Making a Reasonable Recovery after Mediation? *Siemens Building Technologies FE Ltd v Supershield Ltd*

by
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1. BACKGROUND

The freeholder, lessee and occupier of an office building sued the developer and builders for water damage which had, in turn, caused extensive electrical damage. The action was brought relying on warranties provided under the development and building contracts.

The water damage arose from a flood in the basement of the building caused by flooding of the tank which had been put into the building to feed the sprinkler system. The tank had a ball valve, rather like those found in domestic water tanks, with a float that rose as the water level in the tank reached a pre-determined level. As the float rose the lever arm turned the water off. The float was attached to the lever arm by two nuts and bolts. One of the nuts hadn't been tightened properly. The bolt it was holding came out. The float did not float. The ball valve did not shut. And the tank room flooded; causing considerable electrical damage.

But that was not the whole story. There were a number of other fail-safes specifically designed to prevent the tank room from flooding. First there was a 600mm wall around the tank which had been erected to contain any flooding—it was overwhelmed. Secondly there were drains in the tank room floor designed to drain off any flooding which did occur—but these had become blocked. Finally there was an electronic Building Management System which was in the process of being installed, but which at the time of the flood was not being monitored 24-hours a day—although it was accepted that it had received a number of signals arising from the incident.

2. GREAT FLEAS

It is said that "great fleas have little fleas upon their backs to bite 'em, And little fleas have lesser fleas, and so *ad infinitum*".[2] A similar system, it seems, exists with contractors and subcontractors—"contractors have subbies upon their backs to bite 'em and subbies too, have subbies and so *ad infinitum*". It was from just such a ménage that the issues arose in the *Supershield* case.

Helical Bar (Chiswell Street) Ltd was the developer. Skanska Construction Ltd was the builder. Skanska had subcontracted for Haden Young Ltd to undertake certain mechanical and electrical work, including the installation of the sprinkler system. Haden Young Ltd, in turn, had subcontracted the installation of the sprinkler system to Siemens Building Technologies FE Ltd (Siemens). And Siemens had subcontracted some of the installation work on the sprinkler system to Supershield Ltd (Supershield). Siemens had also contracted with AC Plastics Industries Ltd to supply and fit the sprinkler supply tank under a quotation which included provision "for two ball valve boxes and two ball valve plates". The ball valve assemblies themselves were the subject of another supply contract between Siemens and Lansdale Viking Ltd and were manufactured by The Peter Smith Valve Co Ltd.

[1] *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] EWCA Civ 7; [2010] N.P.C. 5 (January 20, 2010).

[2] A. De Morgan, *Budget of Paradoxes* (1872), p.377.

3. CLAIM AND SETTLEMENT

The freeholder, lessor and occupier of the building brought claims against both the developer and the builder in respect of the electrical damage caused by the water damage. Before long the various subcontractors who had been contracted to work on the sprinkler system found themselves joined in the proceedings under Pt 20 of the CPR as each blamed the one lower down the contract chain for the damage.

In June 2008 there was a mediation at which Siemens settled the claimants' claims for £2,864,080.00 (just under 50 per cent of the total amount in dispute), but maintained its Pt 20 claim against Supershield for the whole of the settlement amount plus interest. And it was from this case that the *Supershield* appeal arose.

At the trial in the Pt 20 proceedings between Siemens and Supershield Ramsey J. found that Supershield was responsible, under the terms of the subcontract, for fitting the ball valve and float (rather than AC Plastics which Supershield had suggested had had responsibility for that part of the work). The judge also found, as a matter of fact, that Supershield had fitted the float connectors and that the nut which had been the cause of the damage had been left loose at that time. So he found Supershield liable to Siemens in respect of the damage. Finally the judge found that the amount for which Siemens had settled was reasonable and he therefore found in favour of Siemens and awarded Siemens the settlement sum plus interest. It was against this finding[3] that Supershield appealed.

Supershield's argued that the judge's construction of Supershield's subcontract had been wrong to the extent that it suggested that Supershield was responsible for fitting the ball valve and float system. This, and a subsidiary argument which was reliant on that argument succeeding, were both rejected by the Court of Appeal. This left only the question of whether the amount paid by Siemens to settle was recoverable against Supershield under Pt 20.

