selborne
CHAMBERS

NEWSLETTER

SPRING 2016

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SPRING NEWSLETTER 2016 - SELBORNE CHAMBERS

Welcome to Selborne Chambers Spring Newsletter

Welcome to Selborne Chambers´ first 2016 newsletter in a new format. The year has started well, with Ian Clarke QC being sworn in as a new silk at a ceremony at Westminster Hall on 22 February. The photograph to the right shows Ian on his way to Westminster Hall with Chambers Senior Clerk, Greg Piner. We all send our congratulations to Ian.

On a more serious note, this newsletter seeks to provide articles covering the range of Chambers´ work. David Uff writes on the implications of the Insurance Act 2015. His article is concerned with the amendments to the Act which are contemplated by the Enterprise Bill. Alex Goold and Justina Stewart write on remoteness and loss of a chance (which features the recent Court of Appeal Judgement in *Wellesley Partners LLP v Withers LLP*). Ian Clarke QC reviews *Murdoch v Amesbury*, and its implications for all those dealing with boundary disputes. Finally, I write about the law of subrogation, in the light of the Supreme Court decision in *Menelaou v Bank of Cyprus*.

One of our new tenants (Alice Hawker) is experiencing the rougher end of legal practice and has been instructed in a complex case which requires her to spend 6 months in the Cayman Islands. This only serves to emphasise that all of us are willing to serve, wheresoever we are sent!

I hope that you enjoy this newsletter, and will attend our regular seminars. As always, our Clerks are available to help with any legal query you may have.

Very Kind Regards,

MARK WARWICK QC
Head of Chambers

The Insurance Act 2015 and possible Amendments

Written by,
DAVID UFF

The law of insurance contracts is undergoing considerable change. The Consumer Insurance (Disclosure and Representations) Act 2012 came into force on 6 April 2013. The Insurance Act 2015 will come into force on 12 August 2016 and will apply to non-consumer insurance contracts and variations to such contracts from that date. This article is concerned with the amendments to the Insurance Act 2015 which are contemplated by the Enterprise Bill 2015.

Before turning to the purpose and effect of those proposed amendments it may be helpful to set out a broad summary of the changes to be made by the Insurance Act in its present form.

The rule of law permitting a party to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.

A statutory duty of "fair presentation" is imposed on the insured.

The insurer's remedies for "qualifying breaches" of that duty are stepped.

A representation is not capable of being converted into a warranty (as to which see below) by any contractual machinery e.g. a basis of contract provision.

A warranty remains a condition which must be exactly complied with, whether it is material to the risk or not.

Subject to limited exceptions, an insurer has no liability in respect of an event occurring after a warranty has been breached but before the breach has been remedied.

Warranties aside, the insurer may not rely on non-compliance with a term of the contract to exclude, limit or discharge its liability if that non-compliance could not have increased the risk of the loss which occurred in the circumstances in which it occurred.

Save as set out above, contracting out in non-consumer insurance is permitted subject to transparency requirements.

The purpose of the amendments contemplated by the Enterprise Bill is to address a problem which will be familiar to every lawyer who acts for insured claimants.

Where a business suffers a catastrophic loss, its survival is very likely to depend on prompt settlement by its insurer. However, insurers have no legal obligation to pay valid claims within a reasonable time.

The reason an insurer is able to "sit on its hands" and refuse to pay a claim without any good reason is found in the "hold harmless" principle and in the fact that the only available remedy for breach of the duty of utmost good faith on the part of the insurer is avoidance of the policy.

It may appear rather counter-intuitive that an insurer promises to hold a policyholder safe from harm and is liable in damages for breach of that promise as soon as harm occurs. The consequence however is that the insured cannot recover damages for late payment (of damages).

It may also appear unsatisfactory from the insured's perspective that the only remedy for breach of the duty of utmost good faith on the part of the insurer following a catastrophic loss is to avoid the policy and recover the premium.

