Solicitors' Negligence: When and Why is the Measure of Damages Limited to Difference in Value?

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How is the quantification of loss approached in cases of solicitors' negligence where there has been negligence in the course of a transaction for the acquisition of property?

Surveyors' negligence cases - the difference in value rule

In surveyors' negligence cases, to all intents and purposes, the law is clear. The so-called "difference in value" rule will apply. A surveyor is instructed by a prospective purchaser, upon no special terms, to prepare a report in respect of the property. The surveyor negligently fails to discover defects in the property. In ***Watts v Morrow* [1991] 1 WLR 1421**, the Court of Appeal confirmed that, the proper measure of damages in such a case is the difference between the value of the property[1] as it was

[1] Note that in many cases, the value of the property as it is represented to be is said to be the price paid. If the price paid is used, C will lose the benefit of any bargain which he obtained in relation to the purchase price (the rationale being that, but for the negligence, there would have been no sale and hence no profit). But, the Court will not allow C to take advantage of D's negligence to recover from a bad bargain. Thus, where C has overpaid for the property, the lower valuation will be adopted for the purpose of the rule (on the ground that C's losses have not been caused by the negligence).

represented to be and its value in its true condition. The Claimant may be able to recover, in addition, the costs of selling the property and buying one which he would have wanted in the first place. He may well be entitled to general damages for physical inconvenience resulting from the defects. But there is no basis for recovering the cost of repairs, even if the cost of these significantly exceeds the difference in value. For him to do so would be to place the Claimant in the position that he would have been in if the representations were true. Since the negligent surveyor has not warranted that the condition of the property has been properly described, such damages are not recoverable.

But, in relation to solicitors' negligence cases, the measure of damage recoverable remains far from clear. The difference in value rule is certainly the starting point and, in many cases, damages will be assessed on that basis. But the Courts have confirmed that the difference in value rule is not absolute and, in appropriate circumstances, another method of quantification may be appropriate. In the words of Bingham LJ, it *"should not be mechanistically applied in circumstances where it may appear inappropriate."*[2] There are a vast number of reported cases dealing with this issue: there are numerous examples of cases where the difference in value rule has been applied and a fair number where it has not. There is a tendency in the text books[3] to list these cases in categories either by reference to factual distinctions between them or by the methodology of quantification which was followed. While such categorisation may be informative – there often remains no clear guidance as to which approach should be followed in any particular case.

The sheer number of cases demonstrates that this issue remains of particular importance to practitioners. In many of these cases, liability is not in issue. It may be self-evident that the defect in title has not been discovered or the planning restriction identified and explained. But it is still necessary to work out the measure of Claimant's recoverable loss. Frequently, there will be an issue between the parties as to whether damages are limited to diminution in value. In the meantime, the Claimant will be asking for advice as to his likely recovery and often as to how he should set about extricating himself from his predicament.

[2] ***County Personnel (Employment Agency) Ltd v Alan R Pulver & Co*** **[1987] 1 WLR 916**. The contrast is illustrated by ***Watts v Morrow*** itself. At first instance, the trial judge (Judge Bowsher QC) had followed the dicta of Bingham LJ in the ***County Personnel*** case and found that he was not bound by the difference in value rule. His approach was rejected by the Court of Appeal.

[3] See **McGregor on Damages, 17th ed. paras 29-009 – 29-021, Jackson & Powell on Professional Negligence, 5th ed. paras. 10-268 – 10-276**

Issues

1. The framework of general rules or principles which will be applied when determining the measure of damages.

2. The application of the diminution in value rule in solicitors' negligence cases and its limitations.

3. The alternative approaches which have been advocated or adopted by the Courts.

4. The Courts' approach to claims for consequential loss - usually loss of profits.

5. Approach the quantification of loss in practice.

There are several basic principles or parameters within which the Court will operate when assessing the loss.

The measure of damages

The measure of damages is often quoted to be *"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

Lord Blackburn – *Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 at 39.*

It is important not to lose sight of this basic principle. Its significance is two-fold. Firstly, in every case, it is necessary to identify at the outset what the position would have been had the solicitor not been negligent. Losses flowing from an event which would not have occurred but for the solicitors' negligence will not be recoverable. To take a simple example, if it is the Claimant's case that, had he known of the true position, he would not have purchased the property at all, he will not be entitled to recover his loss arising out of his inability to make a profit from the property which he has purchased. This has not always been appreciated by claimants. In the recent case of ***Greymalkin***[4], the claim for damages was recast at the last moment because the main claim had been put on a basis which was not supportable in law.