4. RECOVERABILITY OF SUMS PAID IN SETTLEMENT

The starting point for determining whether or not a sum paid out in settlement can be recovered by the payer (here Siemens) against a third party (here Supershield) is by asking the two questions put by Lord Coleridge C.J. to the jury in *Fisher v Val de Travers*.[4] The first is whether the payer acted reasonably in settling the claim; the second is whether the amount paid in settlement was reasonable. In *Biggin v Permanite*[5] Somervell L.J. said that those two questions were really one as:

> "[I]t would seem to be difficult to say that, if the answer to the second question was 'Yes', the answer to the first question could be 'No'."[6]

However, in *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd,*[7] Goff L.J., whilst agreeing with Somervell L.J. in *Biggin* that "in practice I think [the two questions] will generally be found to merge into one another",[8] went on to suggest that in certain situations they might not. By way of example he suggested that:

> "[I]f the point was one which could be speedily and cheaply determined, it might not be reasonable as against the indemnifier to settle, though if there were going to be a settlement, the amount might be perfectly reasonable."

[3] *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC); [2009] T.C.L.R. 7, Ramsey J.
[4] *Fisher v Val de Travers* (1876) 1 C.P.D. 511; 45 L.J.Q.B. 479; (1874–80) All E.R. Rep. 622.
[5] *Biggin v Permanite* [1951] 2 K.B. 314; [1951] 2 All E.R. 191; [1951] 2 T.L.R. 159 CA.
[6] *Biggin v Permanite* [1951] 2 K.B. 314 at 320; [1951] 2 All E.R. 191; [1951] 2 T.L.R. 159 CA.
[7] *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd* [1979] 17 B.L.R. 56 CA.
[8] *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd* [1979] 17 B.L.R. 56 CA at 89.

And, in *Comyn Ching* itself, Goff L.J. dealt with the two questions separately.

In *Comyn Ching* Goff L.J. was able to answer the question of whether or not it had been reasonable for *Comyn Ching* to settle in the affirmative, on the basis that:

> "Ching were advised to settle by competent and experienced legal advisers. That is not conclusive but clearly important. Ching were facing long and complex litigation which was bound to be costly, and the outcome of which they could not foresee with any certainty."[9]

The fact that the settlement was entered into on legal advice, taken together with the uncertainty of litigation, made the decision to settle reasonable. In *Biggin* Somervell L.J. too considered what would be relevant evidence in trying to establish whether or not a settlement was reasonable: "I think it relevant to prove that the settlement was made under advice legally taken." At first instance in *Supershield* Ramsey J. considered that issues of legal advice and the uncertainties of litigation fell to be considered under the second leg of Lord Coleridge C.J.'s direction to the jury; perhaps a further indication of how difficult it is to separate the two questions in practice:

> "The test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include:
>
> (a) The strength of the claim;
> (b) Whether the settlement was the result of legal advice;
> (c) The uncertainties and expenses of litigation;
> (d) The benefits of settling the case rather than disputing it."[10]

In *Supershield* Siemens had entered into the settlement on legal advice.[11]

Ramsey J. also went on to note that:

> "[T]he question of whether a settlement was reasonable is to be assessed at the date of the settlement when necessarily the issues between the [original parties to the dispute] remained unresolved."[12]

Colman J. in *General Feeds v Slobodna Plovidba Yugoslavia*[13] said:

> "Unless the claim is of sufficient strength reasonably to justify a settlement and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract [for which the indemnifier is liable]. That is not to say that unless it can be shown that the claim is likely to succeed it will be impossible to establish that it was reasonable to settle it. There may be many claims which appear to be intrinsically weak but which common prudence suggests should be settled in order to avoid the uncertainties and expenses of litigation. Even the successful defence of a claim in complex litigation is likely to involve substantial irrevocable costs... Unless it appears on the evidence that the claim is so weak that no reasonable owner or club would take it sufficiently seriously to negotiate any settlement

[9] *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd* [1979] 17 B.L.R. 56 CA at 89.

[10] *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC); [2009] T.C.L.R. 7 at [80].

[11] *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC); [2009] T.C.L.R. 7 at [117].

[12] *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC); [2009] T.C.L.R. 7 at [117].

[13] *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep. 688.