The purpose of the amendments contemplated by the Enterprise Bill is to undo the effect of the "hold harmless" principle and enable the insured to claim damages for the late payment of a claim. The reason that the amendment is being brought forward in the Enterprise Bill is that it was thought too controversial to be passed into law under the special procedure reserved for non-contentious Law Commission Bills.

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Where a business suffers a catastrophic loss, its survival is very likely to depend on prompt settlement by its insurer.

In its present form the Bill will introduce a requirement on the insurer to pay sums due within "a reasonable time". That is by an implied term. There will be a non-exhaustive list of matters which may be taken into account in determining what is a reasonable time. The insured will have a right to damages where additional loss is suffered because of the insurer's unreasonable delay in payment. The insured's right will give rise to a discrete cause of action with its own limitation period.

The date of accrual of the cause of action and the consequent period of limitation appeared likely to provide interesting ground for litigation.

The insurer will have a defence where it had "reasonable" grounds for disputing the validity or value of a claim.

In an attempt to avoid any such satellite litigation, an amendment has been introduced which provides that an action may not be brought after the expiration of one year from the date on which the insurer paid all the sums due in respect of the claim (or extinguished its liability to do so).

Contracting out will be permitted in non-consumer insurance subject to the transparency requirements in the Insurance Act and save where the breach of the implied term is deliberate or reckless.

The contractual measure of damages will apply.

It is anticipated that the inability of a business to recover and the consequent loss of its value will, in appropriate circumstances, be found to be loss which the insurer should have realised was not unlikely to result from the failure to make payment of sums due in respect of the claim within a reasonable period of time.

The risk to insurers of facing a very substantial award of damages for late payment may go some way to provide a rather more level playing field in the relationship between insurer and insured.

Whilst the Enterprise Bill is a Government Bill, there is no apparent rush to justice. The Bill provides that the provisions as to late payment will come into effect one year after the Bill is passed into law and will then apply to insurance contracts entered into after that date.

In the interim, it is worth noting that FCA rules require claims to be handled and settled promptly and that litigating good claims timeously remains the biggest disincentive for insurers wishing to avoid or defer their obligations. That assumes of course that the crippled business can afford the issue fee and/or attract funding or willing lawyers to support its cause.

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REMOTENESS AND LOSS OF CHANCE

Written by,
ALEXANDER GOOLD
JUSTINA STEWART

On 11 November 2015, the Court of Appeal (Longmore LJ, Floyd LJ and Roth J) handed down its long-awaited judgment in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146.

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ALEXANDER GOOLD
JUSTINA STEWART

On 11 November 2015, the Court of Appeal (Longmore LJ, Floyd LJ and Roth J(handed down its long-awaited judgment in *Wellesley Partners LLP v Withers LLP* (2015) EWCA Civ 1146.

ISSUES ON THE APPEAL

The appeal raised issues about the appropriate rule for remoteness of damage where a claimant has concurrent causes of action for pecuniary loss in both tort and in contract and about the application of the 'loss of a chance' principle to the assessment of damages.

THE FACTS

Wellesley was an executive search consultancy or head hunter specialising in the investment banking sector; Withers are a well known firm of solicitors. Withers had acted for Wellesley in connection with changes to its partnership agreement necessitated by the admission of new investors, including a Bahraini bank, Addax Bank BSC. It was agreed between Wellesley and Addax that Addax should have an option, which would entitle Addax to withdraw half of its capital contribution and reduce its interest in the business proportionately. The LLP agreement drafted by Withers, as executed, gave Addax the ability to do so at any time *within* the first 41 months of the agreement. After only 12 months, shortly after the start of the financial crisis, Addax exercised its option. Wellesley established Withers had been negligent in giving effect to its instructions that the option should only have been exercisable *after* 42 months.

LOSSES SOUGHT

In consequence, Wellesley sought to recover, amongst other things, all of its losses arising from its inability to open an office in New York and trade profitably. An example of this was its failure to obtain a mandate from Nomura to recruit personnel to expand its US banking operation, following its acquisition of Lehman Brothers' non-US business. The Judge had not been satisfied that Wellesley had established such profitability but proceeded to award damages caused by the loss of the real and substantial chance that Wellesley would have obtained some form of mandate for Nomura's business, reduced by his assessment of the percentage chance of its success in doing so in a number of alternative scenarios. He did so applying the tortious test for remoteness, considering himself constrained by higher authority to do so.