[4] ***Greymalkin v Copleys (A Firm)*** (ChD) [2004] PNLR 44, CA (affirm.) [2005] PNLR 20

Secondly, whatever measure of damages is proposed, it is necessary to stand back from the case and consider whether or not that measure properly reflects Lord Blackburn's principle[5]. If it does not, then that method of quantification may be incorrect.

The scope of the duty

It is necessary to identify the scope of the duty which has been breached since this will define the scope of the remedy. In SAAMCO[6], the House of Lords drew a distinction between breach of a duty to provide information and breach of a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to take reasonable care to supply information upon which someone else will decide a course of action, he is, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong. In other words, the measure of damages is the loss attributable to the inaccuracy of the information. In many cases, the solicitors' duty will extend beyond that of the valuer. In that context, many of the examples of so-called exceptions to the difference in value rule can be explained.

Accordingly, before attempting to quantify the loss, consider the duties and obligations of the solicitor. In some cases, the solicitor will be providing information which only goes to value. In other cases, his obligations will be more extensive. The scope of the duty is that which the law regards as best giving effect to the express obligations assumed by the solicitor.

Foreseeability

The measure of damages recoverable will be limited by concepts of foreseeability and remoteness. In this context, the extent of the solicitor's knowledge as to the intended use of the property may be crucial.

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[5] An approach advocated by Bingham LJ in ***County Personnel (Employment Agency) Ltd v Alan R Pulver & Co*** **[1987] 1 WLR 916**

[6] ***South Australia Asset Management Corporations and York Montague Ltd*** (often referred to as *Banque Bruxelles SA v Eagle Star*) **[1997] AC 191 at p.214E.** *"Much of the discussion, both in the judgment of the Court of Appeal and in argument at the Bar, has assumed that the case is about the correct measure of damages for the loss which the lender has suffered. … I think that this is the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages." (Lord Hoffman at p.210G)*

The case of ***Pilkington v Wood* [1953] Ch 770** serves as an illustration.

In 1950, the Claimant purchased a freehold property in Hampshire. He had employed the Defendant to act as solicitor in the transaction. Following the purchase, the Claimant spent £400 - £500 in improvements and repairs and purchased adjacent land for £334 which considerably added to the amenities and value of the original land. During the following year, the Claimant changed his place of employment from Hampshire to Lancashire. When he came to sell the property, he discovered that the title was defective since the vendor was a trustee of the property and had committed a breach of trust in purchasing it himself.

Negligence on the part of the Defendant was admitted. The only issue was the quantum of damages.

In addition to damages for the difference in value of the property with a good title and its value with a defective title, the Claimant claimed:

(a) Expenses in connection with his new employment, namely hotel expenses for temporary accommodation in Lancashire, the cost of running a car between Hampshire and Lancashire and telephone calls every night to his wife whilst in Lancashire;

(b) The cost of the valuation of the property required by his bankers at the time of the purchase; and

(c) Interest on his overdraft which remained because he was unable to sell the property.

The Defendant contended that the Claimant should have mitigated his damage by suing the vendor on the covenant of title implied under section 76 of and Schedule II to the Law of Property Act 1925; alternatively, he should have taken out a policy of insurance against the consequences of the defect in title.

Harman J held that:

The proper measure of damages was the difference between the market value of the property with good title and the market value it would have had with a defective title. Applying the second rule in *Hadley v Baxendale* 9 Exch 341, none of the items of special damage were recoverable because they were too remote. They could not have been within the reasonable contemplation of the parties at the date of purchase of the property in 1950.

The Judge did not accept the Claimant's argument that the Defendant must be deemed to know that the Claimant might wish to change his employment and sell his house in order to live elsewhere.

The Claimant had not unreasonably failed to mitigate his loss. His duty to mitigate did not extend to embarking upon litigation against the vendor in order to protect the Defendant from the consequences of his own carelessness. Furthermore, no satisfactory evidence was adduced that any policy of insurance to cover the defect could be obtained.

In many cases, the solicitor will have specific knowledge as to the purpose of the transaction and the Claimant's intentions. To this extent, the solicitor may well be in a different position to the valuer. In those circumstances, losses which arise out of an inability to use a property in a certain way may well be foreseeable.

