

**A thoroughly practical approach to the measure of damages
in solicitors' negligence cases**

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The Starting Point:

Your client, C, buys land for £10m with the intention of building its new Head Office to accommodate its 1000 members of staff.

There is a restrictive covenant in favour of an adjoining occupier, AJ, "*not to erect office buildings*"

C's previous solicitors had missed it.

That restrictive covenant would have made the land worth £700,000 at the date of purchase.

C enters into negotiations with AJ because of the duty to mitigate.

C ends up with a deal whereby £100,000 is paid to AJ. The restrictive covenant, however, is not relaxed, it is replaced with a covenant "*not to erect office buildings to accommodate more than 500 members of staff*".

With that covenant in place the land is worth £900,000. (so it was good mitigation).

What is the measure of damages? £300,000 or £200,000.

It's 200

1. Step 1: If any successful (or partially successful) mitigation has taken place, the measure of damages will be the cost of that mitigation (plus any remaining diminution in value).

When is the remaining diminution in value measured? - what happens if the difference in value has changed?

P wants to purchase a dentist's practice and agrees a price with V - £53,750.

The solicitor acting for P is negligent and causes a delay during which Robinson offers £60,000, which V accepts. P tries to buy somewhere else at about the 54k mark but that falls through too.

P then realises that he really wants that practice and three months later persuades Robinson to sell it for £92,500. At that point it is really only worth £75,000.

What is the measure of damages?

- A. £92,500 minus £53,750 (the difference between what was eventually paid and what P could have got it for absent the negligence) = £38,750?
- B. £75,000 minus £53,750 (the difference between what it should have cost after the negligence and what it should have cost before) = £21,250
- C. £60,000 minus £53,750 (the difference between what P could have got it for immediately after the negligence and what he could have got it for before) = £6,250.

It's B.

Simpson v Grove Tompkins & Co (1982) Sol J 347.

Dent v Davis Blank Furniss [2001] Lloyd's Rep PN 534

A and C are about price.

2. Step 2: The remaining diminution in value (note, value not price) following a successful mitigation is measured at the date the mitigation succeeds.

You take the remaining difference in VALUE at the date the mitigation succeeds

Ford v White [1964] 1 WLR 885: solicitors said no restriction against building. There was. But price equalled true value of the land with the building restriction ⇒ no loss.

3. Step 3: If successful (or partially successful) mitigation has not taken place, the measure of loss will usually be based on diminution in value.

This is not a 'prima facie' rule. It is a 'most cases' rule

It is the case in 99 property related professional negligence cases out of a 100 because what the Claimant has usually lost in such a case is some value off a property.

Follows from the fact that most complaints in property related prof neg are of loss of asset value. e.g negligence in serving notices under 1954 Act - the loss is difference in value between the business as it was and as it would have been absent the negligence.

Most - not all - sometimes the Claimant is entitled to be compensated not for a loss in asset value but a loss of bargaining opportunity - when damages assessed on a different bases - *Wrotham Park* - loss of bargain.

4. Step 4: When it comes to diminution in value, if you look after the 'when', the 'how much' usually looks after itself.

Loss is a movie.

Damages involve the taking of a snapshot

5. Step 5: On the big 'when' question, the prima facie rule is 'Day 1'

Day 1 = date of breach.

6. Step 6: To 'get' whether the Day 1 rule applies in your case, you have to 'get' the big assumption behind it

Why is Day 1 the prima facie rule?

This is "essence of Day 1":

Sale of Goods Act 1979, section 53:

- (2) *The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.*
- (3) *In the case of breach of warranty such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.*

The clue is in the fact that this relates to goods.

The assumption is that once the defective goods have been delivered to the buyer

- (1) the buyer will be aware of the defect
- (2) the buyer can immediately go into the market, sell the defective goods at a knock down price and buy defect free goods so as to mitigate the position.

The assumption behind Day 1 is that the buyer is immediately free to mitigate its loss away. If it's a Day 1 case, the Claimant is not locked in and unable to mitigate. e.g

- (1) The buyer may not know of the defect
- (2) The buyer may not be able to pay to sell the duff goods and buy defect free ones.

7. Step 7: Day 1 will therefore only apply where the Claimant is not 'locked in' to the loss and is free to mitigate its way out of it.

8. Step 8: If the 'Day 1' rule doesn't apply, the 'when' is either when mitigation fails or when the nature of the loss is otherwise transformed.

It's usually going to be one or the other.

Johnson v Agnew [1980] AC 367 (HL).

Nov 1974: the V's are in default on their mortgage and owe £100.

They are forced to, and agree sell the property to P for £110.

P fails to complete. V gets order for SP.

