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CASE COMMENTARY

SURVIVING A FALL INTO THE DEEP END

Patchett and another v Swimming Pool & Allied Trades Association Ltd [2009] EWCA Civ 717

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In spite of the vast increase in contracts entered into over the internet, there are still very few appellant level cases concerning this process. It was therefore of great interest when the Court of Appeal gave its decision in *Patchett and another v Swimming Pool & Allied Trades Association Ltd* [2009] EWCA Civ 717.

FACTS

Mr and Mrs Patchett wanted to have a swimming pool constructed in their garden. As many of us would do, Mr Patchett did a Google search and came across the defendant's website. The defendant, Swimming Pool & Allied Trades Association Ltd ("SPATA"), was an incorporated trade association who was owned by its members. These members included most of the major pool installers trading in the United Kingdom.

From the SPATA website, Mr Patchett obtained the details of three pool installers from whom he sought direct quotations. He eventually negotiated with one of these, Crown Pools Limited ("Crown") and agreed a price of £55,815 for the installation of a pool and for related work to the garden. Crown started on the work but did not complete it. Crown wrote to the claimant stating that they had ceased trading. This required the claimants to have the work completed another contractor resulting in them paying an additional £44,000.

As they could not obtain a remedy against Crown, the claimants sought to recover from SPATA based on the statements made on its website. There were 10 unnumbered paragraphs on the SPATA homepage, two of which were crucial to the decision. They stated (the numbers were added by the trial judge):

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> "(6) SPATA pool installer members are fully vetted before being admitted to membership, with checks on their financial record, their experience in the trade and inspections of their work. They are required to comply fully with the SPATA construction standards and code of ethics, and their work is also subject to periodic re-inspections after joining. Only SPATA registered pool and spa installers belong to SPATASHIELD, SPATA's unique Bond and Warranty Scheme offering customers peace of mind that their installation will be completed fully to SPATA Standards – come what may!
>
> (8) SPATA supplies an information pack and members lists which give details of suitably qualified and approved installers in the customer's area. The pack includes a Contract Check List which sets out the questions that the customer should ask a would-be tenderer together with those which must be asked of the appointed installer before work starts and prior to releasing the final payment."

It turned out there was an error on the website and Crown was not a full member of SPATA. Therefore the Patchetts could not claim under the SPATASHIELD warranty scheme. The claim was therefore made on the basis that paragraph six was a negligently made statement to the effect that if you contracted with a SPATA member (as identified on the website), you would be protected "come what may", that the claimants entered into a contract because of this statement and this resulted in a loss to them. Therefore SPATA should be liable on *Hedley Bryne* prinicples for the economic loss suffered.

TRIAL DECISION

The trial judge, His Honour Judge Worster, found for the defendants. While there may have been a negligent representation, the defendant would have expected further inquiry to be made before entering into a contract, and indeed paragraph 8 positively encouraged further inquiry. The claimant could not pick and choose parts of the website and so the statement in paragraph 6 was subject to the suggestion to apply for an information pack in paragraph 8. Had the claimants asked for an information pack, it would have been clear that Crown was not a full member of SPATA and so the SPATASHIELD protection would not apply. The trial judge further went on to say that even if there was liability, the claimants were 100% contributorially negligent because of their failure to make further inquiry about Crown and its position with SPATA.

COURT OF APPEAL

The majority in the Court of Appeal dismissed the appeal but this was subject to a dissenting judgment. There was broad agreement as to the law to be applied and the difference was in the application of the law to the facts of the case.

MAJORITY DECISION

Lord Clarke MR gave the lead judgement which was agreed to by Scott-Baker LJ. The case was accepted to be one of negligent misstatement[1] and so the claimant has to show that his economic loss was occasioned by a negligent misstatement made by the defendant for which the defendant would in law be held responsible.

The circumstance where the defendant would be held responsible was more difficult to define. Lord Clarke found that the phrase "voluntary assumption of liability" was of limited use as it merely stated that the defendant's actions were voluntary and that the law implied that the defendant assumed responsibility. But he did find that the test of liability was an objective one.[2] He also found the three-fold test in *Commissioners of Customs and Excise v Barclays Bank plc*[3] to be of use which required:

> "…whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant."

