

PROPERTY AND PROFESSIONAL NEGLIGENCE ACTIONS

by

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Jonathan specialises in property litigation and professional negligence arising out of it. This year's Legal 500 write up on Property Litigation Silks says, "No barrister has recently caught the eye of instructing solicitors as much as Jonathan Seitler QC. Undeniably a rising star, he is immensely popular for his human qualities, praised for his 'lack of airs and graces', 'immense wit' and 'user friendliness', in addition to being 'extremely bright and responsive' and 'ready to take on virtually anything no matter the difficulty' Jonathan's mother was so proud of this entry that she wrote to Mr Pritchard himself saying how much she liked his "very nice book".

The Top 10 issues that people ask about in Property & Professional Negligence

10. Letters of Claim:

- 10.1 Key elements of the Professional Negligence pre-action protocol, applying to all professionals other than construction professionals and healthcare providers:
- 10.2 A pre-letter of claim should be served as soon as a Claimant decides that there is a reasonable chance of bringing a claim against a professional, giving a brief outline of the grievance and (if possible) a general indication of the financial value of the potential claim. The professional just needs to acknowledge it within 21 days.

- 10.3 The letter of claim follows as soon as the Claimant decides that there are indeed grounds for a claim against the professional. This should include:
- 10.3.1. An identification of the likely parties to the claim ;
 - 10.3.2. A chronological summary of the key facts, enclosing key documents ;
 - 10.3.3. The allegation of negligence – what the professional has done or not done in relation to which complaint is made;
 - 10.3.4. The case on causation – how that negligence has caused the Claimant a loss;
 - 10.3.5. An estimate of the financial loss suffered by the Claimant, including details of how it is calculated, enclosing supporting documents ;
 - 10.3.6. A statement as to whether and when an expert was appointed and who and in what discipline ;
 - 10.3.7. A request that the letter of claim be forwarded to the Defendant's insurers ;
 - 10.3.8. Copies of any other letters of claim sent to any other party in relation to the dispute.
- 10.4 The Defendant has 14 days to acknowledge it and three months from that letter of acknowledgement to investigate and prepare either a Letter of Response or a Letter of Settlement.
- 10.5 The Letter of Response says:
- 10.5.1. What, if anything is admitted ;

- 10.5.2. Specific comments on the allegations made and any alternative version of events ;
 - 10.5.3. What, if anything more is needed to deal with the claim;
 - 10.5.4. Any alternative estimate of the Claimant's financial loss
 - 10.5.5. what if any other documents are relied upon, enclosing them
- 10.6 The Claimant can only commence the claim without further ado (save where there are limitation issues) if in the Letter of Response the professional denies the claim in its entirety. Otherwise the parties should commence negotiations with the aim of concluding them within 6 months of the Letter of Acknowledgement. If they do not manage this, they must either agree an extension to the period (by identifying the issues that remain unagreed) or if an extension cannot be agreed, the Claimant is at liberty to commence proceedings.
- 10.7 There are specific provisions to refer a claim to an ADR agency. This places the onus on the other party either:
- 10.7.1. to agree to a reference to ADR ; or
 - 10.7.2. to state why it is inappropriate (giving reasons) ; or
 - 10.7.3. to state when else it may become appropriate ; or
 - 10.7.4. to state in what other form ADR may be appropriate (stating which).

9. Mitigation of Loss:

- 9.1 The Claimant has to be reasonable: reasonable people don't gamble against poor odds. A Claimant cannot beat a well-timed citation of Lord Macmillan's speech from *Banco da Portugal v Waterlow* [1932] AC 452 at 506: "*Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest other measures less burdensome to him might have been taken.*"
- 9.2 Solicitor slips up in relation to 54' Act proceedings. Is the Claimant tenant obliged to accept a new protected tenancy offered by the landlord which is on worse (say 25% worse as regards rent), but not that much worse terms ? Yes: *Joliffe v Charles Coleman & Co* (1971) 219 EG 1608.
- 9.3 A lender would also be required to subrogate:
- 9.3.1 A third party who pays off a mortgage is presumed, unless there is something convincing to the contrary, to be keeping that mortgage alive for his own benefit. As long as that is the purpose of the loan, negligence which leads to a loss of priority, should not cause a material financial loss. In *Halifax Mortgage Services v. Muirhead* (CA, unreported) Lord Justice Evans said, "*It may be that the equitable jurisdiction to enforce a charge by way of subrogation rights derives partly from the third party's mistaken belief that his own security is valid, coupled with the unjust enrichment of the borrower which might otherwise result*".