Order for SP cannot be enforced.

July 1975: the mortgagees sell the property and raise £80

V seeks damages in lieu against P, giving credit for the £80.

By this time there is more interest on the £20 that the mortgagee has not recovered.

Are damages measured at the date of the breach (not encompassing that extra interest) or as at the date when sp fails (encompassing it)?

- 1) Day 1 rule doesn't apply because P could not remedy the problem immediately - P was stuck with going through a legal process first
- 2) You look for 'has mitigation failed or has the nature of the loss otherwise been transformed?'

Mitigation fails when the contract is finally lost because enforcement of it becomes impossible. There is no transformation of the loss at any point.

I have a property: my roof is damaged by the next door's chemical plant.

If I repair it now and protect it, it will cost £200.

I can't afford to, so I sue the next door and wait for the money before doing it.

By that time it's £600.

When are damages assessed?

1) Day 1 rule doesn't apply because I cannot remedy the problem immediately - I am just unable to, so am locked and unable to mitigate my loss away.

2) If the 'Day 1' rule doesn't apply, the 'when' is either when mitigation fails or when the nature of the loss is otherwise transformed.

Mitigation doesn't fail - but my repair transforms the nature of the loss. My loss is now what I have spent - the £600, not the £200 or any lesser sum. That is when I have the ability to repair it.

Alcoa Minerals of Jamaica v Herbert Broderick [2002] 1 AC 371 (PC)

Application to professional negligence:

Claimant buys property for £1m.

Develops it and spend £500k.

THEN finds there is a restrictive covenant which solicitors should have picked up.

Are damages:

- 1) The difference between what it's worth at the date of breach, with and without the restriction; or
 - 2) The difference between what its worth at the date the restriction was discovered, with and without the restriction;
- or
- 3) The difference between what its worth at the later of when the works are done and the attempt to lift the restriction fails, with and without the restriction;
- or
- 4) The difference between what its worth at the date of trial with and without the restriction ?

Usually I write down all the candidates in order and apply the two criterion. Is this the date the Claimant is unlocked and able to mitigate its loss away; is this the date on which either mitigation fails or the nature of the loss is otherwise transformed?

When is it 1) ? NEVER

Ridiculous - before the Claimant could do anything about it - the Claimant is seriously locked in unable to mitigate its loss away.

When is it 2: if we could have unlocked then and become able to mitigate.

We would be locked in at Point 2 if:

- ☞ we didn't know of the restriction until we were committed to the works and we have only just finished the works or
- ☞ we were told we had a reasonable chance of lifting the restriction (reasonable mitigation)

3 is potentially a moment when mitigation fails and when the nature of the loss is transformed because it now includes the cost of the works. Strong candidate.

When is it 4: if we needed the damages to sell and buy a comparable and suitable property.

See, by analogy *Smith v South Gloucestershire Council* [2002] 3 EGLR 1 (CA)

9. Step 9: When you are looking at whether the Claimant is 'locked in' and unable to mitigate its loss away, you look at the what is, not at the what might have been

Stark example:

You buy a lease of a house for £1m.

Your solicitors allow you to pay a premium of 100k even though receipt of a premium for such a lease is illegal.

You live in the house.

Payment of a premium then becomes legal.

How is your loss measured?

- A) The Day 1 measure is 100k but it will not apply if you are locked in and unable to mitigate your loss away. You have no duty to sell to mitigate - it won't work on these facts. You have suffered your loss and selling will not assist - so you *are* 'locked in' and unable to mitigate your loss away. So it's not Day 1.
- B) Let's look for when mitigation fails or when the nature of the loss is otherwise actually transformed. There is no mitigation to fail but the change in the law does transform the nature of the loss - then the negligence has no effect because you can sell with a premium and recover it. That is the 'what is'

Damages are nil.

Kennedy v Van Emden [1996] PNLR 409 (CA)

Step 10: When you look at 'locked in', you look at 'locked in to the loss' not 'locked into the property'.

You buy a house for £1m.

Because of the solicitors error you do not realise there is a history of subsidence.

You have loads of repairs to do. It's really only worth 700k.

You live there for 2½ years

Then you apply for pp to demolish and build two new bungalows.

You get it.

You can now sell to a developer for £1.3m.

What is your measure of damages?

- A) Are you locked into the situation and so unable to mitigate ? No - if you could get the pp two years later you could have got it at day 1. So prima facie it's date of breach.

- B) So you never get to a non Day 1 measure. You never have to look for when mitigation fails of when the nature of the loss is transformed. In fact the loss is never '*transformed*' it is wiped out.

So it's Day 1.

Which is 300k.

Hussey v Eels [1990] 2 QB 227 (CA).

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