Causation

It is also important to note that there may be issues of causation which impact upon the recoverability of damages.

The methods of quantification of loss which have been adopted by the Courts should be considered with these principles in mind. The starting point is the basic rule: difference in value.

Difference in value

The case of ***Pilkington v Wood*** is a classic example of the application of the difference in value rule. The operation of the rule is also illustrated by the case of ***Ford v White & Co*** **[1964] 1 WLR 895**.

The plaintiffs negotiated for the purchase of land which was offered at a price reflecting the existence of a restriction against building on part of it. The plaintiffs instructed their solicitors to exchange contracts provided that the vacant plot was unaffected by the building restrictions because the plaintiffs said that they wished to build on it. Their solicitors negligently stated that the land was not so restricted, and acting on that advice the plaintiffs purchased the land at the original price. In an action for negligence against the solicitors the plaintiffs claimed damages measured between the value of the land subject to the restriction and the market value free from the restriction.

Pennycuick J held:

That the plaintiffs had suffered no loss. Where the property was purchased at a price in excess of the then market value as a result of wrong advice the relevant measure of damage was the difference between the market value and the price actually paid, but that, as the plaintiffs had acquired a property equal in value to the price they paid for it, they had suffered no special damage. In other words, the plaintiffs were in the same position as if the defendant has fulfilled its duty and advised correctly as to

the restrictions upon the property. They had purchased a property which was worth precisely what they had paid for it.

The plaintiffs were not entitled to recover the difference between the actual value and the value, had there been no restriction. This would be tantamount to making the solicitors liable on the basis that they had warranted that their view was right. This was not the case.

What the Claimants had in fact lost in that case was the loss of their bargain – their anticipated profit on the purchase. Pennycuick J's reasoning was correct. If the Claimants had been advised correctly, then they would not have purchased the property and they would not have made a profit. But, change the facts slightly, and one can see the limitations of the difference in value rule. Suppose the Claimants had already started building before the true position came to light. Their money would have been wasted. Suppose there was an alternative plot which the Claimants would have bought for the purpose of development, if they had been correctly advised about this one. In those circumstances, the Claimants would have felt short changed. Why? Because the position of the solicitor can be distinguished from that of the valuer. The solicitors' duty of care arises in circumstances of knowledge about the purpose of the transaction. His advice and expertise goes to more than just value.

It is possible to identify a number of reasons why Claimants may wish to recover more than the difference in value.

- The loss flows from some particular characteristic of the property which is of importance to the claimant which does not affect the value of the property to a like extent. For example, the Claimant wishes to put the property to a particular use.
- There has been a lapse of time before the Claimant finds out the truth. As a result, substantial expenditure has been incurred or wasted.
- There is no ready market for the property and/or the Claimant cannot readily extricate himself from the consequences of the transaction, for reasons of impecuniosity or otherwise.
- The difference in value measure of loss alone does not compensate the Claimant for his lost profits.

When one turns to those cases where an alternative approach has been considered or adopted, it is possible to see these factors in play. As I have already indicated, a number of attempts have already been made to categorise these cases. Some of the distinctions which have been drawn seem to me to

be of doubtful validity. I recognise that similar criticisms may be made of my approach. But in the interests of simplicity, it seems to me that there are broadly three ways in which the Courts seek to modify or avoid the difference in value rule.

1. Wasted expenditure / cost of extrication.

2. Cost of meeting expectation.

3. Modification / adaption of the diminution in value rule.

Wasted expenditure / cost of extrication[7]

There are three main cases to consider in this context – these are the ones usually relied upon by claimants who are seeking to avoid the consequences of the diminution in value rule.

County Personnel (Employment Agency) Ltd v Alan R Pulver & Co **[1987] 1 WLR 916**

P company instructed D solicitors to act for them in negotiating the underlease of two ground floor rooms to be used as business premises. The underlease was finally granted at a rent of £3,500 per annum with a rent review clause which provided for the rent to be increased on the same dates and by the same percentages as the increase of rent under the headlease. Protection under the Landlord and Tenant Act 1954 was excluded. D failed to ascertain the rent payable under the headlease or to warn the P of any risks involved in the unusual rent review clause. Nor did they advise P to have the property valued before entering into the underlease.

