Contributory Negligence as a partial defence to contractual claims where there is concurrent liability in contract and tort: *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd and another* [2023] UKPC 40

Introduction

1. Whilst practitioners pored over the Supreme Court's decision in *Canada Square*, the Judicial Committee of the Privy Council (**"JCPC"**) handed down its decision in *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd and another* [2023] UKPC 40 on the same day.

2. This Note considers the JCPC's re-statement of the availability of contributory negligence as a partial defence to claims brought concurrently in contract and in tort (for breach of a duty of care) in circumstances where negligence was an essential ingredient of both causes of action.

Background

Facts

3. The Claimant and Appellant (**"Primeo"**) was an investment fund. From 1994, Primeo invested funds with Bernard L Madoff Investment Securities LLC (**"BLMIS"**). By 2007, this was entirely indirectly via shares in 'feeder funds'. Unhappily for it and its customers, BLMIS happened to be a vehicle used by the fraudster, Bernard Madoff, to carry on a 'Ponzi Scheme'.

4. To operate the fund, Primeo appointed: i) the First Respondent, Bank of Bermuda (Cayman) Ltd (**"Bank of Bermuda"**), as administrator of the fund, and ii) the Second Respondent, HSBC Securities Services (Luxembourg) SA (**"HSBC"**), as custodian of the fund.

5. By 11 December 2008, Bernard Madoff was charged with fraudulently operating a Ponzi Scheme via BLMIS. It was insolvent and did not own the securities it purported to. On 23 January 2009, unable to recover the invested funds, Primeo went into involuntary liquidation.

6. Primeo brought claims against Bank of Bermuda and HSBC in the Cayman Islands, alleging:

   6.1. against the Bank of Bermuda, breach of its obligations as administrator in relation to: i) calculating Primeo's Net Asset Value (**"NAV"**), ii) keeping Primeo's accounts, books, and records, and iii) implied duties of reasonable care and skill; and

   6.2. against HSBC, breach of duty in relation to: i) those duties set out in the various Custodian Agreements, ii) the actions of BLMIS (as sub-custodian) by way of negligence or wilful breach of duty, and iii) various other implied duties.

7. On the contributory negligence issue, the Court of Appeal of the Cayman Islands held that the defence applied to both claims and considered that the appropriate reduction was 50%.

Issues

8. In relation to the contributory negligence issue: the JCPC summarised the parties' grounds of appeal as follows **[47]-[48]**: i) Primeo challenged whether contributory negligence was available as a defence to a claim brought for breach of contract and, if so, whether it was just and equitable to apply a reduction, and ii) the Respondents argued that the Court of Appeal had erred in substituting its own assessment of 50% in place of the 75% reduction determined by the trial judge (n.b. the trial judge considered that the defence was not available to HSBC).

Judgment

9. On the contributory negligence issue, the JCPC found that: i) the defence is, in principle, available where a claim is based on the breach of a contractual duty of care which is concurrent with a duty in tort, ii) it applied to the claim against the Bank of Bermuda, iii) it did not apply to the claim against HSBC, and iv) the Court of Appeal's reduction was upheld **[391]**.

Principles

10. As to the relevant law and authorities, over the course of the Judgment, the JCPC:

10.1. observed that the Cayman Islands law on contributory negligence (the Torts (Reform) Law (**"1996 Revision"**)) was modelled on the UK's Law Reform (Contributory Negligence) Act 1945 and operated in the same way, both in relation to: i) the replacement of the complete defence at common law with a partial defence in statute **[325]**, and ii) the definitions of fault in relation to the same (**[331]**); and

10.2. surveyed the authorities pertaining to the application of contributory negligence in the context of breach of contract claims both in England & Wales **[292]-[308]** and in Commonwealth jurisdictions **[309]-[323]**.

11. Primeo argued that Hobhouse J was wrong to hold in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 that contributory negligence was available as a defence to a claim in contract where there exist concurrent duties to the same effect in contract and tort because such a defence did not exist at common law prior to 1945. As to this:

11.1. in *Vesta*, Hobhouse J considered there to be three categories of case, where the defendant's liability: i) arises from a contractual provision which *does not* depend on negligence on the part of the defendant ('Category 1'), ii) arises from a contractual obligation which, although expressed in terms of taking care, does not correspond to a common law duty of care independent of the contract ('Category 2'), and iii) in contract is the same as their liability in the tort of negligence independently of the existence of any contract ('Category 3') (see, **[296]**);

11.2. in *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos 2 and 4)* [2003] 1 AC 959 and *Pritchard v Co-operative Group Ltd* [2011] EWCA Civ 329 (cases concerning deceit and assault and battery, respectively), it was held that the defence was not available in relation to these causes of action because there was no such defence available at common law; accordingly

11.3. in reliance upon *Standard Chartered Bank*, *Pritchard*, and academic commentary, Primeo argued that the 1945 Act related only to those causes of action where contributory negligence ran at common law. As breach of contract was not among those causes of action, the 1945 Act could not apply to the same **[326]**.

12. The JCPC comprehensively rejected this argument:

    12.1. the JCPC was attracted to the view of Cooke and Roper JJ in the New Zealand Court of Appeal in *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 178 that the defence *"can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty"* **[310]**; accordingly

    12.2. whereas *Standard Chartered Bank* and *Pritchard* featured intentional torts which never gave rise to the defence at common law, the present case concerned a situation where negligence was an essential ingredient of both causes of action (following *Rowe*) and, therefore, a 'Category 3 claim' (as defined in *Vesta*); and in any event

    12.3. the JCPC concluded that the common law recognised contributory negligence as a defence in cases involving concurrent duties of care in tort and contract **[337]** before embarking on a fascinating overview of the relevant authorities prior to 1945 as well as the legislative history of the 1945 Act which assumed the same **[337]-[352]**.

