Cope's proceedings attended a mediation in Birmingham. That mediation led in due course to a settlement under which, amongst other things, the claimant agreed to provide a replacement vehicle to Mr Cope and to meet the costs of all the other parties, including of course those of Mr Cope. Those costs had been increased because Mr Cope had arranged a conditional fee agreement (leading to a success fee) and also taken out an ATE insurance policy in respect of his costs.

6. As I have said, the judge rejected an attempt made at trial to suggest that the claimant was in fact aware of the maximum gross weight deficiency of the motor home. The vehicle was registered with the DVLA by the claimant's staff as having a gross weight of 3,500kg as described in the brochure. However it is clear that the judge was not impressed with the claimant either as a witness or as a businessman. He said:

> "Given how I view the Claimant's managerial skills (like his performance in the witness box, poorly), I am not in the least surprised that the his staff registered a vehicle with the DVLA without checking the facts relating to that vehicle or that the undertaking of the pre-delivery checks missed the fact that the maximum permitted axle weight was non-standard.
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> I therefore find when the Claimant came to transfer his interest in [the motor home] to Mr Rose, he did not know that it had a non-standard chassis weight tolerance. I also accept [counsel for the Claimant's] submission that however incompetent the Claimant's staff were in failing to detect this non-standard variant chassis for the [the motor home] it cannot affect the strict contractual effect and obligation on the part of the seller."

7. Earlier the judge had said that the claimant had no explanation, other than the incompetence of his staff, to explain how the mismatch in the chassis weight limits went unnoticed in the seven months which followed his purchase of the L2 during the pre-delivery checks and the registration process.

8. The judge rejected the claimant's case that Mr Rose was not his agent, and held that, to the claimant's knowledge, he was.

9. The judge then went on to consider the recoverable loss and damage. The judge held that once the claimant was on notice of Mr Cope's claim, as he had been in April 2008, he had to bring that issue to a swift conclusion. This was particularly the case when Mr Cope started to sue the finance company and his agent Mr Rose.

10. The judge found that Mr Stacey of the claimant did not act reasonably in the circumstances. Not only did he deny liability in the original claim to which he was joined, he continued to deny any liability to Mr Cope when, inevitably, he was joined back in after Mr Cope had discontinued his direct claim against him. This behaviour added to the costs and delay.

11. On the other hand, the judge also found that Mr Cope was not an easy man to deal with. He was unsure and pensive, frequently changing his mind. It had taken 6 months after the mediation to thrash out the eventual deal. The judge concluded, therefore:

> "had the Claimant acted proactively as I suggest he should have, I doubt the position would have been any different but the end result would have been the same, save (a) Mr Rose would never have had to incur any costs, Paragon's costs would have been substantially lower (as they would have been let out in the summer of 2008 and not following the mediation in March 2010), Mr Cope's would have been substantially lower (it was to be expected he would have been provided with his mobile home by say February/March 2009)."

12. In relation to the conditional fee agreement and the ATE insurance, the judge said this:

> "I accept that whilst mediation would not have been necessary, Mr Cope would still have required solicitor involvement in thrashing out a compromise with the Claimant and the details of his replacement vehicle, which judging by the time it took to resolve was no easy matter. He would still have incurred his ATE insurance premium and an uplift of those costs. All this in my judgment is recoverable as the Claimant's obligation to pay costs reasonably incurred."

13. The judge went on to allow the assessed costs up to the date the claimant lodged his defence, and then solicitors' base costs limited to 30 hours solicitors' time, at specificied rates, together with the ATE premium and uplift.

14. Both sides referred us to the helpful analysis of Gross LJ (sitting in the Commercial Court) in *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm); [2011] 1 Lloyd's LR 482. That case was concerned with the defendant's supply of contaminated feedstock to an olefin plant operated by the claimant, in breach of a term that it should be of satisfactory quality. The defendant alleged that the claimant had been negligent in failing to react appropriately to a pH alarm which was an indication, according to the defendant, that something was amiss with the feed, and that in consequence the chain of causation had been broken. Gross LJ dealt with the principles applicable to causation at [42] to [47] of his judgment. The principal points to note from that summary, which neither side challenged are these:

    i) Although the legal burden of proof that the breach of contract caused loss rests throughout on the claimant, there is an evidential burden on the defendant if it contends that there was a break in the chain of causation.