9.3.2 *Faircharm Investments Ltd v Citibank International plc* (February 20 1998, *The Times*) and *Banque Financiere De La Cité V Parc (Battersea) Ltd* [1999] AC 221 HL can be taken as authority for these propositions:

9.3.2.1 Subrogation, as a restitutionary remedy, does not depend on the intention of the parties, and the appropriate questions are whether one party would be enriched at another's expense, whether such enrichment would be unjust, and whether there are nevertheless policy reasons for denying the remedy: in most mortgage cases there won't be;

9.3.2.2 Subrogation is not based on fault and so neither one party's failure to take precautions to safeguard its interest nor a lack of misrepresentation or sharp practice on the part of the other, are relevant considerations.

9.4 In relation to litigation:

9.4.1 the duty to mitigate remains limited: see *London & South of England Building Society v Stone* [1983] 1 WLR 1242 (no duty to mitigate loss by suing borrower where it would impair good public relations) and *Pilkington v Wood* [1953] Ch 770 (no duty to embark on complicated and difficult piece of litigation).

9.4.2 Purchaser of Welsh hill farm finds completion delayed as a result of which the chance to breed ewes in time is lost (for a few years). The delay was as a result of the failure of the purchaser's solicitors' to advise that a completion notice be served. Does the purchaser have a duty to mitigate loss by suing the vendor for that loss or can a claim be made straight against the solicitor? *Williams v Glyn Owen & Co* [2004] PNLR 20. The Claimant's duty to mitigate loss did not require him to take proceedings for damages against the vendor: he had

acted reasonably in the course which he eventually took in suing the solicitor.

9.4.3 There is one important exception to this rule: if the Claimant is simply asked to lend his name to litigation, under a full indemnity for costs, it is probably unreasonable to refuse – e.g. where preliminary issue is required to be slogged out in relation to whether a limitation period has expired.

9.5 What about a duty to mitigate by changing plans: purchaser of a perfectly adequate property has plans to improve it to a super-spec. After completion it is discovered that this is not possible because of a restrictive covenant. This was overlooked by the purchaser's solicitor. Is there a duty to abandon the plans to upgrade or can the purchaser pay the large (but not extortionate) ransom sum required by the party who has the benefit of the restrictive covenant? *King v Hawkins & Co* The Times January 28, 1982. He is not in breach of his duty to mitigate if he decides to proceed with his pre-negligence plans.

8. Contribution:

8.1 Two separate statutes fall for consideration:

8.2 The Law Reform (Contributory Negligence) Act 1945:

8.2.1 *Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".*

8.2.2 The result is that when the loss is caused or contributed to by an act or omission of the Claimant at the time, or before, the Defendant's breach of duty, which involves a failure on the part of the Claimant, to use reasonable care to look after his own interests, damages can be reduced by a proportionate amount.

8.2.3 In *Davies v. Swan Motor Co. (Swansea) Ltd* [1949] 2 KB 291, 326 Denning LJ said, "*causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff*" *nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. ... the fact of standing on the steps of the dustcart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of his employment or a boy in play or a youth doing it for a lark: but the degree of blameworthiness may be very different.*" The words "*having regard to*" in section 1(1) of the 1945 Act denote the exercise of a broad judgment based on reasonableness and fairness. See *Palser v. Grinling* [1948] AC 291, 315 per Lord Simon

8.2.4 In practice:

8.2.4.1 It has been held that very small percentages of apportionment, under 10%, ought not to be made. *Johnson v. Tennant Bros* (Unreported, November 19 1954 CA).

8.2.4.2 At the other extreme, the reference in section 1(1) of the 1945 Act to "*damage as the result partly of his own fault*" makes a finding of 100% contributory negligence illogical, given the wording of the section, (see *Pitts v. Hunt* [1992] 1 QB 24, 50, per Beldam LJ) ;

8.2.4.3 The exercise of apportionment would naturally start at 50:50, before causative potency and blameworthiness are assessed.

8.3 The Civil Liability (Contribution Act) 1978.

8.3.1 Section 1 of the 1978 Act provides that: "*...any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with himself or otherwise)*".

