Supreme Court holds that a contractual pre-estimate of loss is only recoverable from a negligent stranger in tort if the pre-estimate was reasonable, finding that the burden of proof in respect of remoteness lies on a defendant

On 14 February 2024, the Supreme Court handed down judgment in the case of **Armstead v Royal & Sun Alliance Insurance Company Limited** [2024] UKSC 6.

The case addresses fundamental issues "*in applying the tort of negligence in a situation where economic loss, comprising a contractual liability to pay a sum of money, has resulted from physical damage to property*". Those issues included whether the loss is irrecoverable because it is too remote [1]. The court held that, to be recoverable from a tortfeasor, it was necessary that the contractual sum was a reasonable pre-estimate of the likely loss suffered.

Armstead clarifies which party bears the burden of proof in relation to remoteness of loss in tort, an issue as to which "*There is a surprising absence of authority*" [62], the Supreme Court holding that the legal burden of proof lies "…*on the defendant to plead and prove that loss, which was in fact caused by the defendant's tort, is nevertheless irrecoverable because it is too remote*" [62].

The case also addresses an aspect of the law of bailment, namely that bailor and bailee are not to be treated as having one set of rights when claiming damages, applying **The Winkfield** [1902] P 42 [40].

The underlying claim in **Armstead** represented another front in what has been described as the "*long running battle between the motor insurance market and the credit hire companies*" (*per* Flaux LJ in **McBride v UK Insurance Ltd; Clayton v EUI Limited** [2017] EWCA Civ 144). Accordingly, **Armstead** will be particularly relevant to the car hire, credit hire and motor insurance industries. However, as the case addresses fundamental issues in applying the tort of negligence where physical damage results in contractual liabilities, it is likely to be of relevance wherever liquidated damages, accelerated or increased payment terms are engaged when property is physically damaged by a third party's negligence.

In a joint judgment, Lord Leggatt and Lord Burrows (with whom Lord Richards and Lady Simler agreed) acknowledged the "*valid concern*" that "…*the hire company should not be able, simply by stipulating an amount of money in a contract to which the defendant is not a party and over which it has no control, to recover an amount which exceeds a fair or reasonable estimate of loss actually suffered*" [29] while noting that "*There is no reason in principle why recoverable loss should not include a contractual liability to a third party provided that the liability is consequential on physical damage to the claimant's property*" [31].

Applying **Network Rail Infrastructure Ltd v Conarken Group Ltd** [2011] EWCA Civ 644; [2012] 1 All ER (Comm) 692, the

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Supreme Court held that "*Where physical damage is negligently caused to revenue-generating property, the loss recoverable by the owner of the property from the person who caused the damage includes a sum payable by the owner, under an agreement with another party to compensate that party for its loss of revenue resulting from the damage, provided the sum agreed is a reasonable estimate of the likely amount of that loss*" [36].

Applying **Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co, The Wagon Mound** [1961] AC 388 and **Hughes v Lord Advocate** [1963] AC 837, the Supreme Court found that in tort "…*loss is too remote to be recoverable as damages if the type of loss suffered was not reasonably foreseeable at the time of the breach of duty. But if the type of loss was reasonably foreseeable, it does not matter that the precise manner in which it was incurred was not reasonably foreseeable*" [47(i)].

It followed that, to be recoverable in tort, it was necessary that the contractual sum demanded was a reasonable pre-estimate of the hire company's loss of use (see, for example, [52], [57]). However, on the facts of this case, the Supreme Court held that the appeal should be allowed, as RSA had not pleaded that the contractual liability was not a reasonable pre-estimate of the hire company's loss of use and as there had been no evidence as to this aspect before the Deputy District Judge in the County Court when the matter was heard at first instance (see, for example, [71]).

Lord Marks KC and Quentin Tannock, were instructed by DAC Beachcroft on behalf of the Defendant and Respondent, RSA.

View the full judgment on the Supreme Court website here.

View the Supreme Court's press summary here.

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