THE COURT'S DECISION ON REMOTENESS

The Court of Appeal's unanimous decision on the issue of remoteness (with each member of the court delivering a reasoned judgment) is that **in instances of concurrent liability for economic loss in contract and tort, the innocent party no longer has a choice** between

i) the (potentially more extensive) tort measure of damages –i.e. reasonable foreseeability of damage of the kind in question falling within the scope of the duty and

ii) the (potentially more restrictive) contract measure –i.e. a contract breaker is liable for damages resulting from his breach if, at the time of making the contract, a reasonable person in his shoes would have had damage of the kind in mind as not unlikely to result from a breach.

In such situations, **the measure of recoverable damages is the contract measure** only.

"...in instances of concurrent liability for economic loss in contract and tort, the innocent party no longer has a choice ...the measure of recoverable damages is the contract measure only."

The decision thus addresses one of the long-standing practical issues identified by Lord Goff in *Henderson and others v Merrett Syndicates Ltd and others* [1995] 2AC 145, as a result of the House of Lords' approval, in that case, of the existence of a concurrent cause of action in tort.

THE COURT'S REASONING

The essence of the court's reasoning for the decision reached appears to be that where parties stand in a contractual relationship with each other (as opposed to one of pure tortfeasor and victim),

> *"the parties have the opportunity to draw special circumstances to each other's attention at the time of the formation of the contract. Whether or not this is treated as being an implied term of the contract, there exists the opportunity for consensus between the parties as to the type of damage (both in terms of its likelihood and type) for which it will hold the other responsible. The parties are assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable contemplation. It would make no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract."*

– see Floyd LJ at [80] (and see also Roth J [157] and Longmore LJ at [186-7])

This is the most important aspect of the Court of Appeal's decision. It makes Wellesley a very important decision on the law of remoteness of damage in cases involving concurrent liability for economic loss in contract and tort.

On the facts, the decision also held that Wellesley's claim for loss of opportunity was not too remote to be recoverable as damages for breach of contract, despite the Judge's provisional view that it might be.

LOSS OF A CHANCE

So far as 'loss of a chance' is concerned, the decision re-states the orthodox view of loss of a chance in,

i) 'two party' cases such as *Chaplin v Hicks* [1911] 2 KB 786, as involving an assessment of damages that reflects the claimant's chance of success (having established liability on the balance of probabilities); and,

ii) 'three party cases' as in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 as requiring, additionally, determination of the issue of the causation of the hypothetical conduct of a specifically identified independent third party by the application of the test of 'real and substantial' chance.

Cases such as Parabola Investments Ltd v Browallia Cal Ltd [2010] EWCA Civ 486 and Vasiliou v Hajigeorgiou [2010] EWCA Civ 1475 (indeed the way Wellesley itself had been sought to be argued at trial), supposedly involving the conduct of a world of multiple independent third parties, were, in fact, not 'loss of a chance' cases at all. Liability had been determined at trial –the trading vehicle in Parabola would have traded successfully; the restaurant in Vasiliou would have been a successful restaurant- on the balance of probabilities. The assessment of damages that followed required the judge to take account of the chances, great or small taking all significant factors into account/make a realistic and reasoned assessment of a variety of circumstances in order to determine what the level of loss had been.

Determining boundaries "Mind the [jurisdictional] gap!" after Murdoch v. Amesbury [2016] UKUT 0003 (TCC)

Written by,
IAN CLARKE QC

1. In a decision of the Upper Tier Tribunal handed down on 31 December 2015, His Honour Judge Dight allowed an appeal from the First Tier Tribunal in **Murdoch v Amesbury on, inter alia,** the basis that the First Tier Tribunal did not have jurisdiction when rejecting an application for a determined boundary to consider and make findings as to the true position of the legal boundary. This decision will have a significant impact on those conducting such cases or those considering commencing them.

