

## Nuisance/Rylands v Fletcher

Total found 100% liable for losses arising out of the Buncefield explosion in 2005 - *Colour Quest Ltd and others v Total Downstream UK Plc, Total UK Ltd and Hertfordshire Oil Storage Ltd* [22.4.09]

On 11 December 2005, an explosion at the Buncefield Oil Storage Depot ("BOSD") in Hemel Hempstead rocked much of Hertfordshire causing far reaching and devastating effects to both properties and businesses.

Thanks to commercial and domestic insurers, many of the victims of the negligence leading to the explosion were compensated for their losses. However, vast uninsured losses remained and the subrogation potential for the insured losses was huge. As such, Kennedys (acting for the majority of the interested market) issued proceedings in January 2007 in respect of over 130 claims, seeking due compensation from those to blame.

The resultant litigation before Commercial Court Judge Mr Justice David Steel encompassed a number of actions, all under the umbrella of this action.

The action comprised claims in negligence, nuisance and under the rule in *Rylands v Fletcher*.

An admission in spring 2008 by both Total and Hertfordshire Oil Storage (HOSL, the joint venture company set up by Total and Chevron purportedly to run part of BOSD) that there had been negligence on the part of the relevant member of staff on duty as supervisor at the time of the incident meant that the trial which commenced on 1 October 2008 was largely to be concerned with the following:

- Whether the damage sustained was reasonably foreseeable.
- Whether the Defendants were liable in public and/or private nuisance.
- Whether the Defendants were strictly liable under the rule in *Rylands v Fletcher*.
- Whether the Total companies or HOSL were vicariously liable for the negligent member of staff (an issue which involved Chevron as Total's joint venture partner).
- Whether Total was entitled to an indemnity from Chevron in respect of any liability it had to the Claimants.

### Foreseeability

On the third day of the trial, originally set down for three months, the Defendants

abandoned their defence on foreseeability, admitting liability for the consequences of the negligence, albeit subject to the question of whether it was Total or HOSL that was vicariously liable for that negligence.

Whilst for the majority of Claimants, this concession was sufficient for the recovery of their losses, others would benefit from a positive finding in nuisance and/or under the rule in *Rylands v Fletcher*, particularly those who found themselves with losses of a purely economic nature.

### *Nuisance /Rylands v Fletcher*

Despite arguments to the contrary put forward by the Defendants, the Judge found in the Claimants' favour as follows:

- There could be a claim in private nuisance separate from a claim in *Rylands v Fletcher*.
- An isolated escape (as opposed to a state of affairs) where there is both unreasonable or negligent user of land and foreseeability of escape can give rise to liability in private nuisance.
- A public nuisance was committed.
- The feature necessary to invoke a claim in public nuisance is one of common injury to the public.
- Whilst a private owner's right to the enjoyment of his own land is not a right enjoyed by him in common with other members of the public, nonetheless any illegitimate interference, being the same interference contemporaneously suffered by other members of the public, constitutes a common injury satisfying the public nature of a public nuisance.
- Claims in public nuisance and private nuisance are not mutually exclusive.
- A collection of private nuisances can constitute a public nuisance.
- A claimant can recover damages in public nuisance where access to or from his premises is obstructed so as to occasion a loss of trade attributable to obstruction of his customers' use of the highway and liberty of access.
- Whilst public nuisance embraces claims of those who complain of an interference with their use and enjoyment of land it is not confined to such claims.
- There is no requirement for proximity in proprietary terms, although such considerations may have a bearing on whether the claimant's damage is

special in the sense of being “particular, direct and substantial”.

- Pure economic loss can be recoverable in public nuisance.

## Vicarious liability

The Judge found that Total alone was vicariously liable for the negligence of the member of staff on duty but that on an analysis of the corporate documentation existing between Total and Chevron and the factual evidence given, Total was not entitled to any indemnity from Chevron as its joint venture partner. Total was therefore found to be 100% liable for the losses caused by the incident.

## Comment

Although much of the case was won by concession, the decisions of Steel J in respect of nuisance and *Rylands v Fletcher* were a notable victory for the Claimants and will no doubt be a judgment to rely upon in future nuisance and pure economic loss cases.

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