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Update

The balance of improbabilities: discharging the burden of proof and other tales of the unexpected in solicitors' negligence

Wellesley Partners v Withers LLP

Earlier this month, the High Court handed down its judgment in the solicitors' negligence case of *Wellesley Partners LLP v Withers LLP* [2014].

Nugee J's lengthy judgment offers a range of useful insights into the correct approach to take in relation to many issues that are frequently encountered in claims against solicitors, and serves as helpful guidance to those involved in such disputes. What follows is intended as a brief examination of the most important of the issues raised.

Background

Withers LLP (**Withers**) acted for an executive search consultancy firm, Wellesley LLP (**Wellesley**), in relation to Wellesley's admission of several new partners to the LLP. These included a Bahraini bank, Addax Bank (**Addax**), which was to make a capital contribution of GBP 2.5 million to Wellesley in return for acquiring a 25% stake. As part of the deal, Wellesley's founder member, Rupert Channing (**Mr Channing**), agreed to grant Addax an option to withdraw 50% of its capital contribution.

Withers prepared a new LLP agreement (the **Agreement**), which went through several drafts. In the early drafts, clause 25 of the Agreement allowed Addax to exercise its option after 42 months. Prior to execution, however, Withers amended clause 25 so that Addax's option would be exercisable at any time **during** the first 41 months of the Agreement. The Agreement was executed in that form. 12 months later, Addax exercised its option. A dispute subsequently ensued when Wellesley failed to re-pay the whole of Addax's contribution.

Wellesley alleged that Withers had been negligent as the instructions given by Mr Channing had been that Addax's option should be exercisable only after 42 months. Other allegations were also made, including that the Agreement exposed Wellesley (which operated in sterling) to a currency risk by providing that Addax was entitled to repayment in US dollars.

Wellesley claimed the following losses: (i) loss of the revenue it would have earned from the anticipated expansion of its business in London and abroad, had Addax not withdrawn its capital after 12 months; (ii) losses flowing from the diversion of Mr Channing's time away from expanding the business and into dealing with the ensuing dispute with Addax; and (iii) the costs of its disputes with Addax.

The High Court found that Withers had breached its duty in drafting clause 25 of the Agreement. Wellesley's other allegations failed. The court awarded damages totalling over GBP 1.6 million for loss of profits, the diversion of Mr Channing's time and legal costs.

The "balance of improbabilities"?

In assessing breach, Nugee J sought to determine, as a matter of fact, the circumstances in which clause 25 of the Agreement had been amended by Withers. Having reviewed the evidence in detail, he concluded that there were only two possibilities – either Mr Channing had given unclear instructions such that Withers misunderstood what was required, or Mr Channing gave instructions to do something else which Withers subsequently misremembered. The judge considered neither possibility to be particularly plausible, suggesting the case concerned the "balance of improbabilities". He considered whether, in the circumstances, Wellesley had discharged the burden of proof.

Despite recognising that it is always open to a trial judge to hold that the burden of proof has not been discharged and that (s)he simply does not know what happened (*Rhesa Shipping Co v Edmunds* [1985]), Nugee J concluded that "*a trial judge should be slow to resort to the burden of proof and should wherever possible make findings of fact*". While emphasising the uncertainties in his assessment, therefore, he went on to make relevant findings of fact – essentially, that the second of the two not especially plausible possibilities above was nevertheless the most likely.

The role of attendance notes

No attendance note had been made of the call in which instructions were given to Withers regarding clause 25, nor did Withers' witness have any specific recollection of what was said. In these circumstances, Wellesley argued that it was open to the judge to prefer its evidence.

The judge accepted that keeping attendance notes is "*good practice*" as they make it easier to establish later on what instructions and advice have been given. He dismissed the suggestion, however, that "*the absence of an attendance note in some way counts against the solicitor in forming a view as to where the truth lies*". The lack of an attendance note is not evidence that supports one side's case over the other's; it simply makes it more difficult to resolve the matters at issue.

Scope of duty

Nugee J reiterated the principle articulated in *Pickersgill v Riley* [2004] that the extent of a solicitor's duty to proffer advice when not expressly asked to do so is very fact-sensitive and depends on all the circumstances. In this case, he found that Withers did not owe a duty to advise Wellesley (i) that the effect of expressing Addax's capital contribution in US dollars would be to entitle it to repayment in the same currency (which, though a legal issue, the judge called a "*simple and straightforward point*") or (ii) that this would expose Wellesley to an exchange rate risk (which the judge ruled was a commercial, not a legal issue).

Two types of lost opportunity

Wellesley claimed the profits which it would have made if it had (i) opened a new office in the US, primarily to deal with the US recruitment needs of a Japanese bank, Nomura, which had just acquired Lehman's non-US operations, and (ii) expanded by recruiting more consultants in its London office.

Nugee J distinguished between two types of "lost opportunity" case:

- Cases of the *Allied Maples v Simmons & Simmons* type, where the claimant has lost the opportunity of gaining a benefit which was contingent on a third party acting in a particular way. In such cases, the claimant first has to prove that there was a "real and substantial" chance of the third party acting in a particular way. Damages are then quantified at the appropriate percentage having regard to the claimant's chance of obtaining the benefit
- Cases where the claimant has lost the opportunity to trade generally, but where the opportunity was not dependent on the actions of a third party. In such cases, the claimant must prove on the balance of probabilities only that it would have traded profitably. Looking at all the circumstances, the court then carries out a realistic assessment of what the claimant's profit would have been. No loss of chance discount is applied

The court held that Wellesley's claim to loss of profits in the US was dependent on obtaining a particular mandate from a specific third party, Nomura, and so fell to be assessed on *Allied Maples* loss of chance principles. The profits which Wellesley would have made in the UK, however, were not contingent on the actions of a third party and therefore fell into the second category.

Remoteness

Withers argued that the losses flowing from Wellesley's failure to obtain the Nomura mandate were too remote. Withers sought to apply the narrower contractual test for remoteness – i.e. whether the type of loss was "not unlikely" to result from the breach in question. Wellesley sought to rely on the more favourable tortious test – i.e. whether the loss was "reasonably foreseeable" at the time of the breach.

The judge held that a claimant can rely on the more favourable tortious test for remoteness where there is concurrent liability in tort and contract. He did, however, also recognise the benefits of having a single test for remoteness, which he thought should probably be in the form of the current contractual test, for use in cases where concurrent liability exists. However, as the relevant legal principles are laid down by cases decided at appellate level, Nugee J concluded that it would be for a higher court to make a final determination on this issue.

Comment

This case demonstrates a well-balanced approach to a range of different professional negligence issues, and there is helpful guidance in the judge's analyses of both remoteness and the different categories of lost opportunity.

Overall, the case contains more to help than hinder the defence of solicitors' claims, not only because of the comments on specific matters such as attendance notes but also because of the care with which the judge sought to reconstruct undocumented facts in order to reach his finely balanced conclusion.

On a practical note, the case also serves to remind witnesses (and their solicitors) of the importance of not overstating in evidence their actual recollection of relevant events. Nugee J praised the candour of Withers' main witness in this regard. A candid and well-rounded witness statement, which distinguishes clearly between a witness's actual recollection and his/her "usual practice", may carry more weight in evidence than a statement that purports to be entirely independent recollection.

We understand that the case may be appealed. If so, further guidance may be handed down by the Court of Appeal on the issues addressed at first instance – remoteness and loss of chance, in particular.

Further information

If you would like further information on any issue raised in this update please contact:

Neil Jamieson
E: neil.jamieson@clydeco.com

Tom Ellis
E: tom.ellis@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.