2. The case concerned an application for a determined boundary. It was common ground that by reason of the inaccuracy of the plans attached to the application, it failed to fall within the maximum permitted margin of error (plus or minus 10 mm) and fell to be dismissed. The first instance Judge then proceeded to determine the position of the boundary as between the parties notwithstanding her direction to the Chief Land Registrar to cancel the application for a determined boundary. This approach was, it must be observed, in accordance with established practice both before the Adjudicator and, hitherto, before the First Tier Tribunal.

3. The case raises a number of interesting points, not least whether – in circumstances where no one was seeking to change the substantive order – it was open to one of the parties aggrieved by the findings as to the boundary to challenge the first instance decision as to jurisdiction and/or the result of that particular determination. HHJ Dight concluded that the Appellant did have standing in those circumstances, construing "decision" in the context of a tribunal's determination more widely than "judgment or order" in the comparable provisions pertaining to appeals from decisions of the Court and deriving support for that conclusion from the policy that underpinned the decision in **Lake v. Lake** [1955] P.336 which (so Waller LJ held in *CIE Noga d'Importation et d'Exportation SA v. Australia and New Zealand Banking Group Limited 2002* EWCA Civ 1142, [27]) held, when properly understood, that if the decision which the appellant sought to challenge were to be recorded in a formal order and the appellant was seeking to challenge it that decision, there was jurisdiction.

4. The point of more immediate relevance to those practising before the First Tier Tribunal concerns the decision, after a careful review of the authorities, that the First Tier Tribunal did not, on an application for a determined boundary, have jurisdiction then to proceed to make findings as to the position of the legal boundary.

5. In reaching this conclusion, HHJ Dight:

   (1) overruled the decision at first instance of **Mattson v. Maynard** [2004] Ref 2004 0579 (a decision of Ms Ann McAllister, sitting as a Deputy Adjudicator);

   (2) distinguished **Jayasinghe v. Liyanage** [2010] EWHC 265 (Ch) (Briggs J) in which the High Court (then the Appellate Tribunal) upheld the Adjudicator's jurisdiction when determining the existence of an Appellant's alleged beneficial interest in a property thereafter to proceed to ascertain the extent of that interest; and

   (3) distinguished **Chief Land Registrar v. Silkstone** 2011 EWCA Civ 801 where, in the context of an application to maintain a notice supporting a right of way, the Court of Appeal held that the Deputy Adjudicator was entitled to – and indeed needed to – determine whether the underlying right existed.

6. The Upper Tier Tribunal's analysis turns upon a careful analysis of what it is – in the context of an application for a determined boundary – that constitutes "the matter" of which the First Tier Tribunal was seized. The reasoning ran as follows.

7. Section 73(7) of the Land Registration Act 2002 obliges the Registrar to refer a disputed application for a determined boundary to the Adjudicator, whose jurisdiction is bestowed by section 108, which states that he has the following functions: "(a) determining matters referred to him under Section 73(7) ....".

8. The Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003 define "matter" as "the subject matter of either a reference or a rectification application". In light of these statutory provisions and the translation of jurisdiction into the Tribunal system, the Upper Tier Tribunal determined that the subject matter of the reference in that particular case was the Appellants' disputed application for a determined boundary only and not for the resolution of a general boundary dispute. Moreover, it was not cast as such by the Registrar's reference.

9. Accordingly, HHJ Dight concluded:

   "It therefore seems to me the matter which is referred to the Adjudicator for determination was the application for a determined boundary, the issues for the Adjudicator being the accuracy of the Appellants' plan. That the issue identified in the case summary was the accuracy of the plan submitted by the Appellants is consistent with my view that the key to understanding the provisions relating to determined boundaries is that very accuracy."

10. Accordingly and for these reasons – and contrasting the position with that which would pertain if the matter had been directed into Court – the Upper Tier Tribunal held that the Adjudicator/First Tier Tribunal had no jurisdiction to determine where the legal boundary lay when considering a determined boundary application.