In due course, P attempted to sell the underlease and the goodwill of the business, but the sale fell through, partly because of the uncertainty in the rent review clause. In the following year, the rent review clause came into effect and the rent under the headlease was increased. P's rent was increased proportionately to £9,022 per annum, although the open market rental of the underlease was only £2,600. P subsequently surrendered the underlease on the payment of £16,000 plus a sum representing the increased rent payable since the rent review date. In an action for negligence, P claimed the sums paid on surrendering the underlease and the £17,000 lost on the prospective sale.

On appeal, CA held (Sir Nicolas Browne-Wilkinson VC, Stephen Brown and Bingham LJJ):

1. D solicitors were negligent in failing to advise P in connection with the unusual rent review clause.

[7] Note that the cost of extrication in this context is used to refer to an award on a basis other than diminution in value rather than a claim for consequential losses (such as moving costs) recoverable in addition to the diminution in value.

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2. (a) The overriding rule in assessing damages was to ascertain the sum that would place the injured party in the same position as he would have been in had he not sustained the wrong.

(b) The diminution in value rule appears almost always, if not always, appropriate where property is acquired following negligent advice by surveyors.

(c) That is not an invariable approach, at least in claims against solicitors, and should not be mechanistically applied in circumstances where it may appear inappropriate (p.925G). (See *Simple Simon Catering*, where the CA favoured a general approach taking into account the "general expectation of loss", *Dodd Properties*, where the cost of repair or reinstatement may provide the appropriate measure and *G & K Ladenbau* – where the cost of making good the error of a negligent adviser may be allowed.)

(d) Whilst the general rule was undoubtedly that damages for tort or breach of contract would be assessed as at the date of breach, this rule should also not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule.

(e) P was entitled to the sums that it had paid to extricate itself from the underlease unless it could be shown that it was not a reasonable attempt to mitigate their loss. But P would only be entitled to damages for the loss of the prospective sale if it could show that if properly advised it could have negotiated an underlease of the same premises without the unfavourable clause.

D had contended that the correct measure of damage was the difference between (a) the open market value of the asset acquired as it actually was and (b) whichever is the lower of the price paid and the open market value of the asset in the state in which, as a result of the negligent advice, it was thought to be. This approach was rejected by the CA. The lead judgment was given by Bingham LJ. He noted that, on the facts, the diminution in value rule would involve a somewhat speculative and unreal valuation exercise intended to reflect the substantial negative value of this underlease. The loss might well exceed the figure actually claimed. By contrast, there was firm evidence as to what it actually cost P to extricate itself from the consequences of the negligent advice which it had received. Unless (which seemed unlikely) it could be shown that this sum did not represent a reasonable attempt by P to mitigate the loss it had suffered, this figure would represent a fair assessment of one head of the loss.

The claim for the loss of the sale was a claim under the second limb of *Hadley v Baxendale*. But the findings of the Judge were that P would not have entered into the transaction had it been properly advised. Accordingly, it could not recover this loss unless it could show that, properly advised, it would probably have been able to negotiate the grant of the underlease without the offending clause.

It is worth noting that Bingham LJ did countenance the possibility of a further claim based upon the contention that P would have entered into an alternative underlease of another property, had it been properly advised and thus it had lost the opportunity to obtain a profit from the sale of an alternative business. However, he advocated caution when approaching the quantification of such a loss.

"The overriding rule was stated by Lord Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39 and has been repeated on countless occasions since: the measure of damages is

> *"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

As Megaw LJ added in Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 All ER 928 at 934, [1980] 1 WLR 433, 451:

> *"In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn's fundamental principle. If it appears not to conform, the judge should examine the question again to see whether the particular case falls within one of the exceptions of which Lord Blackburn gave examples, or whether he is obliged by some binding authority to arrive at a result which is inconsistent with the fundamental principle."* - Bingham LJ (p.925)

Sir Nicolas Browne-Wilkinson V-C put the matter in this way (p.927H):

"In the present case the plaintiffs were buying an asset which, as they thought, could have not capital value; they were buying an underlease at a rack market rent which would have no capital value. As a result of the negligence by the solicitors the plaintiffs have exposed themselves to a long-standing liability requiring them to pay substantial sums out of pocket. To apply any test of capital diminution in such circumstances would be wholly artificial. The loss suffered is the liability to pay a sum over a period of time. The plaintiffs managed to extricate themselves from such liability by the down payment

of a capital sum. In my judgment, the capital sum they had to pay is the true measure of damage under that head."

