Litigation

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UK: 'Gross' vs. 'Simple' Negligence–Contract Controls Where Law Lacks Delineation

by Raymond L. Sweigart and Steven P. Farmer

"Gross negligence" is a term often used in agreements, where one party seeks to exclude liability for breach unless liability arises directly as a consequence of "gross negligence" or the like. However, despite its common usage and being subject of much judicial debate over the years, "gross negligence" does not have a recognised meaning under English law, distinct from simple negligence. In the case of Camarata Property v Credit Suisse Securities *[2011] EWHC 479, Mr Justice Andrew Smith re-visited the meaning of "gross negligence" and opined that the agreement in which the term is used will hold the key to its meaning.*

The Facts

In a nutshell, in 2007, Camarata Property ("Camarata") purchased a 5-year auto-redemption note issued by Lehman Brothers Treasury Co BV ("Lehman) through Credit Suisse Securities ("Credit Suisse") for US$12 million. Following the bankruptcy of Lehman in 2008, Camarata lost a significant part of the investment and claimed that the advice given by Credit Suisse in relation to the note was negligent and in breach of its contractual obligations (i.e., but for the advice received, Camarata would have sold the note before Lehman failed). Credit Suisse denied these claims and relied on a clause in its agreement with Camarata which stated that it would not be liable for any advice unless that liability arose directly as a consequence of "gross negligence, fraud or willful default of us or any of our directors, officers, or employees".

The Judgment

In deciding that Credit Suisse was neither negligent nor "grossly negligent" because it could not have predicted Lehman's collapse, Andrew Smith J, considered the claimant's argument that there was no relevant distinction in English law between negligence and "gross negligence", yet decided that rather than focusing on whether "gross negligence" was a familiar concept, it was correct to concentrate on what this term meant in Credit Suisse's contractual terms and conditions, given a distinction had been made.

Looking at the terms and conditions, the judge commented that "Gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence". The judge went on: "…as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk".

Comment

This case highlights the muddy distinction between simple negligence and "gross negligence". It confirms that whilst "gross negligence" is more than simple negligence, the difference is blurred and the courts will interpret "gross negligence" according to its natural and ordinary meaning in the context of the agreement in which it is found, rather than in line with previous dicta. In the absence of more definitive dicta, careful attention during drafting as to what constitutes "gross negligence" in the first place will undoubtedly save headaches down the line.

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