Lord Clarke did agree with the trial judge that these were "blunt tools" but still were useful to "steer the mind to the task at hand."[4] He then gave a number of factors which needed to be considered when deciding whether the defendant was to be held responsible. He stated:

> "In summary form those factors were the precise relationship between adviser and advisee; the precise circumstances in which the information relied upon came into existence; the precise circumstances in which that information was communicated,

[1] It did not appear that the possibility of a claim in contract was argued.
[2] Adopting the reasoning of Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, 836.
[3] [2006] UKHL 28, [2007] 1 AC 181.
[4] Quoting Kirby J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, para 284.

> considering the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy and the reliance in fact placed on it; the presence or absence of other advisers; and the opportunity for disclaimers."[5]

In applying the threefold test, Lord Clarke found no difficulty in finding that the consequences were reasonably foreseeable. He therefore focussed on the other two factors.

PROXIMITY OR THE SPECIAL RELATIONSHIP

The great strength of the claimant's case was that he received his information from a website whose very purpose was to attract potential customers and induce them to use a SPATA member. The claimant acted in reliance on this website to his detriment. While a website could be read by a large number of people,[6] this website was targeted for a specific purpose and aimed at a defined class of potential pool buyers. The website made very definite statements about the worthiness of the SPATA members which it summarised with the broad statement, "their installation will be completed fully to SPATA Standards – come what may!"

Against this strong argument was the need to look at the relationship between the parties. The paradigm relationship was one of adviser and advisee. While the parties to this action were not strangers, Lord Clarke felt it was wrong to say that they had a relationship, let alone a special one. While Mr Patchett said he relied on the website, Lord Clarke found that he should not have done so, especially as the website in para 8 invited further investigation.

FAIR AND REASONABLE TO IMPOSE LIABILITY

The main argument made against liability looked at the impact of para 8 of the website. Here potential buyers were invited to obtain an information pack and a members list. The statements made on the website were subject to the expectation that potential buyers would apply for this information pack

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[5] At para 16 adopting the reasoning of Arden LJ in *Precis (521) Plc v William M Mercer Ltd* [2005] EWCA Civ 114, [2005] PNLR 511 and of Sir Brian Neill in *BCCI (Overseas) Ltd v Price Waterhouse (No 2)* [1998] PNLR 564 at 587-8.

[6] And was therefore subject to Cardozo, CJ famous dictum that there should not be "liabilty in an indeterminate amount for an indeterminate time to an indeterminate class" *Ultramares Corporation v Touche* (1931) 174 NE 441 at 444.

and had the Patchetts done so, the mistake as to the membership status of Crown would have been corrected. To have expected to have insurance against the insolvency of SPATA members without reading the details of the insurance policy was unreasonable.

So para 8 has two aspects. It helps show that there is no special relationship created by the website as there is an expectation of further inquiry. As well, it acts to disclaim liability unless there is further enquiry taken in addition to reading the website.

CONTRIBUTORY NEGLIGENCE

The trial judge had found that had there been a duty of care, SPATA would escape liability as the failure of the claimants to further investigate about the bond and warranty scheme and the judge fixed their contributory negligence at 100 per cent. As the matter was not necessary to the decision, Lord Clarke did not dwell on the matter but stated he would have fixed contributory negligence at 75 per cent.

DISSENTING JUDGMENT

Lady Justice Smith reached the opposite conclusion. In a concisely worded dissent, she made no complaints about the statement of facts or the exposition of law given by Lord Clarke. She merely applied the law differently.

As to proximity, she found no problem in their being a sufficiently proximate relationship. The SPATA website was not addressed to all and sundry. It was specifically aimed at the type of person who, like the claimants, wished to install a pool.

As to whether it was fair and reasonable to impose a duty of care, the question was how a reasonable person would treat the website. Here, SPATA held itself out as the trustworthy regulator who set standards and vetted members. It was entirely foreseeable that someone would rely upon them as the website invited readers to do.

The main problem to this view put forward by the trial judge and the minority was para 8 and the availability of the information pack. Smith, LJ broke down para 8. The first sentence said a list of members could be obtained. But the website gave a drop down list of members so the reader would think it unnecessary to write for such information. The second sentence offered a checklist of questions for the customer to ask. But the customer might well think he could work out for himself the questions that needed to be asked. But nowhere in para 8 was anything which made it a

mandatory step or which linked obtaining an information pack to the availability of the SPATASHIELD insurance.