***Hayes v James & Charles Dodd (A firm)* [1990] 2 All ER 815**

PP ran a motor repair business. In 1982, they decided to purchase a larger premises. They entered into negotiations to purchase a leasehold workshop and yard which had access by means of a narrow and inconvenient tunnel from the street at the front of the property and access over land at the rear. In the course of negotiations, D solicitors were given notice that the owner of the land at the rear asserted that there was no right of way over his land; yet D informed PP that there was such a right of way. Access via the rear of the property was critical to the success of the repair business. In reliance on D's assurance, PP purchased the workshop and yard and also a maisonette which formed part of the property for a total of £65,000 with a bank loan of £55,000.

Within a few days, the owner of the land at the rear had blocked the rear access, with the result that PP were unable to run their business properly. After 12 months, they closed the business and attempted to sell it as a single unit. Eventually, they managed to sell the maisonette in June 1986 for £38,000 and they disposed of the workshop and plant a year later. In an action for damages for breach of contract, the trial judge awarded damages on the basis of the capital expenditure thrown away in the purchase of the business, the expenses incurred, including bank interest and damages for anguish and vexation.

On appeal, the Court of Appeal (Purchas, Staughton LJJ and Sir George Waller) held that the judge had been entitled in the circumstances to award damages on the basis of comparing PP's actual situation with the position they would have been in, had they never entered into the transaction at all, rather than with the position they would have been in had the transaction been successful.

Therefore, he had been entitled to award damages on the basis of the capital expenditure thrown away in the purchase of the business and the expenses incurred. However, damages for anguish and vexation were not recoverable.

Staughton LJ started with the effect of the D's breach. If D had not acted negligently, they would have advised that there was no right of way. Accordingly, PP would never have entered into the transaction at all. They would have bought no property, spent no money and borrowed no money from the bank. This was the "no transaction" method. This should be distinguished from cases such as *Perry v Sidney Phillips* [1982] 1 WLR 1297 where one takes for the first element in the transaction the situation in which P would have been had the transaction gone through in accordance with his legitimate

expectations (Staughton LJ noted that, in *Perry* it appeared to have been assumed in that the transaction would have gone ahead for a lower value. Upon reading the judgment, he may have been mistaken in this respect). He relied upon the dicta of Bingham LJ in *County Personnel* and pointed out that this appeared to be another *"no transaction"* case.

He drew the following distinction.

"The difference between the two methods is unlikely to be of importance in a case which concerns some commodity that is readily saleable, such as peas or beans, and if there is no difficulty or delay in ascertaining that a breach has occurred. A plaintiff who has agreed to buy beans at the current market price and has received a quantity which is defective can sell them forthwith and realise their actual value. If he intended to perform a profitable sub-contract, he can buy other beans in the market for that purpose. In such a case, it makes no difference whether damages are assessed on the no-transaction method, so that he recovers the price paid less the sum realised on the disposition of the defective beans, or on the successful-transaction method, which gives him the difference between the value of sound beans and the value of defective beans.

However, this case is not concerned with a readily saleable commodity …"

Accordingly, he concluded p.820b),

"I am quite satisfied that Hirst J was entitled to award damages in this case on the no-transaction basis, and that he was right to do so. Indeed it may well be that the plaintiffs were, as he held, entitled to elect between that method and the successful-transaction method; but I need not express any concluded view on that. So they should recover all the money which they spent, less anything which they subsequently recovered, provided always that they acted reasonably in mitigating their loss. But they were quite properly denied any sum for the profit which they would have made if they had operated their business successfully."

Accordingly, PP recovered their rent, rates, insurance and travel expenses paid together with interest. In addition, they recovered the money spent on the lease and goodwill and the loss made on the plant. Bank interest was also awarded, less a deduction for the fact that PP had in fact overpaid for the maisonette. Perhaps for that reason, by agreement of the parties, the maisonette was left out of account. But PP were obliged to give credit for the profit which they made on the sale of the maisonette.

***Reeves v Thrings & Long* [1996] PNLR 265**

In November 1986, P, who was a businessman, wished to purchase a hotel at a price of £506,275 plus stock at valuation, for the purpose of improvement and development of the hotel. There was a walled car park at the rear of the hotel. Access to the car park could only be obtained across neighbouring land and was the subject of a licence agreement with the occupier of the neighbouring land. The licence agreement was for a term of 10 years from 1980 and thereafter from time to time until determined on six months notice.

