TRANSACTION OR NO TRANSACTION? THAT IS THE QUESTION

How damages for professional negligence are often assessed in the context of residential and commercial conveyancing

It has been said that the assessment of damages for professional negligence is more of an art than a science. Nowhere is this more true than in the context of residential and commercial conveyancing. The professional adviser is not there usually trying to help bring about the acquisition of a particular product, the failure to do so sounding in easily quantifiable losses. Rather his duty is to use reasonable skill and care in advising his client on the legal pros and cons of the transaction. It is usually down to the client to decide whether, in the light of this advice, he wants to proceed with the transaction. If it is discovered following purchase that the advice was wrong the question is then what the client would or could have done had he been properly advised. Would he or could he have gone ahead with the transaction or not? The answer to that question will often determine the basis on which damages are assessed and that can have far-reaching consequences in terms of the sum recovered.

The difference between the varying approaches to the assessment of damages in these circumstaces was explained by Staughton LJ in **Hayes v Dodd** [1990] 2 All ER 815 in which the plaintiffs sued their conveyancing solicitor for failing to point out to them that there was no right of way over the only reasonable access to the motor repair premises which they were buying. He said at 818f-819a:

"*The first question in this appeal relates to the basis on which damages should be assessed. Like Hirst J. I start with the principle stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 A.C. 25 , at page 39:*
"You should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".
One must therefore ascertain the actual situation of the plaintiffs and compare it with their situation if the breach of contract had not occurred.
What then was the breach of contract? It was not the breach of any warranty that there was a right of way; the solicitors gave no such warranty. This is an important point: see Perry v. Sidney Phillips & Son (1982) 1 WIR 1297 . The breach was of the solicitors' promise to use reasonable skill and care in advising their clients. If they had done that, they would have told the plaintiffs that there was no right of way; and it is clear that, on the receipt of such advice, the plaintiffs would have decided not to enter into the transaction at all. They would have bought no property, spent no money, and borrowed none from the bank.
That at first sight is the situation which one should compare with the actual financial state of the plaintiffs. I will call this the "no-transaction method". There are, however, authorities which show that instead one takes for the first element in the comparison the situation which the plaintiff would have been in if the transaction had gone through in accordance with his legitimate expectations. This I call the"successful transaction method" . Thus, in Perry's case, the plaintiff recovered

from negligent surveyors the difference between the value of the house at the date when he bought it if it had not been defective, and its actual value at that date. However, it appears to have been found, or assumed, in that case that the plaintiff would still have bought the house if he had been given correct advice as to its condition, albeit at a lower price. It was not a case where he would never have entered into the transaction at all."

Staughton LJ's approach was applied by Vos J in **Scott v Kennedys Law and Vertex Law** [2011] EWHC 3808 (Ch) . There the solicitor was retained to advise his clients on the acquisition of a guest-house business. By his admitted negligence he failed to point out to the clients that the business was blighted by a planning issue – permission had been granted to extend it, but on condition that it remained one dwelling and one business. The vendors were planning to live in the extension and to run their own business there, in clear breach of the condition. Within months of purchasing the business the clients received a visit from the local planning officer who threatened to, and eventually did, serve an enforcement notice. Thereafter the business was badly affected by adverse publicity and the clients were forced to sell it at a considerable loss.

Had he been aware of the planning condition, as he should have been, the solicitor would surely have advised his clients to have nothing to do with this particular business, and they would not have done so. Damages were therefore assessed in this case on the no-transaction basis. The Judge found that the clients would have kept their hard-earned savings in the bank where they would have earned interest in the period between purchase and sale. Their loss was principally therefore the total of the capital injected into the business during this time, plus interest from the date of each such injection to the date of sale, less the capital recovered on sale.

On the other hand, the evidence is sometimes similar to that in surveyors' negligence cases like **Perry v Sidney Phillips** to which Staughton LJ referred in the extract from **Hayes v Dodd** quoted above. Had he not been negligent, the solicitor would have advised his clients about a potential defect in title, whereupon they would have had the defect remedied at a price or would have renegotiated the purchase price to reflect the defect. In these circumstances damages will be assessed on the successful transaction basis – it being found that the transaction would still have gone ahead but at a reduced price.

This was the approach adopted by Lawrence Collins J in **Greymalkin v Copleys** [2004] PNLR 44, a claim in negligence by a property development company against the solicitors who advised it on the purchase of a decrepit seaside hotel. The solicitors had failed to spot the charges on the property which bound it. The clients claimed the considerable sums they spent improving and preserving the property but the solicitors argued that they were only entitled to the difference between the value of the property without the cloud on title and its value to a purchaser who knew that it would take 3 years to remove the cloud. The Judge agreed with the solicitors.

Sometimes it is not possible to find with any certainty that, on being advised of a defect in title, the client would have been willing or able to complete the transaction. There may be a number of contingent factors which need to be taken into account. In

these circumstances the court will assess the probability of each contingency occurring and discount any damages accordingly.

In **Joyce v Bowman Law** [2010] PNLR 22 Vos J was again called upon to assess damages in a case in which the client was seeking to be compensated for the lost profit he said he could have made had he been able to develop a piece of land. That he was not able to do so as he wished was, as was finally admitted on the eve of the trial, down to his conveyancer who had failed to ensure that the contract included an option for him to purchase an adjoining piece of land. The question was whether, the availability or otherwise of the option aside, he would have been able to carry out the development in any event. It turned on a number of contingencies: the chance of the vendor agreeing to vary the contract to include the option, the chance of the purchaser obtaining planning permission for the proposed development and the chance of the purchaser having the funds to carry it out.

Having heard evidence as to each of these matters, the Judge started by assessing what profit the client could have earned had the development taken place as planned. He then assessed the probability of each contingency occurring. He concluded that there was an 85% chance that the vendor would have agreed to the variation to include the option, a 40% chance of obtaining planning permission and an 85% chance that the purchaser could have obtained the necessary funds. He therefore assessed damages at 29% (85% x 40% x 85%) of the potential profit.

There is then a variety of ways of approaching the assessment of damages in these cases. Much depends on the answer to the question: what would or could the client have done had he been properly advised? Remembering always the fundamental principle that the award of damages is intended to put the party concerned back in the position in which he would have been had the wrongdoing not occurred, it will be seen that a number of potential outcomes is always possible.

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