Smith, LJ was willing to agree with Lord Clarke that damages should be reduced by 75 per cent. The failure to make further inquiries as to the availability of the insurance and to check that Crown sported the SPATA logo was negligent and would bring into play the doctrine of contributory negligence.

COMMENT

a) Internet Savvy

One of the important aspects of the case is that it starts to deal with the sort of liabilities one can incur when operating on the Internet. The fact that you can possibly be liable for negligent misstatements on a website is important, even if there was no liability in the case. But also of interest is how the Internet environment is so accepted by the members of the court that phrases like "Came across SPATA's website via Google"[7] or "The Home Page has a series of drop down menus"[8] are included in the judgment without any explanation or comment, in the same way that an advertisement in the Pall Mall Gazette[9] might have been referred to in previous years.

As well, the court has little difficulty using non-Internet cases into an Internet context. But the application of such cases in an Internet context led to radically different views between the majority and dissenting judgments.

b) Contract or Tort

The case was entirely argued using tortious principles of negligent misstatement under *Hedley Bryne*. An interesting comparison case is *Bowerman v Association of British Travel Agents*[10] In this case, the claimant had booked a holiday through an ABTA travel agent. The travel agent went bankrupt and ABTA as sued using the notion of a unilateral contract from *Carlill v Carbolic Smoke Ball Company*.[11] There was a poster in the travel agent's office which stated: "Where holidays...have not commenced at the time of failure [of the ABTA member], ABTA arranged for you to be reimbursed the money you have paid in respect of your holiday

[7] Para 3 of the judgment.
[8] Para 5 of the judgment.
[9] As in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.
[10] [1996] CLC 451.
[11] Ibid.

arrangements."[12] This was treated as a unilateral offer that if you booked through the ABTA agent, ABTA promised to protect you from the insolvency of that agent.

SPATA did not make such a clear statement but the similarities of the cases are striking. In both, the trade association makes a public statement. That statement is clearly designed to encourage customers to use the services of members of the trade association. The statement can be viewed as a promise that the association guarantees the member, "come what may!" The argument in contract was dismissed in four words by Lord Clarke when he stated: "No warranty was given."[13] It is unfortunate that more guidance was not given to help distinguish the two cases.

c) Contributory Negligence

While all members of the court agreed that the Patchetts were guilty of contributory negligence, there was no real explanation of how this conclusion was reached. It was in any event *obiter* as the majority had found no liability but Smith, LJ agreed to it to limit the damages she would have awarded. The logic is a bit hard to follow. If the Patchetts reasonably relied on the SPATA website, why would they be negligent by not looking for more information. A finding of liability seems to imply that the Patchetts had done enough.[14]

d) Whole of the Website

One of the key aspects of the case was the inter-relation of paragraphs 6 and 8 on the website. These were set out of the same page of the website and would presumably have been viewed at the same time. Both the trial judge and Lord Clarke said that it was necessary for the website to be considered as a whole. This is a bit frightening given the size of some websites and the complex structures possible on them. Even for an experienced user, it would be hard to guarantee that they had found all of the words on the website, let alone taken them into account when making their decision. While it was not really in issue in the case, it can only be hoped that Lord Clarke's language

[12] [1996] CLC 451, Court of Appeal [Civil Division], 21 November 1995, Lexis-Nexis, Official Transcripts 1990-1997.
[13] Para 29.
[14] In *Gran Gelato v Richcliff* [1992] 1 All ER 865, it was found that contributory negligence was available as a defence under s 2(1) of the Misrepresentation Act where there was concurrent liability under *Hedley Byrne*. However, it was also found that "carelessness in not making other inquiries provides no answer to a claim that the plaintiff has done that which the representor intended he should do." (at p 876). See also *Redgrave v Hurd* (1881) 20 Ch D 1.

will not inspire website designers to hide away exclusionary language in the remote corners of their sites.[15]

CONCLUSION

Patchett gives a good example of how the courts will approach questions of liability arising from commercial transactions conducted using the Internet. It shows the courts ready to take on such problems using established common law principles. But it also shows there are many unanswered questions.

[15] If the effect of the clause was treated as an exclusion clause, the reasonableness test under the *Unfair Contract Terms Act 1977* would include consideration of "whether the customer knew or ought reasonably to have known of the existence and extent of the term..." under para (c), Schedule 2. Therefore the positioning of the clause on the website could be taken into account as part of the reasonableness test.