D solicitors were engaged in connection with the purchase. They advised P of the existence and terms of the licence agreement and advised that it could be terminated and that P would have no right to a renewal.

In early 1990, P wished to sell the hotel. He discovered the fact that access to the car park was precarious. To provide secure rights of access, P purchased a property adjoining both the highway and the car park at a price of £200,000.

P brought proceedings against D alleging that they had negligently failed to make clear to him that there was no secure right of way to the hotel car park. He alleged that, had he been correctly advised, he would not have proceeded with the transaction. Accordingly, he claimed by way of damages his entire wasted expenditure, alternatively the difference in value between the true value of the hotel and the value of the hotel with the supposed right of access to the car park.

The CA (Simon Brown and Hobhouse LJJ, Bingham MR dissenting) held that the claim failed. D had discharged their duty by clearly explaining that access to the car park was dependent upon the licence agreement. There was no duty on D to advise upon the commercial implications of the access arrangements, or to point out the risk for future operation, development or sale of the hotel.

Both the Master of the Rolls and Simon Brown LJ expressed some conclusions (obiter) as to the measure of damages which would have been recoverable, had P been successful.

Bingham MR canvassed a number of possibilities:

1. That P should recover his entire net outlay on the purchase and refurbishment, on the basis that, if properly advised he would not have entered into the transaction. He was inclined to think that this would over-compensate P, since whatever he had invested in on the eve of the current recessionary cycle might well have led to loss.

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2. As an alternative, the normal basis of diminution in value could be considered but there would be problems arising out of the fact that the breach did not come to light for some years. Accordingly, he considered that a fairer approach would be to apply the diminution in value test at the time when the problem came to light.

3. Alternatively, P could be awarded the net cost of rectifying the defect in the car parking rights, after the problem had come to light. This could yield a more reliable answer.

Ultimately, he said that it was undesirable to rule on the proper measure of damages (p.278E). *"The assessment of damages is ultimately a factual exercise, designed to compensate but not over-compensate the plaintiff for the civil wrong he has suffered. While this is not an area free of legal rules, it is an area in which legal rules may have to bow to the peculiar facts of the case. It would in my view be dangerous to state principles in ignorance of the figures to which they would be applied."*

Simon Brown LJ concurred.

Whilst confirming the fact that a number of options were available, ***Reeves*** did not provide a great deal of guidance as to when an approach based upon the costs of extrication may be appropriate. This measure of damages was also considered and rejected in ***Stanley Oates v Pitman***[8] for two principle reasons – the claim was never put on this basis and, in any event, the evidence was wholly inadequate for the court to make any satisfactory calculations. Accordingly, the decision does not really assist the parties in considering whether such a claim should be advanced in the first place.

More recently, the issue has been considered in the case of ***Greymalkin Ltd v Copleys*** [2004] PNLR 44 (affirmed by the CA [2005] PNLR 20).

In 1993, CC, a property development company, agreed to buy a decrepit seaside hotel for £240,000. The vendor was S, who in turn had purchased it for £130,000 in a back to back transaction from receivers appointed by the bankers of a defunct company. D solicitors acted for CC. D failed to discover that the property was subject to three charges in favour of other lenders, which were not overreached by the sale. As a result of the difficulties with title, CC's plans to convert the hotel into flats failed.

CC threatened proceedings against S. S then sued T, his own solicitors, claiming damages and an indemnity against CC's claim. The prior charges were bought off by solicitors acting for T in 1996.

8 [1998] PNLR 683

Meanwhile, CC spent substantial sums on preserving and repairing the premises. But, in 1999, being pressed by their own bankers, they sold the property for £129,000.

In 1998, CC sued S and D. The proceedings against S were abandoned. D admitted negligently failing to spot the charges.

CC sought to recover £525,000, being in effect the amount spent in acquiring, improving and preserving the property, less the sum later received for it. D contended that, had CC known about the problem with title, they would have refused to complete and thus, they had suffered no loss. Alternatively, C's claim was limited to £45,000, being the difference between the value of the property in 1993 without the problem with title (£130,000) and its value to a purchaser who knew that the problem would take 3 years to resolve (£85,000).