11. This has not gone down well in that particular jurisdiction. It opens up the real possibility that boundary disputes may become more protracted and expensive than hitherto – if that is conceivably possible – because of this lack of jurisdiction. Indeed, the case in **Murdoch** is a paradigm example – the boundary dispute had been running since 1977 and, as a result of the Appellate decision, has yet to be resolved notwithstanding the findings of the First Tier Tribunal as to where the boundary lay (with which, as it happens, the Upper Tribunal differed).

12. Where does this leave determined boundary applications? Clearly, in circumstances where that is the only matter referred to the First Tier Tribunal, there is – pending any reversal of this decision on any second appeal – clearly no scope for the broader dispute to be resolved. (Given that the decision in **Murdoch** was only handed down on 31 December 2015, the prospects of a second appeal are unclear.)

13. For those contemplating or currently conducting extant determined boundary applications and who wish also to have the benefit of a decision as to the position of the boundary whilst also opposing the application for its determination, this decision represents an unwelcome complication. Those individuals must now give immediate consideration to: –

    (1) applying to the Registrar for the alteration of the Register to reflect what is said to be the true boundary position (usually either as a result of the proper construction of historical conveyances or, in the appropriate case, adverse possession) and, if necessary, staying any determined boundary application until any such application has caught up. By this route, the matter would remain in the Tribunal system. It is worth noting in passing that the decision in **Matson v. Maynard** was precisely one in which there were two applications, one for a determined boundary and one for alteration of the Register as to the correct (as the Applicants saw it) position of the general boundary; or

    (2) applying to stay the reference and, at the same time commencing proceedings in the County Court.

Which strategy is adopted may well depend upon how far the references progress towards trial. Clearly, the more advanced the progress towards trial, the more desirable it would be to adopt the first strategy since it may avoid unwelcome costs consequences. The First Tier-Tribunal may, in the light of the decision in Murdoch be anticipated to be favourable to such applications.

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SUBROGATION - THE LENDER'S VERY FLEXIBLE FRIEND.

Written by,
MARK WARWICK QC

Subrogation - The Lender's very flexible friend

Written by,
MARK WARWICK QC

1. In **Foskett v. McKeown** (2001) 1 AC 102, at page 127F, Lord Millett explained that:

   "Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property".

2. Traditionally, subrogation in the property field, has depended upon the Claimant (often a lender who has failed to obtain an anticipated legal charge) seeking to trace its money into a property. Indeed, in a famous passage in the judgment of Walton J in **Burston Finance Limited v. Speirway Limited** (1974) 1 WLR 1648, that Judge, at page 1652B, said as follows:

   "What is the basis of the doctrine of subrogation? It is simply that, where A's money is used to pay off the Claimant B, who is a secured creditor A is entitled to be regarded in equity as having had an assignment to him of these rights as a secured creditor. There are other cases of subrogation where B is not secured, but the ordinary and typical example is as I have stated. It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced and, for one reason or another, he does not receive the promised security. In such case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him but of course only to the extent to which his money has, in fact, discharged their claims."

3. However, following the Supreme Court's decision in **Menelaou v. Bank of Cyprus UK Limited** [2016] AC 176, it is no longer necessary for the claimant to seek to find a *"tracing link"* between its money and the property, before subrogation will arise. Of the five Judges in Menelaou there was only one who felt it was necessary to look for a *"tracing link"* (see Lord Carnwath, at paragraph 140). The other four Judges decided that subrogation is a remedy available for unjust enrichment. This means that property lawyers need to become familiar with the principles of unjust enrichment. Such familiarity may afford their clients relief, which was not previously available to them.

4. Hereafter this Article examines the Menelaou case and the principles of unjust enrichment, that the majority of the Judges deployed to reach their decision.