8.3.2 The Act is drawn in wide terms, so that the person seeking contribution only has to show that the person against whom contribution is sought is liable to the Claimant in respect of the same damage. The basis of the liability is irrelevant. In *K v P (J, third party)* [1993] Ch 140 at 148, Ferris J said "*The 1978 Act extends the potential for contribution beyond joint tortfeasors to joint contractors, joint trustees and others who are liable in respect of the same damage . . . it is manifest that the words of s 6(1) of the 1978 Act are intended to be interpreted widely, hence the use of the words "whatever the basis of his liability" and the emphasis added by the word "otherwise" at the end of the enumerated causes of action.*"

- 8.3.3 Section 6(1) of the 1978 Act provides as follows: *“A person is liable in respect of any damage for the purposes of this Act if the person who suffered it...is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability whether tort, breach of contract, breach of otherwise)”* .
- 8.3.4 The result is that the liability of the "contributor" and "contributtee" need not arise out of breach of the same duty, or even in relation to the same cause of action.
- 8.3.5 The best examples come from the lender's cases: it's a normal conveyance of a smart residential flat but it's a back to back sale. The solicitor is found to have a conflict of interest. The surveyor values the property 'wildly wrong'. If either party had been non-negligent, the lender would not have lent. *Anglia Hastings & Thanet Building Society v House & Son* (1981) 260 EG 1128:- solicitors 70%, valuers 30%. Bingham J: *“the default of the valuer was an act of pure misjudgement in the course of a relatively brief involvement in this transaction. There was in their case no question of putting themselves in a position where their interest and their duty conflicted”*

7. Recovery of fees for negligent work

“There are two cases where a party is precluded from recovering for work and labour: one where the work, which is useful, has been performed unskilfully; the other where work, which is useless for the object in view, has been performed even skilfully” Alderson J in Hill v Featherstonhaugh (1831) 7 Bing 569

6. The band of non-negligent valuation

- 6.1. In cases in which a complaint against a solicitor might be made, it is usually possible to say that the solicitor has got it right or got it wrong.
- 6.2. It is different for valuers. *Mount Banking Corporation -v- Brian Cooper & Co.* [1992 35 EG 123] is authority for the proposition that the valuation must be well above the top point of the acceptable bracket of valuation for it to be negligent. In *Legal & General Mortgage Service PLC v HPC Professional Services* [1997] PNLR 567, that band from the top of the bracket was found to be 15%.
- 6.3. *Legal & General* was recently re-affirmed in *Preferred Mortgages Ltd v Countrywide Surveyors Ltd* [2006] 9 PNLR 154.

5. Causation and the 'but-for' test

- 5.1 Lewison J has set out the position in *Vision Golf Ltd v Weightmans* [2005] EWHC 1675 (Ch), basing himself on the speech of Lord Nicholls of Birkenhead in *Kuwait Airways Corporation v Iraqi Airways Co (No 6)* [2002] UKHL 19, [2002] 2 AC 883, 1090:
- 5.2 There are two questions in analysing causation: (1) whether the wrongful conduct causally contributed to the loss ? (2) if it did, what is the extent of the loss for which the Defendant ought to be held liable ?
- 5.3 Question (1) involves applying a “but for” test. This is a factual inquiry. The question is, “would the Claimant have suffered the loss without ('but for') the Defendant's wrongdoing”. If not, the wrongful conduct is a cause of the loss. If the loss would have arisen even without the Defendant's wrongdoing, normally the negligence would not give rise to legal liability.
- 5.4 Question (2) involves a value judgment and an assessment of whether the Claimant's harm should really be within the scope of the Defendant's liability, given the reasons why the law has recognised the relevant cause of action.
- 5.5 These are not necessarily cumulative questions. Answering one in the alternative is going to be enough. This is because the 'but for' test must be recognised as capable of being over-exclusionary where more than one wrongdoer is involved. The classic example is where two persons independently search for the source of a gas leak with the aid of lighted candles. According to the simple 'but for' test, neither would be liable for damage caused by the resultant explosion. In this type of case, involving multiple wrongdoers, the court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple 'but for' test is not satisfied. In so deciding the court is primarily saying yes to question (2) instead – it is having regard to the purpose sought to be achieved by the relevant tort, as applied to the particular circumstances.

4. The six year (primary) limitation period

4.1. Following *Law Society v Sephton* [2006] UKHL 22, limitation issues are dealt with like this:

4.2. Breach of contract – 6 years from breach of contract i.e. the date of purchase. That was always the position.

4.3. Tort:

4.3.1. Where the nature of the loss is such that measurable loss is suffered at the date of the negligence / entry into the relevant agreement, the six year primary limitation period runs from that date. The Claimant must be measurably financially worse off at that point. This is *Forster v Outred* [1982] 1 WLR 86, *D W Moore v Ferrier* [1988] 1 WLR 267. It often arises in a property purchase if the defect would depress the value at Day 1. E.g. property with no proper right of access.

