



5 May 2010

PRESS SUMMARY

Farstad Supply AS (Appellant) v Enviroco Limited (1) and Asco UK Limited (2) (Respondents) (Scotland) [2010] UKSC 18

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lord Mance, Lord Clarke

BACKGROUND TO THE APPLICATION

Farstad Supply AS ('Farstad') owned an oil rig supply vessel which was damaged by fire while berthed in harbour on 7 July 2002. At the time of the fire, the third party charterer, Asco UK Limited ('Asco'), had engaged the defender, Enviroco Limited ('Enviroco'), to clean out tanks on board the vessel. Following the fire, Farstad sued Enviroco for damages, alleging that the fire was caused by the negligence of Enviroco's employees. Enviroco, as well as alleging contributory negligence against Farstad's employees, sought a contribution from Asco under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 ('the 1940 Act').

Section 3 of the 1940 Act is entitled "Contribution among joint wrongdoers". Section 3(1) deals with the case where the party suing (Farstad) proceeds against two defenders in respect of loss or damage caused by both and a judgment is given against both, so that both are "found jointly and severally liable in damages". Subsection (2) provides that a defender who has been held liable and pays damages to the suing party under subsection (1), has a right to recover such contribution as the court deems just from "any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded".

By clause 33(5) of the charterparty, Farstad agreed to "defend, indemnify and hold harmless" Asco from all liabilities resulting from damage to the vessel. If therefore Enviroco was entitled to a contribution from Asco under section 3(2) it was agreed that Asco would (at the least) be entitled to an indemnity from Farstad under clause 33(5). Whatever the result therefore, Asco would not ultimately be liable.

In the Outer House, Court of Session, the Lord Ordinary held that Enviroco was not entitled to a contribution from Asco under section 3(2) of the 1940 Act. An Extra Division of the Inner House, Court of Session, allowed Enviroco's subsequent reclaiming motion by a majority of 2:1. Farstad appealed to the Supreme Court to restore the decision of the Lord Ordinary.

The three agreed issues to be decided on appeal were:

- 1) The meaning and effect of section 3(2) of the 1940 Act;
- 2) Whether a defence provided by a pre-existing contract (such as the charterparty) can be taken into account in determining whether a person "if sued, might also have been held liable" for the purposes of section 3(2); and
- 3) If the answer to (2) is yes, whether clause 33(5) of the charterparty has the effect that Asco is not a "person who, if sued, might have also been held liable" to Farstad for the purposes of section 3(2).

JUDGMENT

The Supreme Court unanimously allows the appeal. The Court holds that Enviroco is not entitled to a contribution from Asco under section 3(2) of the 1940 Act because it cannot establish that “if sued” Asco might have been liable to Farstad in respect of losses caused by the fire. Lord Clarke delivered the leading judgment.

REASONS FOR THE JUDGMENT

Lord Clarke, with whom all other members of the Court agree, considered the first two questions together as both involve the construction of the 1940 Act. Although section 3(2) is specifically intended to deal with the position where there are two actions it is not limited to such a case and the claim for contribution could be made by third party proceedings in the same action (paras [11]-[12]). The words “if sued” are to be construed as meaning “relevantly, competently and timeously sued” (para [14]).

The question under section 3(2) is whether, if Asco had been sued by Farstad, it would have been liable. That depends upon whether Asco would have had a defence to Farstad’s claim. The outcome of the appeal therefore depends upon the true construction of the charterparty, with the essential question being whether clause 33.5 of the charterparty excludes Asco’s liability to Farstad in respect of damage to the vessel caused by Asco’s own negligence (paras [15]-[16]). The Court found that it does (paras [24], [29]). Enviroco is not entitled to contribution from Asco under section 3(2) of the 1940 Act because it cannot establish that “if sued” Asco might have been liable to Farstad in respect of losses caused by the fire (paras [15], [16], [19]-[29]).

This conclusion makes the remaining question - whether the position would be different if clause 33.5 were only an indemnity rather than an exclusion clause - irrelevant. The Court did not accept the argument that, if clause 33.5 was only an indemnity clause Farstad would have been entitled to a joint and several decree against both Asco and Enviroco and both would be “found joint and severally liable in damages” within the meaning of section 3(1) of the 1940 Act. The charterparty is governed by English law and such a claim by Farstad would be met by the defence of circuitry of action. In other words, it would be useless in such circumstances to give judgment for Farstad against Asco as there could be no order of the court that Asco pay damages to Farstad. Although not called circuitry of action, Scots law applies what is in effect the same principle. Therefore, even if it were a matter of Scots law, the answer would be the same and any action by Farstad against Asco would clearly fail (paras [30]-[34], [44], [59]).

In his judgment, Lord Rodger confirmed that the Court’s construction of section 3(2) is in line with the established case law of the courts of New Zealand and Canada on similar provisions. The policy which underlies the decisions of those courts is equally applicable to Scots law.

The appeal is allowed and the decision of the Lord Ordinary is restored.

NOTE

This summary is provided to assist in understand the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html