

Aerospace Publishing Limited v Thames Water Utilities Limited [2007] EWCA Civ 3

The recovery of management and staff costs as damages.

The recent Court of Appeal decision of *Aerospace Publishing Limited v Thames Water Utilities Limited* [2007] EWCA Civ 3 has clarified the circumstances in which claims for wasted management and staff costs incurred when dealing with a loss, can be recovered as part of the damages.

In 2001, Aerospace Publishing Limited ('Aerospace') sustained extensive water damage to their photographic art and reference archive as a result of a burst mains water pipe belonging to Thames Water Utilities Limited ('Thames Water'). Thames Water admitted liability for the damage caused, but issues remained as to the extent and nature of that damage and the correct approach to adopt in its assessment. At first instance it was held that the correct approach was to assess the damages by reference to the cost of reinstating the damaged archive. Aerospace then claimed as a special head of damage, the costs of diverting certain members of their staff to activities relating to the restoration of the archive.

Thames Water appealed the trial Judge's decision in respect of the assessment of damages, arguing that his reasoning had been insufficiently explained. However, the Court of Appeal held that the approach adopted by the trial Judge was correct. Thames Water also took the opportunity to raise the separate issue relating to Aerospace's claim for the recovery of staff costs, arguing that they had

not proved their loss of revenue and that it was not open to the trial judge to simply infer a diversion from revenue-generating activities. Wilson LJ directly considered this issue of the recovery of staff costs. Giving a detailed analysis of the authorities, he identified three key principles to apply to the question of whether management/staff costs can be recovered:

1. The fact and extent of the diversion of staff time must be properly established.

In *Tate & Lyle Food v Greater London Council* [1982] 1 WLR 149, Forbes J confirmed that 'the expenditure of managerial time in remedying an actionable wrong done to a trading concern can properly form the subject matter of a head of special damage'.

However, it was also acknowledged that the modern office environment allows for the recording of time spent by individual employees on specific projects and in this case the claimant's claim failed as they had not sufficiently established the amount of time diverted, and more generally, the extent to which the employees' trading routine had been disturbed by that diversion.

Judge Bowsher QC in *Horace Holman Group Ltd v Sherwood International Group Ltd* [2001] All ER (D) 83 (Nov), in considering the decision in *Tate & Lyle*, held that it is not the case that where there is no evidence, there can be no recovery. Rather, where a claimant has not adduced

evidence they can reasonably be expected to adduce, they are at risk of a finding that the diversion of staff time has not been established.

2. The diversion of staff time must have caused significant disruption to the business.

In *Standard Chartered Bank v Pakistan National Shipping Corporation* [2001] EWCA Civ 55 the employee in question had been required to perform a task outside their usual activities in response to the wrongful act of the defendant. However, the claimant's claim to recover the cost of this diversion was unsuccessful as its business had been in no way adversely affected by it.

This decision was not cited to Judge Bowsher in *Horace Holman Group*. However, both the fact and the extent of the diversion, and the significant disruption caused to the business as a result of it, were well demonstrated in that case.

3. It is reasonable for the Court to infer from the disruption that, had the employees' time not been so diverted, they would have been engaged in revenue-generating activities for the claimant at least equal in value to their salary for the period of time of the diversion.

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This note has been written by Roger Franklin and Emma Sangeelee for Edwin Coe LLP. If there is any aspect of this case that you would like to discuss, or you simply wish to discuss your insurance matters in general, please contact Roger via the contact details below.

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Stanley Burton J in *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233 (Ch) held that to claim for payments that would have been made to staff in any event, the claim had to be formulated as one for loss of revenue as a result of the diversion of staff time, and accordingly, that the loss of revenue had to be evidenced.

Subsequently this decision was considered in *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm) by Gloster J who held that, notwithstanding the lack of evidence showing the loss of revenue, the costs of wasted staff time could be recovered where it is demonstrated with sufficient certainty that

the wasted time was spent on investigating or mitigating the wrongful act of the Defendant.

Wilson LJ in *Aerospace* prefers the reasoning of Gloster LJ in *R+V Versicherung* which he views as more consonant with the decision in *Standard Chartered Bank*. He also acknowledges Judge Bowsher's acceptance of the submission of the claimant's forensic accountant in *Horace Holman Group*, that every employer values each employee at more than the amount the employee is paid as there would otherwise be no point in employing them.

Comment

The *Aerospace* case clarifies the position of the courts in relation to claims for wasted staff/management costs as a consequence of the investigation or mitigation of the wrongful act of a defendant. The defendant's appeal failed as the Court of Appeal held that, as the claimant was able to establish the fact and the extent of the diversion, and a significant disruption to its business as a result of that diversion, the trial judge was open to infer that that diversion was from revenue-generating activities. However, it is also now clear that there is a real risk of the court finding the fact and extent of the diversion not to have been established where the claimant has not taken all reasonable steps to maintain accurate and comprehensive records of the diversion of staff time.

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