13. Primeo also argued that the definition of 'fault' under the Cayman Islands law excluded the contributory negligence defence in a 'Category 3' case. The JCPC rejected this:

    13.1. the definitions of 'fault' under both the Cayman Islands and UK law had two limbs: i) the defendant's fault, and ii) the claimant's fault. The definitions of the same were considered to be similar:

        13.1.1. as to the defendant's fault, whereas the 1996 Revision referred to *"an act creating a liability in tort"*, the 1945 Act referred to "*negligence, breach of statutory duty or other act or omission, which gives rise to a liability in tort"*; and

        13.1.2. as to the claimant's fault, whereas the 1996 Revision referred to *"an act … which, prior to the operation of this Law, would have given rise to the defence of contributory negligence"*, the 1945 Act referred to *"negligence, breach of statutory duty or other act or omission which …*

would, apart from this Act, give rise to the defence of contributory negligence".

13.2. each limb was mirrored *"so that one is in that way comparing like with like: in both cases it is the conduct of the claimant and the conduct of the defendant which has to be taken into account, judged according to objective standards laid down by the substantive law"* **[335]**. As to this:

13.2.1. the definition of the defendant's fault directed attention at the conduct which gave rise to the cause of action, not the cause of action itself. Accordingly, *"it is sufficient that the cause of action is founded on an act or omission which gives rise to liability in tort. As a result, the defence should in principle be available in category 3 cases where the claimant relies on concurrent liability in contract and in tort."* **[332]**; likewise

13.2.2. the definitions of the claimant's fault also focused on the conduct in question which would have given rise to the defence of contributory negligence at common law. For the purposes of the 1945 Act, this was because the definition *"refers to a standard of conduct, not a cause of action"* **[335]**.

14. The JCPC also attached "considerable importance" to the fact that Vesta had been established law for 35 years and "throughout this period contracting parties, both in the area of the provision of professional services and more generally, have negotiated and contracted on the basis that where there may arise concurrent claims in contract and in the tort of negligence, contributory negligence will be available as a defence." **[353]**

Availability of the Defence for HSBC

15. The trial judge's decision that the defence was open to the Bank of Bermuda was not challenged. However, the JCPC held that the defence was not open to HSBC because:

15.1. the JCPC considered that the Custodian Agreement conferred on HSBC: i) a power to appoint sub-custodians to perform the duties for which it was responsible, ii) a duty to take reasonable care and to exercise due diligence when appointing, among others, sub-custodians, iii) an obligation to require any sub-custodian to implement the most effective safeguards available **[359]**;

15.2. there was no contractual obligation upon HSBC to perform custodial services. Rather, HSBC's obligation was to require the sub-custodian to put in place the most effective safeguards to protect the assets. This was a Category 1 or 2 obligation **[368]**;

15.3. whereas the Court of Appeal considered that the existence of indemnity and exoneration provisions rendered the duty to implement the most effective safeguards a duty to exercise reasonable care and skill, the JCPC was clear that *"the exoneration and indemnity provisions do not change the scope and nature of the duty. Instead, they deal with the position once a breach of duty has been established and operate to limit the circumstances in which damages may be payable for that breach."* **[365]-[369]**; and

15.4. the Respondents had failed to identify what the negligence concurrent with the contractual duty was in this case **[370]**.

Assessment of Responsibility

16. As to the trial judge's assessment of the Bank of Bermuda's responsibility, the Court of Appeal was entitled to substitute the deduction of 75% with 50% **[382]**. The Bank of Bermuda had failed to produce and issue a Net Asset Value and ensure that it was accurate by failing to take steps to confirm that the information it had received was accurate and that the assets existed. This was not considered by the trial judge **[380]-[381]**;

Analysis and Learning Points

17. Stepping back, what can we learn from this case? In my view:

17.1. in a comprehensive judgment on the point, the JCPC affirmed *Vesta* and put beyond doubt the availability of contributory negligence as a partial defence to actions brought concurrently in tort and contract where negligence is an essential ingredient of both;

17.2. it is interesting that this JCPC placed *"considerable importance"* on the expectations of contracting parties who had negotiated and contracted on the basis of the availability of this defence. This reasoning seeks to avoid introducing a development that might disrupt the 'status quo' expectations of those acting in the shadow of it; and

17.3. practitioners should take care in the framing of any contractual obligation to provide professional services and consider whether the formulation may admit the possibility of a defence of contributory negligence. They would be prudent to have the three categories of *Vesta* at the forefront of their minds when doing so. As to this:

17.3.1. the professional service provider will only be able to avail themselves of a contributory negligence defence if liability under the contract can be said to be the same as liability in the tort of negligence;

17.3.2. *Primeo* demonstrates how fine a line that characterisation can be. The Court of Appeal considered that HSBC's obligation was to exercise reasonable care and skill in connection with the most effective safeguards. However, the JCPC considered that HSBC had a narrower contractual duty to require any sub-custodian it appointed to put in place effective safeguards. This narrower contractual duty took it out of the Category 3-type case; similarly

17.3.3. the JCPC emphasised that there was no concurrent cause of action in tort against HSBC for such breaches independent of the contract; accordingly

17.3.4. when drafting such clauses commercial parties might wish to bear in mind whether the obligation is framed in such a way as would admit a

defence of contributory negligence: careful drafting could shut down that option for a counter-party or, as the case may be, preserve the possibility of a defence of contributory negligence; and

17.3.5. for like reasons those involved in litigation will need to pay careful attention to how cases are pleaded, with one eye on either shutting down or opening up the possibility of a defence of contributory negligence.

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1 December 2023