Author

Saleem Khalid

February 2016

PROFESSIONAL NEGLIGENCE BRIEFING

In this first edition of 2016, Saleem Khalid reviews a selected number of Professional Negligence cases.

Review of Professional Negligence Cases

Another year is well under way, so here is my selected review of professional negligence cases from 2015 to see if we have learnt our lessons for 2016. Although these cases are recent, as is often the way in our field, you will find many familiar first principles within them, still being litigated...

There have been a few notable cases over the last twelve months which have revisited the issue of scope of duty. A couple involved solicitors (covered later), but I start with this one concerning a valuer.

Freemont (Denbigh) Ltd. v Knight Frank LLP (2015) PNLR 4

Not for the first time, reliance formed the foundations of the case. [Sorry: couldn't resist a construction based joke, yes that was one.] Freemont was a property development company. It obtained outline planning permission in order to attract investors. Knight Frank was instructed to value the land by the lender. Said valuation naturally varied depending upon if detailed planning permission was later obtained. They valued the land, however, as it then was, concluding with a figure of some £17m. Freemont claimed that it had accordingly rejected bids of c.£10m shortly after the valuation. The judge rejected the assertion by Freemont that it had relied upon Knight Frank's valuation when assessing bids. The purpose of the valuation was in order to secure financing. The valuer was not deemed to have actual or constructive knowledge that the valuation would be relied upon for other purposes.

Lloyds Bank PLC v McBains Cooper Consulting Ltd. (2015) EWHC 2372 (TCC)

This time, causation was the principal subject of the case. Lloyds engaged McBains to project monitor a former mixed use development. There was an express term along the lines that McBains had to assess the quality and progress of the works and to approve applications for drawdown amounts submitted by the borrower. When the money inevitably ran out, the bank opted to cut its losses and exercise its charge, resulting post-sale in a loss of some £1.4m. Understandably, a negligence claim ensued.

McBains actually admitted breach of its retainer but maintained that there was no causation. The twist in the tale is that Lloyds formally conceded in proceedings that it too had been negligent in that the lending facility would clearly never have been enough to cover developing this

site. Further, McBains gave some warnings in their regular reports to the bank and these were simply not heeded. For these reasons, the bank's damages were decimated, (well, they were found to have one third contributory negligence to give a more accurate emphasis).

Wellesley Partners v Withers LLP (2016) CILL 3757

An erstwhile favourite topic of mine is concurrent duties. The Court of Appeal had the enviable (not a typo) task of dealing with this point and came down on the side of contractual duties taking precedence. There is, as we know, a slight difference in terms of the test for remoteness in contract as opposed to tort. 'Reasonable contemplation of the parties' is a little narrower than 'reasonably foreseeable' objectively speaking.

Wellesley Partners asked Withers to draft a partnership agreement providing that capital could not be withdrawn by an investor before 42 months. You guessed it: the resultant document had the effect of allowing a withdrawal within 41 months.

The CA held that the contractual test applied. There should be only one test used for the recoverability of damage for economic loss. Nevertheless, it found on the facts that the loss of profit was within the contemplation of the parties so the distinction was without a difference. This is unlikely to be true in every case of course, hence why this decision will be returned to in the near future I imagine.

Wattret v Thomas Sands Consulting (2015) EWHC 3455 (TCC)

The TCC adopted a typically innovative approach when allowing expert evidence as to alternative dispute resolution. Two home owners pursued their former advisers. Given that one adviser was not a solicitor, the court allowed expert evidence on what difference this might result in. Obviously the standard of care is to be measured by reference to the specific professional body in issue.

Geraint & Christine Thomas v Ian Albutt (2015) PNLR 29

It goes without saying that it is a shame that barristers lost their immunity from suit. Therefore I am obliged to mention them in this briefing, albeit the ending would reveal why I chose this case, hence I start (in an approach I consider bound to catch on with others) with the factual matrix.

The barrister was instructed by interested parties to resist an application for judicial review in relation to a campsite in the Brecon Beacons. The claimant landowners had the benefit of planning permission to convert part of their farm into a caravan park. A local group sought for said permission to be quashed. They succeeded.

The Claimants then asserted that the barrister had misled them by being overly optimistic on prospects of success; on any concomitant compensation for failure and on evidence required. Morgan J dismissed the first two grounds but found that the Claimants' prospects of success could have improved with extra evidence by 5-10%. This was thus deemed to be negligible, pursuant to the usual rule on such a loss of a chance (which the case effectively was).

Chinnock v Wasborough (2015) PNLR 25

Whilst doing a spate of limitation cases, I recall writing a while ago (but cannot be specific about dates in the way my witnesses absolutely must be) about 'date of knowledge'. It seems plus ca change because the concept featured regularly during 2015.