    ii) To break the chain of causation, the intervening conduct of the claimant must be of such impact that it obliterates the wrongdoing of the claimant in the sense that the claimant's conduct must be the true cause of the loss rather than the conduct of the defendant. That is because, where the defendant's conduct

remains *an* effective cause of the loss, at least ordinarily the chain of causation will not be broken.

iii) It is difficult to conceive of anything less than unreasonable conduct on the part of the claimant breaking the chain.

iv) Even unreasonable conduct will not necessarily break the chain, for example where the defendant's conduct remains *an* effective cause.

v) Reckless conduct ordinarily breaks the chain of causation, although there is no general rule that only reckless conduct will do so.

vi) The claimant's state of knowledge at the time of and following the defendant's breach is likely to be a factor of great significance.

vii) However it does not follow that actual knowledge of the breach is a pre-requisite of breaking the chain.

viii) The question of whether there has been a break in the chain is fact sensitive. In a given case the determination of whether the chain of causation is broken may involve the cumulative effect of a number of factors which have the effect of removing the wrongdoing sued on as a cause.

ix) Whilst the authorities provide guidance they are not to be read as statutes.

15. On the facts of *Borealis*, Gross LJ rejected the allegation that the claimant's conduct in answer to the pH alarm had been unreasonable. However he went on to hold that even if it had been unreasonable, the chain of causation would not have been broken. Its conduct was not reckless and did not destroy the causative potency of the anterior breach.

16. In his written skeleton Mr Carlisle for the defendant questioned the correctness of the requirement that the subsequent conduct should "obliterate" the wrongdoing, but did not pursue this point in his oral submissions. Instead he drew attention to the fact that in the present case, the judge had found that the defendant had been negligent or incompetent in relation to discovering the very fact that would have revealed the breach of contract, namely the misdescription of the maximum weight of the motor home. This meant that the claimant ought to have known of the misdescription, and his negligence in failing to find out broke the chain of causation. He focused on a sentence in paragraph 46 of the judgment in *Borealis* where Gross LJ said:

> "For the chain of causation to be broken, the claimant need not have knowledge of the legal niceties of the breach of contract; nor, as it seems to me, will the chain of causation *only* be broken if the claimant has actual knowledge that a breach of contract has occurred – otherwise there would be a premium on ignorance."

17. Mr Carlisle submitted that this passage was a recognition that constructive knowledge would do. He went on to submit that there was ample basis for the judge's finding that it was negligent of the claimant not to discover the misdescription.

18. I accept that there was ample basis for the judge's finding that the claimant was negligent in failing to discover the maximum gross weight before he made the onward sale. However his conduct in making the onward sale without checking the maximum gross weight cannot be regarded as reckless. Recklessness would, as it seems to me, imply an absence of any basis for a belief in the accuracy of the description. However, the claimant had acquired the vehicle with the benefit of a warranty as to its maximum gross weight on which he was entitled to rely. It cannot therefore be suggested that he had no basis for his belief that the maximum gross weight was in accordance with the description.

19. *Lambert v Lewis* [1982] AC 225 was a claim based on vehicle coupling which had caused an accident when it had failed when used by the purchasing farmer on a public road, causing a fatal accident. At that point, as the farmer knew, the coupling was missing a handle which caused it to be unsafe. The coupling had, when sold, come with the benefit of a warranty that it was safe, at least for a reasonable time after delivery. The House of Lords held that the purchaser would be entitled to rely on that continuing warranty, at least until the point where the farmer became aware that the coupling was no longer in its original condition. Lord Diplock said at page 276G:

> "After it had become apparent to the farmer that the locking mechanism of the coupling was broken, and consequently that it was no longer in the same state as when it was delivered, the only implied warranty which could justify his failure to take the precaution either to get it mended or at least to find out whether it was safe to continue to use it in that condition, would be a warranty that the coupling could continue to be safely used to tow a trailer on a public highway notwithstanding that it was in an obviously damaged state. My Lords, any implication of a warranty in these terms needs only to be stated, to be rejected…..In the state in which the farmer knew the coupling to be at the time of the accident, there was no longer any warranty by the dealers of its continued safety in use on which the farmer was entitled to rely."