Held, awarding damages of £45,000:

1. On the evidence, D's failure to notice the problems with the title had caused CC to go ahead with the transaction.
2. The prima facie measure of damages to be applied was D's figure of £45,000. Although in some cases, it might be appropriate to take some later date as a point of reference, there was no reason to do so here.
3. Although damages might in a suitable case be based on the costs incurred by C in extricating himself from a transaction that D's negligence had caused him to enter into, in the present situation, there had been no extrication. The eventual sale of the property in 1999 was due to other factors. It followed that there was no award based on the costs of extrication.
4. The court had to take account of the fact that the charges had been paid off in 1996. Hence, no further claim lay in respect of the fact that the property had originally been encumbered by them.

Lawrence Collins J confirmed that the claim for the costs of extrication could not be recoverable where, in fact, there had not been an extrication. Instead, Greymalkin had retained the property. Whilst the company was ultimately obliged to sell, as a matter of causation, the Judge was unable to view that as an extrication caused by the original breach and hence the costs of maintaining the property in the meantime were not recoverable.

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Cost of meeting expectation

These kinds of cases can arise in all sorts of different factual situations. But they are generally easier to distinguish. The duty of the solicitor relates to the procurement of a certain result. Furthermore, but for the negligence of the solicitor, that result would have been achieved. Here, the loss recoverable is the measure of damages which will, so far as possible, place the claimant in the position in which he or she would have been in, had the result been achieved. For example:

Simple Simon Catering Ltd v Binstock Miller & Co **(1973) 228 EG 527**

The Plaintiffs entered into negotiations for the lease of business premises for use as a restaurant. They orally agreed terms with the landlords and then instructed the Defendant solicitors to negotiate a lease in proper form in the terms of the oral agreement.

The Defendant negligently put in £50 per week rent rather than £30 per week. Moreover, instead of giving the tenants the exclusive use of the kitchen, they let the landlords put in a term that the landlords and people authorised by them should have the right to use the kitchen when they so required.

There was no difficulty about the claim for excess rent. But there was an issue about the proper measure of damages recoverable in respect of the solicitors' mistake in allowing a clause in the lease allowing others to use the kitchen.

The matter came before the Court of Appeal (Denning MR, Megaw and Scarman LLJ). Denning MR gave the leading Judgment. He noted that the Judge at first instance appeared to have held that, but for the bad advice, the landlords would have been prepared to enter into a lease giving the Plaintiffs exclusive use of the premises.

Denning referred to *Ford v White* and *Phillips v Ward*. He concluded that the law could not be applied in these terms to this case. *"Viewing the matter as at the date of the wrong advice, what was the loss to these tenants by reason of having a lease for which they were paying £30 a week rent in the situation which had it overhanging it all the time this right, of which they were not told, of the landlords coming in and having a possible right to use the kitchen? It seemed that that that loss was very much a matter of general assessment, one not to be measured necessarily by diminution in value of the reversion and so forth, but as a matter of general expectation of loss."*

Accordingly, the appeal was allowed and the matter remitted for rehearing and assessment.

Murray v Lloyd **[1989] 1 WLR 1060**

In 1981, P instructed D solicitors to advise and act for her in the purchase of a leasehold interest of a residential property held under a lease for a term of 15 years expiring in June 1991. The lease was subject to a prohibition against assignment without the previous consent of the landlord not to be unreasonably withheld. P entered into an agreement for the purchase of the lease for £50,000 which was, on D's advice, assigned to a company registered in the British Virgin Islands in order to save tax. P was advised by D that she would be entitled to occupy the property as her own with all the benefits of ownership in her own name and that the lease could be assigned to her personally at any time in the future.

In 1986, P discovered that advice to be incorrect when the landlord's consent to assign the lease to her was refused on the ground that it would confer rights under the Rent Acts upon her. The company was not able to acquire any statutory rights of occupation or protection under the Rent Acts.

P claimed damages against D solicitors. As a result of D solicitors' negligence, she had the lost the opportunity of becoming a statutory tenant and would be obliged to leave the property at the end of the lease.

There was a substantial dispute between the parties as to the measure of damages to be awarded. It was agreed that any valuation should be as at the date of trial. P contended that she was entitled to damages to reflect the loss of benefit to P of the rights of occupation which she would have enjoyed if properly advised and D had arranged for the property to be purchased in or capable of assignment into, her own name. The value of the loss of those benefits should be calculated as the discount which would be available to her as a statutory tenant of the property, were she able to purchase the property or as the price which the landlord would have been prepared to pay her to give vacant possession. It was agreed that the appropriate discount available to a statutory tenant between a willing landlord and tenant was 25% of the value of the property with vacant possession. The Judge assessed this as £115,000.