> involving payment, it cannot be said that the loss attributable to a reasonable settlement was not caused by the breach by reason of which the goods are in a damaged condition."[14]

In *John F Hunt Demolition Ltd v ASME Engineering Ltd*[15] Coulson J. took this a step further, agreeing with Colman J.'s analysis in *General Feeds*:

> "[A] claim will usually have to be so weak as to be obviously hopeless before it can be said that settlement of the claim was unreasonable."[16]

Indeed the requirement that it must be "reasonable" for the payer to settle does not even require that the payer be liable to the claimant. In both *Comyn Ching* and *General Feeds* there was no actual liability on the part of the payer to pay, but it was nonetheless found reasonable in both cases for the payer to have reached a settlement. The costs and uncertainty of the litigation process are such that settlement may be reasonable (and possibly more cost efficient) than succeeding at trial. However as Akenhead J. pointed out in *AXA Insurance Plc v Cunningham Lindsay (United Kingdom) Ltd*[17]:

> "[Whilst the] mere fact that the Claimant is not liable to the third party, either at all or for the sums payable pursuant to the settlement, is not necessarily a bar to recovery or to the establishment of the reasonableness of the settlement... the fact that the Claimant was not liable to the third party either at all or for anything approaching the sums payable, may be a factor in determining that the settlement was unreasonable."[18]

The upshot of these cases seems to be that it will be rare for a decision to settle not to be reasonable, leaving only the question of "at what level"?

5. REASONABLE SETTLEMENT, CAUSATION AND REMOTENESS

The level of settlement which is reasonable will depend on all the circumstances of the case. In *Biggin v Permanite*[19] Somervell L.J., having first noted that it would be relevant to prove that the settlement was made under legal advice, said:

> "What evidence is necessary to establish reasonableness?... The plaintiff must, I think, lead evidence, which can be cross-examined, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether the sum paid was reasonable. The defendant may, by cross-examination, as was done here, seek to show that it was not reasonable, or call evidence which leads to the same conclusion. He might in some cases show that some vital matter had been overlooked."[20]

Clarke J. in *The Sargasso*[21] considered what was meant by Somervell L.J.'s reference to a "vital matter" which "had been overlooked" in the passage quoted above. He said:

[14] *General Feeds* [1999] 1 Lloyd's Rep. 688 at 691.
[15] *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC); [2008] 1 All E.R. 180; [2008] 1 All ER (Comm) 473.
[16] *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC); [2008] 1 All E.R. 180; [2008] 1 All ER (Comm) 473 at [61].
[17] *AXA Insurance Plc v Cunningham Lindsay (United Kingdom) Ltd* [2007] EWHC 3023 (TCC).
[18] *AXA Insurance Plc v Cunningham Lindsay (United Kingdom) Ltd* [2007] EWHC 3023 (TCC) at [273].
[19] *Biggin & Co Ltd v Permanite Ltd* [1951] 2 K.B. 314; [1951] 2 All E.R. 191 CA.
[20] *Biggin v Permanite* [1951] 2 K.B. 314; [1951] 2 All E.R. 191 CA at 196.
[21] *Stargas SpA v Petredec (The Sargasso)* [1994] 1 Lloyd's Rep. 412.

> "If this were a settlement case I would regard myself as bound to hold that the Plaintiffs would have to prove that the amount for which they had settled was reasonable. It is not clear to me how far the Court of Appeal thought that the Plaintiffs must go in establishing that fact. Nevertheless, the Court of Appeal appears to have thought that... some examination of the underlying facts would be required... Mr Nolan submits that the statement of Singleton L.J. that the Defendant might in some cases show that some vital matter had been overlooked shows that he thought that it was open to the Defendant to rely upon evidence which was not available to the Plaintiff at the time. I do not so read it. It seems to me that Singleton L.J. may have meant no more than that, if the Plaintiff overlooked a point which he ought to have taken, the amount of the agreement would not be regarded as the correct measure of damages in the subsequent action."[22]

In other words one of the things an "indemnifier" can challenge in relation to the settlement is whether the payer overlooked some "vital matter" that might have affected the level of liability, and hence the level of settlement reached. But only, in Clarke J.'s view, if it was or should have been known about at the time of the settlement.[23]

In the Court of Appeal Supershield argued that Siemens had defences to the water damage claims on the grounds both of causation and remoteness. Although Supershield accepted that those defences were not strong enough for Siemens to have declined to settle at all, it argued that those defences made settlement at the level that the cases were settled at too high. Those defences were, in effect (although not expressly as far as can be seen from the Court of Appeal's judgment), being put forward as "vital matters" which had been overlooked by Siemens in reaching the settlement it did.