5. At the centre of the case was Melissa Menelaou ("Melissa"). In the summer of 2008 Melissa was a college student aged 18 years. Her parents owned a substantial house (Rush Green Hall). This property was subject to two charges in favour of the Bank of Cyprus. The parents owed the Bank about £2.2 million. The parents decided to *"downsize"*. They exchanged contracts to sell Rush Green Hall for £1.9 million. Soon thereafter they found a new house, available for purchase at £875,000 (Great Oak Court). They reached agreement with the Bank that the Bank would release the charges over Rush Green Hall if:

   (i) the Bank was paid £750,000 from the proceeds of sale;

   (ii) the Bank was granted a first charge over Great Oak Court, for the entire purchase price of £875,000.

6. At a late stage, the parents told Melissa that they were giving her the new house. They said nothing to Melissa about the arrangement with the Bank, or that the house would be subject to any charge. The Bank agreed to Great Oak Court being purchased in Melissa's name, but still on the basis that they had a first legal charge over it. The same solicitors were instructed on behalf of Melissa, her parents and the Bank. The Bank had no dealings with Melissa. The solicitors made a mess of the conveyancing. Although a legal charge was registered in favour of the Bank over Great Oak Court it proved to be void, because Melissa did not sign it, and anyway the solicitors made changes to it without informing Melissa.

7. Subsequently Melissa was successful in establishing that the Bank's legal charge was void. This meant the Bank had no security over the property unless it could establish an equitable charge by means of subrogation.

8. At the trial the Bank's claim to subrogation was rejected. Melissa's primary argument was that the money used to purchase Great Oak Court was legally her parents, being part of the proceeds of sale of Rush Green Hall. This argument was accepted. However the Court of Appeal disagreed. Floyd LJ said that there was a *"sufficiently close causal connection"* between the Bank's agreement as to the purchase of Rush Green Hall, and Melissa's involvement. Tomlinson and Moses LJJ agreed.

9. The Supreme Court dismissed Melissa's appeal. By a majority that court based its decision in favour of the Bank firmly in the law of unjust enrichment. Lord Clarke, at paragraph 18, said:

   "It appears to me that this is a case of unjust enrichment. In Benedetti v. Sawriis (2014) AC 938 the Supreme Court recognised that it is now well established that the Court must ask itself four questions when faced with a claim for unjust enrichment. They are these:

   (1.) *Has the Defendant been enriched?*
   (2.) *Was the enrichment at the Claimant's expense?*
   (3.) *Was the enrichment unjust?*
   (4.) *Are there any defences available to the Defendant?"*

10. Lord Clarke answered each question in favour of the Bank. At paragraph 37 he then said:

    "The next question is what remedies are available to the Bank. The answer is that the Bank is subrogated to the unpaid seller's lien. Subrogation (sometimes known in this context as restitutionary subrogation) is available as a remedy in order to reverse what would otherwise be Melissa's unjust enrichment. It is important to recognise that a claim in unjust enrichment is different in principle from a claim to vindicate property rights".

11. Lord Clarke emphasised the above point at the end of paragraph 38, where he said:

    "A claim in unjust enrichment does not need to show a property right".

12. After a review of some authorities, Lord Clarke said at paragraph 49:

    "Those statements seem to me to support a flexible approach to the remedies appropriate in a particular case".

13. Lord Neuberger delivered a judgment that broadly agreed with Lord Clarke. Lord Neuberger also applied the principles of unjust enrichment, and then asked himself whether subrogation was an appropriate remedy. He said that it was. Lords Kerr and Wilson agreed with Lords Clarke and Neuberger.

14. As the readers of this Article will appreciate, there are many cases where a lender, who expects to receive a charge over property, fails to do so; for example because of a solicitor's error or a defect in a legal charge. It is no longer necessary to show a direct or even indirect link between the lender's money and the property. A simpler route can be deployed, namely using the law of unjust enrichment.

15. It is anticipated that lenders' lawyers will (or at least should) routinely invoke unjust enrichment instead of, or in addition to, their traditional proprietary claims.

16. Hence, in place of Lord Millett's statement, in Foskett, about certainty where property rights are concerned, one is left with an emphasis upon flexibility. This may be good news for lenders, but not so good for property owners, and the lawyers who they may consult, seeking clarity as to their legal position.

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