In the instant case, the Claimant was informed back in 2001 that her claims against the NHS had poor prospects. In 2009 she received conflicting advice and so started

proceedings against her former solicitors. The underlying case concerned wrongful birth and I should add that the law had changed considerably in the intervening period.

Somewhat surprisingly at first blush, the Court of Appeal upheld the ruling at first instance and found that the Claimant had constructive knowledge back in 2001. This was largely because, given how unhappy she was with the advice at that time, the Claimant should have investigated the matter further then. Waiting that long for a second opinion was considered excessive.

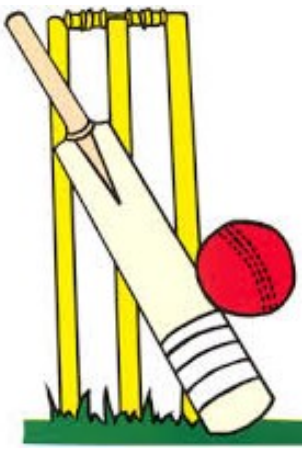
A further intersection between solicitors' negligence and limitation occurred in the case of ***Blakemores LDP v Scott & Others* (2016) CP Rep 1.**

This time, the Court of Appeal reviewed a summary judgment application and held that the claimants did not have relevant knowledge (strictly speaking: the relevant material fact about the damage) for the purposes of s.14A of the Limitation Act 1980. They knew that their solicitor had been negligent, but they did not encounter the consequences (i.e. sustain damage) of that negligence until significantly later.

Wright v Lewis Silkin LLP (2015) PNLR 32

The Claimant had been helping to develop the Indian Premier League. The MD of the company had asked the Claimant employee to draft his own employment contract and it was agreed that there would be a £10m severance payment in the event of constructive dismissal. The employee decided to engage Lewis Silkin. So far so good. But what happened was just not cricket because whilst there was a governing clause referring to England, there was no jurisdiction clause – contrary to the employee's wishes - who wished to avoid litigation in India at all costs. When his employment was terminated , the employee initiated a claim in England for his damages. He won the jurisdiction battle but could not by then enforce judgment against his former employer. The Claimant then issued against Lewis Silkin arguing that they didn't consider all possible avenues to enforce judgment and in any event never initially advised him on jurisdiction. The court found against the law firm in relation to the latter ground, finding that an exclusive jurisdiction clause would have had a 20% chance (damages awarded commensurately) of securing judgment sooner.

Another case which involved determining the scope of a solicitor's duty was ***Sharon Minkin v Lesley Landsberg (Practising as Barnet Family Law)* [2015] EXCA Civ 1152.** Apparently, 2015 saw a dramatic reduction in claims against solicitors but they are still numerous. A regular question posed is: what is the extent of any ongoing obligation to the client when it comes to advising?



Minkin confirmed the first principle that the extent of a solicitor's duty is primarily governed by the retainer. In addition to the contractual duty it was implied that a solicitor would proffer advice reasonably incidental to what he or she was engaged to address. More specifically, in *Minkin* it was asked if a second firm of solicitors instructed should have advised as to an already extant agreement between the parties in divorce proceedings, even though the agreement had been agreed by the firm's predecessors. In some circumstances, the answer would certainly have been in the affirmative. However, on the material facts of *Minkin,* it was considered that the solicitors had not been negligent. Said material facts included how the Claimant was an intelligent woman who had already been given advice as to the agreement and who had instructed the latest firm purely to effect a deal as soon as possible. I point out one note of caution which is that guidance was given by the Court insofar as it opined that solicitors should expressly set out any limitations to their retainer in writing as a matter of 'good practice'. Nevertheless, in this case, the Defendant solicitor was merely required to put the agreement into a Consent Order for court approval. It had been argued by the Claimant that the Defendant failed to give advice and but for this failure the Claimant would not have submitted

the Consent Order and would instead have achieved a more favourable financial outcome in the divorce proceedings.

Murray v Bernard (2015) 5 Costs LO 567

The Claimants faced a submission at the end of their grant of probate trial that they should not be entitled to their usual costs because they had failed to accept an offer to mediate. This is a well-established argument. However, as Mann J found, that was not telling the full story. The Claimants only refused to mediate at the start of proceedings. So the question was when was such a refusal 'permissible'? It is common for a party to give valid reasons for wishing to delay mediation and this case clarified that so long as this delay is not excessive or unreasonable then it will be tolerated if the party ultimately is prepared to mediate.

There have of course been other recent developments, notably regarding belated amendments to the PN Protocol; an important case on adjudication (which I will put on our blog); spiralling Court fees and the ever-changing (although never sufficiently) minefield of costs budgets.

However, I am now already looking into cases from 2016 with an eye to the next review briefing. You have been warned...

About the Author

Saleem practices predominantly in the fields of professional negligence and personal injury, with a particular speciality in defending construction professionals and public authorities.