On the question of causation the Court of Appeal agreed with Ramsey J.'s decision at first instance. Whilst the blockage of the drains failed to relieve the impact of the flooding, it was nonetheless the failure of the ball joint which had been the effective cause of the flood.

The issue of remoteness was more involved. The *locus classicus* on remoteness of damage in contract cases is *Hadley v Baxendale*[24] where Alderson B. said:

> "[W]here two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract is such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[25]

Having noted *Hadley v Baxendale* Toulson L.J. went on to consider a number of cases which had modified its effect. He concluded that:

> "*Hadley v Baxendale* remains the standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However,

[22] *The Sargasso* [1994] 1 Lloyd's Rep. 412 at 423.

[23] This is consistent with Ramsey J.'s view in *Supershield* [2009] EWHC 927 (TCC); [2009] T.C.L.R. 7—see at [80]—text fn.12 above. (This was not dealt with on appeal, although there was not, as far as I am aware, anything which came to light between the date of settlement and the hearing of the *Supershield* case itself which might have made this a live issue at the hearing or on appeal.)

[24] *Hadley v Baxendale* (1854) 9 Ex. 341.

[25] *Hadley v Baxendale* (1854) 9 Ex. 341 at 354.

> *South Australia*[26] and *Transfield Shipping*[27] are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties. In those two instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances."[28]

A distinct feature in *Supershield*, Toulson L.J. noted, was that both the ball valve and the drains were designed to control the water involved in the sprinkler system; no previous case had been found which involved a similar situation. The question therefore was: since there were other safeguards apart from the ball valve assembly itself to protect against water damage, did that make the likelihood of water damage caused by a fault in the ball valve assembly too remote? In deciding that it didn't, Toulson L.J. noted Tim Lord QC's observation that (at [44]):

> "[T]he reason for having a number of precautionary measures is for them to serve as a mutual back up, and it would be a perverse result if the greater the number of precautionary measures, the less the legal remedy available to the victim in the case of multiple failures."

Toulson L.J. concluded that the existence of the drains did not make the damage caused by the failure of the ball valve too remote (at [45]):

> "The ball valve was the first means of protection against water causing damage to other parts of the building and it failed... I would conclude that the flood which resulted from the escape of water from the sprinkler tank, even if it was unlikely, was within the scope of Siemens' contractual duty to prevent."

Having reached the conclusion that the damage was not too remote to be outside Siemens' contractual duty to prevent, Toulson L.J. went on to observe that that part of his decision went further than was necessary:

> "Siemens had only to show that it was reasonable to settle the claims made against it as it did. I see no proper reason for overturning the judge's conclusion that it was reasonable." (At [45].)

6. RANGE OF "REASONABLE SETTLEMENTS"

At first instance Ramsey J. held:

> "The claim [against Siemens] was, in my view, strong and the defences weak but, on any view, the strength of the case would have justified a settlement in the mid range of around 50% of the sums claimed. The claim was settled on the basis of legal advice. In the light of what Siemens knew or ought reasonably to have known at the time of the settlement as to the strength of the claim, of the uncertainties and expenses of litigation and of the benefits of settling the case rather than disputing it, I consider that the settlement was within

[26] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191; [1996] 3 W.L.R. 87.
[27] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48; [2009] 1 A.C. 61.
[28] *Siemens* [2010] EWCA Civ 7; [2010] N.P.C. 5 at [43].

