

PROPERTY BRIEFING: ARTICLE 2

In this edition of 1 Chancery Lane's Property Briefing **Karen Shuman** considers **Crystal ball gazing: how does a judge assess loss of chance?**

You can prove that a past event has happened but you cannot prove that a future event will happen. When the actions of a third party are relevant all that can be done is to evaluate the chance of that event happening. So when a claimant has proved, as a matter of causation a real or substantial chance, rather than a speculative chance of an event or events happening, how does a court evaluate that loss of chance?

In *Joyce v Bowman Law Ltd* [2010] EWHC 251 (Ch) J bought a property which was advertised with an option for the buyer to purchase the lower end of the garden if the seller's application for planning permission was unsuccessful. J was keen to develop the land. He instructed B to act for him. Unfortunately the contract for sale contained a seller's option, not a buyer's option. B admitted negligence. J claimed loss of profit of £400,000: he would have developed the property and the additional land by building a large house. J argued that all the uncertainties concerning negotiating an option in the proper form, funding the redevelopment and obtaining planning permission should be reflected in a single percentage of 75%. He would recover damages of £300,000 on this basis. B argued that none of the consequential losses were recoverable as a matter of law, either because they were not within the scope of B's duty of care, were not caused by the negligence or were too remote. B also argued that J had

failed to mitigate his loss by building a smaller new house. It was held that J could only recover damages for his loss of profit if he could bring himself within the second limb of *Hadley v Baxendale* by showing that B had knowledge of the special circumstances which were liable to cause more loss. The judge found that B knew of J's intention to make a profit from developing the property. It did not matter that B was not aware of the precise scale of the intended development; the knowledge was sufficient to give B knowledge of special circumstances outside the "ordinary course of things" of such a kind that a breach in those special circumstances would be liable to cause J loss.

How did Mr Justice Vos assess the loss of chance? He found that the chances of: J being granted a suitably watertight buyer's option were 85%; J exercising his option 100%; J being able to obtain planning permission or his plans 40%; and J obtaining funding for the development 85%. Multiplying these percentages gives a figure of 29%. On a finding of a loss of profit of £130,000 the Judge awarded damages of £37,700.

In *Tom Hoskins plc v EMW Law* [2010] EWHC 479 (Ch) Mr Justice Floyd approached the task a little differently. This was a professional negligence claim against solicitors handling the sale of a portfolio of public houses and a brewery. The main issue was that E's negligence caused T to complete transactions

late and on relatively unfavourable terms. Although there were multiple contingencies (agreement to the terms, attempts to re-negotiate or extend the date for completion) the Judge considered it was wrong to apply a mechanistic approach of multiplying percentage by percentage. By way of illustration if the Judge had thought there was a 20% chance of the purchaser agreeing to provide a director's guarantee and an 80% chance of completion occurring at the end of October that would produce a loss of chance of 16%. However this did not reflect the true chances of the deal being done. The Judge evaluated the overall chances of completion by the end of October at 50%.

In *Harding Homes v Bircham Dyson Bell* [2015] EWHC 3329 (Ch) B acted for H in connection with a bank loan to finance a residential development. B included an all-monies clause by mistake in the guarantee. When H defaulted the bank demanded that the shareholders pay the sum due of £5.9m. Counsel for B argued that as the contingencies were truly independent so that the chances of one contingency happening were unrelated to the chances of the other contingencies happening the court should apply a mechanistic approach. Mrs Justice Proudman cited the decision in *Tom Hoskins* and decided that she should look at the chances of various contingencies happening in the round, not by applying percentage upon percentage. Although in the end it was irrelevant because the Judge found that causation was not made out and only nominal damages were awarded.

A mechanistic approach seems attractive: sequential logical steps with a percentage at each step then calculate the product of those figures. However it can skew the loss of chance and lead to a figure that does not truly reflect the overall chance that without the negligence the claimant would

have negotiated or achieved a better outcome. After all damages are supposed to be compensatory in nature.

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