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What’s my claim worth?

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Separate Causes of Action?

- *Sciortino v Beaumont* [2021] EWCA Civ 786
  - 4 May 2011– Settling grounds of appeal and advising on prospects in a covering e-mail
  - 26 Oct 2011 – Further advice following receipt of Respondent's Notice
  - 25 Oct 2017 – Claim issued

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Sciortino v Beaumont [2021] EWCA Civ 786

- Is October advice a negligent act or omission causative of loss?
  - CoA –
    - Distinction between a continuing duty argument (which are generally difficult to make out) and an occasion where there are two distinct negligent breaches of duty, one outside the limitation period and one within it.
    - *St Anselm Development Company Ltd v Slaughter & May* [2013] EWHC 125 (Ch)
    - Appeal allowed. October advice was a distinct act for the purposes of the Limitation Act 1980. **If** negligent, losses flowing from that advice potentially recoverable.

Elliott v Hattens Solicitors (a firm) [2021] EWCA (Civ) 720

- Flawed transaction case
  - Lease
  - Underlease – no guarantor as intended
  - Rent Deposit Deed
  - Solicitors also failed to advise head tenant to insure the Property notwithstanding covenants
- Breach of duty accepted
- *Law Society v Sephton & Co* [2006] 2 A.C. 543 distinguised
- Immediately apparent here that the value of Claimant's interest was objectively less valuable than it would have been in the absence of negligence.
  - Time started running on execution of the defective documentation

Gold v Mincoff Science & Gold [2001] Lloyds Rep PN 423

- Indemnity claim re series of mortgages
- Negligence admitted, limitation disputed
  - Clause held Mr Gold liable for all his partner's debts to the bank (i.e. not just partnership debts)
  - Agreements signed between 1984-1990 all contained the clause
  - Agreement signed in 1993 also contained the clause

- HELD:

  - §99 – "if the subsequent instruction was also negligently implemented by the solicitor, and, this later negligence concealed the earlier negligence then, subject to normal questions such as causation and remoteness, if the earlier negligence only comes to light outside the limitation period, the loss of the right to sue in respect of it can properly be the subject of a claim based on the later negligence."

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Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602

- Where negligence is a positive act the establishment of a causal link between negligence and loss is **a question of historical fact**, that question is to be determined on the balance of probabilities.
  - Once the causal link is established on the balance of probabilities, recovery is in full, unless quantification depends on future uncertain events in which case the court must assess the risk of those materialising.
- Where negligence is an omission causation depends on the **answer to the hypothetical question** of what would the claimant have done if the defendant had not been guilty of the omission. Determined on the balance of probabilities.
- Where loss depends on the hypothetical action of third parties the claimant will succeed if there was a real or substantial chance as opposed to a speculative one that the third party would have acted so as to confer the benefit or avoid the risk to the claimant. The evaluation of the chance is a matter to be addressed at the quantum stage.

Assetco plc v Grant Thornton UK LLP [2021] Bus LR 142

- *Facts*
  - A's Senior Management made dishonest statements and provided false documents to GT leading to an unqualified audit report for y.e. Mar 2009 and Mar 2010.
  - True state of affairs materialises in 2011 when A puts in new management
  - Solvency secured by scheme of arrangement in 2011

- *Claimant's contentions on loss* - Had GT not negligently audited A's accounts A would not have:
  - Made intra-group loans of £23.35m
  - Supported intra-group companies with £1.4m it was entitled to by dividend
  - Made various further expenditure totalling £3.53m
  - Made a fraudulent related party transaction of £1.5m
  - Paid dividends of £1.65m

  TOTAL CLAIMED circa £31.4m

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Assetco plc v Grant Thornton UK LLP [2021] Bus LR 142

- BRYAN J:
  - If GT had conducted a competent audit A would have taken all steps necessary to achieve a restructure in 2009.
    - Chance of third parties doing what was required was either 100% or so high it could be treated as 100%.
    - Where he had found that chances were “not less than 90%” he rounded them up to 100%.
  - Awarded damages for all except dividends (because *novus actus*)
  - Contributory negligence reduction from £29.8m to £22.36m

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Assetco plc v Grant Thornton UK LLP [2021] Bus LR 142

- GROUNDS OF APPEAL:
  - Scope of duty and legal causation – GT argued provision of “information” not “advice” (N.B. no longer favoured terminology post *Manchester B.S. v Grant Thornton UK LLP* [2021] UKSC 20)
  - Judge wrongly failed to give credit for benefits received by A including the proceeds of a share issue in July 2009 which would not have been available but for the unqualified audit.
  - **Judge erred in his assessment of the chances of four specific matters (including erring by rounding up) when evaluating loss of a chance.**

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Assetco plc v Grant Thornton UK LLP [2021] Bus LR 142

- GROUND OF APPEAL IN MORE DETAIL:

- First limb – Even on his own findings as to the relevant chances of each step the Judge was wrong to treat each contingency in the 10 stage counterfactual as a certainty.
  - Where the Judge had said the chance was “not less than 90%” he should have used the figure as 90%
  - When putting the effects of each contingency together they should have been multiplied in order to find the overall chance of a successful scheme of arrangement occurring in 2009.

- Second limb – Challenged the specific percentage chance attributed to four specific contingencies.

Assetco plc v Grant Thornton UK LLP [2021] Bus LR 142

- Approach of the appellate court in loss of a chance claims
  - §151 "There is a distinction between the finding of a fact on the balance of probabilities and an assessment of the chances of a hypothetical fact (see also *Perry v Raleys Solicitors* [2020] AC 352 where the SC held it was right to hold a trial within a trial on those matters which must be established on the balance of probabilities, i.e. what C would have done)."
  - §157 "In my judgment, in deciding whether the judge was "wrong" in any of his evaluative conclusions, this court should recognise not only that it was his role to decide these issues but also that, in doing so, he enjoyed advantages not available to this court, and we should interfere only if his conclusions were not ones reasonably open to him on the totality of the evidence, unless there is an underlying flaw in his reasoning which means that his assessment cannot stand."

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Assetco plc v Grant Thornton UK LLP [2021] Bus LR 142

- Mathematical assessment of loss of a chance claims
  - A mathematical approach can be appropriate where the steps are truly independent or discrete in nature *Hanif v Middleweeks* [2000] Lloyd's Rep PN 920
  - Where the factors affecting the cumulative future events overlap or are affected by the same considerations (as in *Hanif v Middleweeks*) an entirely mathematical approach is not appropriate.
  - In an overall commercial situation such as the 2009 counterfactual there was some dependence between all 10 steps. However, the CoA accepted there were 4 independent contingencies (§195)
  - Where the judge held greater than 90% he was declining to be more precise – this was "understandable…an assessment that the chance is 93% or 96% or 99% lends a spurious degree of precision. It is not possible to assess the chances of the sort of events involved in the 2009 counterfactual with such fineness. They are not events that can be tested in laboratory conditions. Having reached an assessment of greater than 90% for each contingency, he was, in my judgment, entitled in this case to treat it as being, in counsel for GT's phrase, a "racing certainty". This was not rounding up a 90% chance to a certainty but a conclusion that, within the confines of judicial decision making, it was a certainty" (§206)

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