> the range of settlements which reasonable people in the position of Siemens might have made."[29]

Toulson L.J. too adopted the "range of reasonable settlements" approach:

> "The issue which the judge has to decide is not what assessment he would have made of the likely outcome of the settled litigation, but whether the settlement was within the range of what was reasonable. If he decides that it was, an appellate court will not interfere with his decision unless persuaded that he erred in principle or (which is intrinsically unlikely) that his decision was incapable of justification on any reasonable view."[30]

For employment lawyers the "range of reasonable responses" test is well established in unfair dismissal claims. It was laid down in *Iceland Frozen Foods v Jones.*[31] It established that in employment cases there was a "band of reasonable responses" which an employer might make to employee's conduct or capability. The Employment Appeals Tribunal's judgment in *Iceland Frozen Foods* approved an example from an earlier case which shows the potential extent of the application of the "range of reasonable responses" test:

> "In a given set of circumstances it is possible for two perfectly reasonable employers to take different courses of action in relation to an employee. Frequently there is a range of responses to the conduct or capacity of an employee on the part of an employer, from and including summary dismissal downwards to a mere informal warning, which can be said to have been reasonable."[32]

The Court of Appeal's application in *Supershield* of "range of reasonable responses" test (or more precisely the "range of reasonable settlements" test) to the recoverability of settlement sums from liable third parties is also consistent with the general approach of the courts in promoting settlements. Toulson L.J. observed:

> "Megarry J. once described the law reports as charts of the wrecks of unsinkable cases. Because of its uncertainty and expense, prudent parties usually try to avoid litigation where possible. It has to be borne in mind that the "settlement value" of a claim is not an objective fact (or something which can be assessed by reference to an available market) but a matter of subjective opinion, taking account of all relevant variables. Often parties may have widely different perceptions of what would be a fair settlement figure without either being unreasonable. The object of mediation or negotiation is then to close the gap to a point which each finds acceptable."[33]

The application of a "range of reasonable settlements" test to see if sums paid by way of settlement were within the scope of a "reasonable settlement" in the circumstances, to determine what can be recouped from a liable third party, will certainly help to promote settlement in cases where there might be some residual question as to whether or not the party agreeing to the settlement is ultimately responsible for "picking up the tab". It will also help in cases where there might otherwise be an argument over the level of settlement. An indemnifier will need to think carefully about challenging the level of settlement if it

[29] *Siemens* [2009] EWHC 927 (TCC) ; [2009] T.C.L.R. 7 at [117].
[30] *Siemens* [2010] EWCA Civ 7; [2010] N.P.C. 5 at [28].
[31] *Iceland Frozen Foods v Jones* [1983] I.C.R. 17; [1983] I.R.L.R. 17 EAT, per Browne-Wilkinson J.
[32] *Rolls-Royce Ltd v Walpole* [1980] I.R.L.R. 343 at 346 approved in *Iceland* [1983] I.C.R. 17; [1983] I.R.L.R. 17 at 23.
[33] *Siemens* [2010] EWCA Civ 7; [2010] N.P.C. 5 at [28].

believes that the settlement is only slightly more than it might have anticipated—or still within the range of reasonable settlements.

The "range of reasonable settlements" test is also not inconsistent with earlier authority in the field. In *Biggin v Permanite,*[34] which is considered to be the leading case in this area, Somervell L.J. said:

> "I think the learned judge, with respect, was wrong in regarding the [level of the agreed] settlement as wholly irrelevant. I think, though it is not conclusive, the fact that it is admittedly an upper limit would lead one to the conclusion that, if reasonable, it should be taken as the measure... The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter."[35]

7. CONCLUSION

From the authorities it appears that it will be rare for settlement at some level not to be reasonable—even if it is a third party who will ultimately be liable for it; especially where the settlement has been reached on the basis of legal advice. (The potential expense and uncertainty of the legal process, which is the other factor which has been considered relevant in relation to the question of whether or not it is reasonable to settle at all, are virtually a given constant that will attach to all but the rarest cases.) This leaves the residual question in such cases: what level of settlement can a third party, who has not specifically agreed to the settlement, be expected to underwrite? And it is here that the *Supershield* decision becomes crucial: the third party will be liable for the whole sum, provided that the settlement is within the "reasonable range of settlements". Unless some "vital factor" has been missed, a liable third party is likely, in future, to have difficulty disputing liability on grounds that the amount of the settlement was excessive.

[34] *Biggin v Permanite* [1951] 2 K.B. 314; [1951] 2 All E.R. 191; [1951] 2 T.L.R. 159 CA.
[35] *Biggin v Permanite* [1951] 2 K.B. 314; [1951] 2 All ER 191 CA, per Somervell L.J. at 196.