20. In the present case it cannot be suggested by analogy that the claimant could no longer rely on the precise terms of the warranty that the motor home conformed to its description. It is true that he had opportunities to check whether it was in fact accurate, but there had been nothing to suggest to him that it was not. The warranty was strict, it did not depend for its efficacy on the claimant taking reasonable care to investigate the very fact which was represented as being true.

21. In *County Limited v Girozentrale Securities* [1996] 3 All ER 834 the plaintiff bank agreed to underwrite the placement of some shares and engaged the defendant broker who made representations, outside the scope of its engagement letter, to the effect that the issue would only go ahead if it was fully subscribed. The bank suffered a loss which it sought to recover from the brokers, who responded that the dominant cause of the bank's loss was the bank's decision to accept the quality of the commitments of the placees without itself making proper enquiries, and not the breach of contract in making representations outside the scope of the engagement letter. The defendant succeeded before the judge, who considered that the banks' decision was of greater efficacy than the broker's misstatement. Beldam LJ said this at page 847:

> "That County chose to try to satisfy itself of the validity of the indicative commitments of CBS clients, not knowing of Gilbert Eliott's statements, is nothing to the point. There was no requirement under the terms of engagement that they should do so, nor at the time the contract of engagement was made was it contemplated that they would do so. In my view, the fact that they chose to do so and did so negligently could not interrupt the direct relationship between the statements made by Gilbert Eliott and the need to refresh the placees."

22. Hobhouse LJ said this at page 857:

> "Where a plaintiff does not know of a defendant's breach of contract and where he is entitled to rely upon the defendant having performed his contract, it will only be in the most exceptional circumstances that conduct of the plaintiff suffices to break the causal relationship between the defendant's breach and the plaintiff's loss.
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> The plaintiffs' conduct was not voluntary in the sense of being undertaken with a knowledge of its significance. Conduct which is undertaken without an appreciation of the existence of the earlier causal factor will normally only suffice to break the causal relationship if the conduct was reckless. It is the character of reckless conduct that it makes the actual state of knowledge of that party immaterial. If the conduct of the plaintiffs had been so exceptional as to take it outside the contemplation of the parties, then it might have made the consequent loss too remote."

23. In my judgment, in a case such as this where a warranty has been given, it is not sufficient for the defendant merely to show negligence of the claimant in failing to uncover the breach of warranty in the absence of anything even to alert him to the possibility of a breach. The claimant was entitled to rely on the defendant having performed his contract. Whilst he might have discovered the breach of contract had he run his business more carefully, he did not do so. There was nothing to alert him to the possibility of any breach by the defendant. In those circumstances I see no reason to hold that the defendant's breach of contract had ceased to be an effective cause of the loss. I would dismiss the appeal on this ground.

24. That leaves the challenge to the judge's decision on quantum. The principal point made by Mr Carlisle is that the ATE premium was not paid until well after the mediation took place within Mr Cope's claim on 10 March 2010. Given the judge's finding that the mediation would not have been necessary if the claimant had acted reasonably, it was not logical then to find that Mr Cope would still have incurred the ATE insurance premium and the uplift. The ATE insurance was not put in place until after the bare bones of an agreement, including an agreement to pay Mr Cope's costs, had been put in place.

25. I do not accept that there is illogicality in the judge's decision to allow the claimant to recover these costs. The judge recognised that, in some respects, the way in which

> the claimant had behaved in connection with Mr Cope's litigation, was unreasonable and had thereby increased the costs. He conducted an entirely proper enquiry into the consequences of that unreasonable conduct in deciding how much if any of the costs incurred by the various third parties he should allow. Nevertheless this did not mean that the judge was bound to disallow all costs after the mediation. An agreement had to be reached with Mr Cope, who, as I have said, the judge found not to be an easy man to deal with. There was plainly material before the judge which enabled him to hold that, even if the claimant had acted reasonably, the ATE premium and uplift would still have been incurred. I see no basis on which this court could properly interfere with the judge's conclusion

26. It follows that, for all the above reasons, I would dismiss the appeal.

**Lord Justice Patten**

27. I agree.

**Lord Justice Elias**

28. I also agree.