4.3.2. If, however, the loss is truly contingent, that is, it may happen or it may not, the limitation period starts when the loss is suffered following the contingency coming to pass. Thus in a case of a mortgagee lending on a defective property: the limitation period starts when the lender is on balance worse off having made the loan – where the value of the security plus the value of the borrower's covenant falls below the value of the debt: *Nykredit Mortgage Bank PLC v Edward Erdman Group (No 2)* [1997] 1 WLR 1627.

3. Purchaser's damages

- 3.1. The normal, basic, simple rule is *Ford v White* [1964] 1 WLR 885. Where a person buys a property in reliance on a negligent survey or a negligent report from a solicitor as to its freedom from encumbrance or legal defect, the measure of damages is the difference between the actual market value of the property at the date of purchase and the price then actually paid. This can be lower than expected, especially if the price paid is less than the market value without the defect. It is always a Defendant's starting point
- 3.2. Claimants make constant attempts to sideline *Ford v White* and occasionally succeed.
 - 3.2.1. This can be done because the law of damages is not fixed in stone. As Sir Thomas Bingham said in *Reeves v Things & Long* [1996] 1 PNLR 265.278, "*While this is not an area free of legal rules, it is an area in which legal rules may have to bow to the particular facts of the case.*"
 - 3.2.2. There are lots of interesting exceptions dotted around the law reports.
 - 3.2.3. The most recent (and controversial) is *Keydon Estates v Eversheds LLP* [2005] EWHC 972. Small commercial property investment company looking for investments (and with money to spend) buys the reversion of an office building thinking it had W as tenant and H as sub-tenant. In fact the supposed sub-let was an assignment (it was a sub-let for the whole term) so that when H went into administration and stopped paying the rent, W was not there to pick it up. On the face of it, the loss should have been the difference between the value of the property with and without W as at the date of purchase. The Claimants claimed and Evans Lombe J awarded them, the difference between the actual and prospective return from this property and the actual and prospective return from another (hypothetical) property that otherwise would have been purchased, as at the date of judgment.

The basis of this appears to have been that Eversheds knew that the purpose of the transaction was to obtain an income stream and that had the correct advice been given, an alternative investment property would have been purchased.

3.2.4. The way to think about it is that *Ford v White* is prima facie the correct approach but there may be cases where in order to get to a sum of money that will truly put the party who has been injured in the same position that he would have been in if he had not suffered that wrong, a different basis of damages must be used.

2. The three year (secondary) limitation period

2.1. The secondary limitation period is three years from the date of knowledge: section 14A Limitation Act 1980.

2.2. The requisite knowledge is knowledge of:

2.2.1. the facts relating to the loss suffered (including that it resulted from the Defendant's advice) ; and

2.2.2. a realisation that the loss is serious enough to justify instituting a claim (against a solvent defendant who is not going to contest liability).

2.3. Note that the key knowledge is of the *loss* and the *potential claim*. It is not necessary for the time to start running for the Claimant to know in what way the Defendant actually was negligent: *Haward v Fawcetts* [2006] UKHL 9. The Claimant just needs to know in general terms that the problem is capable of being attributed to the Defendant. To know that the advice was 'flawed' without knowing precisely how, is enough.

2.4. Note also: the fact that it is thought that the loss may later be avoided and that a reasonable Claimant would in practice wait to see if it was, before suing, is irrelevant: *3M United Kingdom PLC v Linklaters & Paines* [2006] EWCA Civ 530.

1. Loss of a chance

- 1.1. This applies whenever the Claimant's loss depends on what the Claimant would have done had the correct advice been given and then what a third party would have done in response to that.
- 1.2. This is how it works: the first question is what the Claimant would have done had it been in receipt of the correct advice. This question is decided on a balance of probability basis. The likelihood is that the Court will accept the Claimant's evidence (on a balance of probabilities) that it would have taken that advice and avoided the loss – taken Avoidance Action A. Indeed, in *Feakins v Burstow* [2005] EWHC 1931 it was expressly spelt out that in the event of doubt, it should be resolved in favour of the Claimant.
- 1.3. The second question then boils down into two sub-parts:
 - 1.3.1. the first sub-part is the question of whether there was a realistic / more than speculative chance that the third party would have gone along with Action A ;
 - 1.3.2. If, and only if, the answer to that question is 'yes', the Court, under this second sub-part of the second question, then awards damages on the basis of what the chance was that the third party would have gone along with Action A.

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