Lowick Rose LLP v. Swynson Ltd [2017] UKSC 32

The Supreme Court has now ruled on the tricky "no loss" arguments raised in this accountant's negligence claim, reversing the decision of the lower courts. **Nicola Rushton** of Hailsham's professional negligence team considers the implications.

In ***Lowick Rose v. Swynson***, the facts were that Swynson had lent £15m to a borrower company, EMSL, to buy another company, Evo. The defendants were accountants who carried out due diligence for Swynson on the purchase and did so negligently. Evo got into difficulties and EMSL defaulted on its loan. Swynson was owned by a Mr Hunt. To improve Swynson's balance sheet and for reasons of tax efficiency, Mr Hunt made an interest-free loan to EMSL, which it used to discharge the loan to Swynson, so that instead a loan was owed to Mr Hunt. The issue for the courts was whether this had the consequence that neither Swynson nor Mr Hunt had suffered any recoverable loss as a result of the accountants' negligence. The lower courts had held that Swynson could still recover; the Supreme Court in contrast held that there was no loss.

The case is a lesson in the importance of considering all possible implications before restructuring lending, but ultimately it turned on the fact that Mr Hunt and Swynson were separate legal persons. No guidance was given for cases where the lender restructures its own loan – we are going to have to wait for the Supreme Court's ruling in *Tiuta v. De Villiers* for that (where permission has been granted).

Swynson and Mr Hunt tried three routes: (a) collateral payment or *res inter alios acta*; (b) transferred loss and (c) unjust enrichment, but all failed. Lord Sumption gave the lead judgment, but Lords Mance and Neuberger also gave full judgments. The case can probably be seen as a re-assertion of the more traditional approaches to these types of question.

In summary the conclusions were as follows:

(a) On **collateral benefits**: the Supreme Court reaffirmed the principle that any such collateral payments received by the claimant are ignored where their receipt arose independently of the circumstances giving rise to the loss. Gifts are regarded as independent. Insurance payments are independent, because they have been paid for through premiums. However the Court concluded that the repayment received by Swynson from EMSL, in turn funded by a loan from Mr Hunt, could not be classed as any kind of collateral payment at all. The reality was that Swynson's losses on its loans were made good when the borrower EMSL repaid those loans. It was irrelevant that EMSL used money borrowed from Mr Hunt to do so, as it would been if it had been borrowed from any other third party. The purpose of Mr Hunt's loan was to enable EMSL to repay its loan to Swynson and that purpose was achieved. Therefore this was not a case of a collateral payment.

(b) **Transferred loss**, confirmed the Court, only arises where the object of the transaction is to benefit a third party or a class of third parties and the anticipated effect of breach of a duty owed to the claimant is that loss will be caused to the third party. In such cases, the claimant can recover the loss, but is liable to account to the third party. However, it was no part of the engagement of the accountants to benefit Mr Hunt (and the judge had decided no duty of care was owed to him). Therefore this was not a case of transferred loss.

(c) **Unjust enrichment** played a much greater role in the Supreme Court than it had in the lower courts, which had ruled in favour of Swynson on the collateral payment point. The Court reaffirmed a four question approach:

a. Has the defendant benefitted in the sense of being enriched?
b. Was the enrichment at the claimant's expense?
c. Was the enrichment unjust?
d. Are there any defences?

Their Lordships were essentially prepared to assume that (a) and (b) could be satisfied: the accountants had benefitted, in that a claim in damages could no longer be pursued against them, and it was Swynson which had lost the benefit of that claim. However, none were prepared to find the enrichment was unjust. All emphasised that it was necessary to examine the subject transaction, here the further loan by Mr Hunt to EMSL, and ask whether the claimant could show that they did not get all that they expected or thought they had bargained for. Lord Sumption (with whom 3 of the other judges agreed) considered the principle was essentially limited to cases where there was some defect in the subject transaction itself. Here the loan from Mr Hunt to EMSL had operated exactly as intended: he had obtained the security and covenant he anticipated and the loan to Swynson was repaid. The problem was the indirect effect on the claim by Swynson against the accountants. However, all their Lordships considered this was too indirect an effect to equate to being "unjust".

The judgment has therefore given useful further clarity on the principles of collateral benefit and unjust enrichment, especially in the context of assessing whether loss has been suffered. However is probably best seen as an affirmation that hard cases should not be allowed to make bad law.