

Update

UK Supreme Court reaffirms law on accessory liability in tort

The UK Supreme Court has reviewed and confirmed the legal principles behind accessory liability for joint tortfeasors under the doctrine of “common design” in a successful appeal by Sea Shepherd UK, represented by Michelle Crorie and her team of Clyde & Co LLP.

Sea Shepherd UK v Fish & Fish Limited [2015] UKSC 10 provides a useful overview of the development and application of the doctrine of common design in English tort law.

Lord Toulson, who delivered the leading judgment, outlined that a defendant will be jointly liable for the tortious acts of the principal if the defendant (i) acts in a way which furthers the commission of the tort by the principal to a level that is greater than *de minimis*; and (ii) does so in pursuance of a common design to do or secure the doing of the acts which constitute the tort.

Background to the Case

In June 2010, Fish & Fish Limited, a fish farm operator based in Malta, was transporting live Bluefin tuna in the Mediterranean Sea. On 17 June 2010 divers from the vessel “STEVE IRWIN” entered the water and cut cages containing the tuna as part of a campaign known as Operation Blue Rage. The tuna escaped. Sea Shepherd UK (“SSUK”), a charity registered in England, and two US-based defendants - Sea Shepherd Conservation Society (“SSCS”) and Mr Paul Watson - were sued for the value of the tuna. The “STEVE IRWIN” was arrested in Scotland in 2011 as security for the

proceedings, at which point Clyde & Co was instructed by SSUK.

The case involved a preliminary issue as to whether Sea Shepherd UK was liable for the acts of those who were involved in the incident. Jurisdiction against all three Defendants was sought based upon SSUK’s alleged involvement.

Fish & Fish Limited argued that SSUK was liable on the bases, *inter alia*, that it was the legal owner of the vessel and that Paul Watson was a director of SSUK. SSUK’s sole employee at the relevant time gave witness evidence at trial. His activities for SSUK included setting up stalls at English music festivals and arranging volunteer training events.

High Court and Court of Appeal

In the trial at first instance, heard in the English High Court of Admiralty, Mr Justice Hamblen rejected Fish & Fish Limited’s arguments, accepting that Paul Watson was operating at all times on behalf of SSCS, that SSCS was beneficial owner of the vessel and did not require SSUK’s authority to use the vessel, and that the steps taken by SSUK in support of the campaign were minimal such that it was not liable under the doctrine of common design, see: [2012] 2 Lloyd’s Rep 409.

Further information

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The Court of Appeal reversed this judgment in part, see: [2013] 1 W.L.R. 3700. Lord Justice Beatson held that SSUK had “joined in” a common design in tort by doing some acts in furtherance of it. The Court of Appeal overturned both the legal findings and also, in part, the factual findings of the first instance Judge in this regard. The question as to whether SSUK was liable on the basis of common design was the subject of the appeal to the Supreme Court.

Decision of the UK Supreme Court

In a majority of 3:2, the Supreme Court ruled that SSUK was not liable as joint tortfeasor.

All five justices agreed on the test for liability in tort by common design, resolving the ambiguity created in the Court of Appeal. Lord Toulson delivered the leading judgment and provided a useful summary of the development of the doctrine of common design. Lord Toulson restated the principle that a defendant will be jointly liable for the tortious acts of the principal if the defendant (i) acts in a way which furthers the commission of the tort by the principal to a level that is greater than *de minimis*; and (ii) does so in pursuance of a common design to do or secure the doing of the acts which constitute the tort.

Lord Neuberger and Lord Sumption agreed that once assistance in commission of a tort is shown to be more than trivial or *de minimis* a defendant's contribution (even if relatively unimportant) could be reflected through the court's power to apportion liability. In accepting the need to “further” the commission of the tort, their Lordships appeared to be accepting Sea Shepherd UK's position that there needed to be some causal significance albeit only greater than *de minimis*. Lord Neuberger cautioned that in looking to establish a test for joint liability in tort through common design it was unwise to over-analyse the cases or to attempt to define the necessary amount of connection

between the defendant and the tort. Lord Neuberger opined that any case on common design would always be fact-sensitive.

Where the Supreme Court judges disagreed was in the application of facts to this particular case. However, the majority - Lords Toulson, Kerr and Neuberger - found that Hamblen J's findings of fact were not so unreasonable as to be capable of being overturned by an appellant court and the acts of SSUK in furtherance of a common design (accepting GBP 1,730 in donations and sending two volunteers to work on the vessel) were *de minimis*. The Supreme Court ordered that the decision of the Court of Appeal be set aside and the order of Hamblen J restored. The claim against SSUK has been dismissed and service out of jurisdiction on the second and third Defendants – SSCS and Mr Paul Watson – has been set aside.

Michelle Crorie, partner in Clyde & Co's specialty insurance practice, was assisted by associates Erina Kawai and Wynne Lawrence. The team instructed John Russell QC of Quadrant Chambers.