D solicitors contended that an award of only nominal damages was appropriate. The statutory tenancy was personal and non-assignable. As to the claim that she had lost the opportunity to purchase the freehold of the property at a discount or to receive a payment from the landlord to give vacant possession, the position was that, in view of the landlord's unwillingness to do either of these things, she would not have had any such opportunity to lose.

Mr John Mummery, (sitting as a Deputy High Court Judge) held that the P was entitled to damages as she contended. His reasoning was as follows. The starting point was that the measure of damages was the sum required to put the injured party in the position as if he had not suffered the wrong for which compensation is being awarded. If P had not been given negligent advice, the assignment would have been in her name and she could have become a statutory tenant on the expiration of the lease. She would have enjoyed security of tenure at a relatively low rent. She gave evidence that her intention had been to stay in the property. As a result of D's negligence, she had lost that opportunity. Accordingly, damages were to be assessed by reference to what it would cost P to acquire what she had lost i.e. the cost of acquiring similar rights of occupation on similar terms in similar accommodation.

If P were to find a freehold owner of similar property who was willing to grant her a lease on similar terms, the effect of such a lease would be to depreciate the freehold value of the property by £115,000. The probabilities were that P would have to pay at least that sum to acquire the rights. Accordingly, damages were assessed at £115,000.

He held that P may have suffered other items of loss such as the prospective costs of removal, but since these were neither pleaded not proved, he did not take account of these.

***Layzell v Smith Morton & Long* [1992] EG 118**

P's father held an agricultural yearly tenancy of a farm. P and his father managed the farm through a partnership. On 17 August 1986, P's father died. On 26 September 1986, the landlords gave notice to P to quit the holding. DD, P's solicitors, failed to claim rights of succession for P pursuant to s.39 of the Agricultural Holdings Act 1986 in time.

Negligence was admitted and the matter came before Mr Justice Schiemann for assessment of damages.

There were two issues:

1. What prospects did P have of succeeding his father as tenant of the farm; and

2. What compensation should he receive for the loss of those prospects.

The Judge held that P did satisfy the requirements of the Agricultural Holdings Act 1986 and there was no reason for supposing that there was a significant chance that P would not have been found eligible to succeed his father.

The fairest way of assessing his damages was to put him in a position where he could retrieve his losses. To do this, P would need £440,000 to acquire the freehold of a similar farm and he could recover £96,000 by selling the freehold and entering into a tenancy agreement similar to the one he had lost. Thus, damages of £334,000 were awarded. The Judge rejected D's submission that P had in effect lost a source of income and cheap housing and that damages should be assessed on a multiplier / multiplicand basis.

In my view, cases involving a failure to acquire an interest can be viewed in the same way. Where it is reasonable for C to take steps to acquire the interest in question, rather than a similar interest in alternative property, damages may be awarded for the additional cost to C, even if the vendor is taking advantage of C's predicament and offering the interest at an overvalue[9].

The definition of "value"

Finally, there are cases where the Courts have sought to stick to the difference in value rule but found themselves in difficulty in applying the normal method of quantification. The case of ***Stanley Kenneth Oates v Anthony Pitman & Co (A Firm)* [1998] PNLR 683** is a difficult one. In that case, for various reasons, the CA rejected the alternative approaches outlined above. Left with diminution in value, they had difficulty in calculating the loss. In order to overcome this, the CA chose to calculate the value of the property by reference to the hypothetical purchaser wishing to acquire the property for a particular purpose. In effect, they concluded that the cost of removing or rectifying the defects attributable to the solicitor's negligence may be adopted as the best guide to the value of the property.

In 1987, PP wished to buy a property in Devon for the purpose of providing a home for themselves and for carrying on the business of holiday lettings. The property was advertised as holiday flats and consisted of 13 letting units and a 4 bedroom proprietors' suite. The advertised price was £135,000. D solicitors were retained to act in connection with the purchase. After completion, PP began a programme of refurbishment at a cost of £55,000. For the first 18 months, they carried on the business of holiday letting. They then discovered that the planning permission attached to the property only entitled them to use it as a hotel.

[9] In *Stinchcombe & Cooper Ltd v Addison, Cooper, Jesson & Co* (1971) 115 SJ 368 as a result of the solicitors' negligence, the plaintiffs were unable to complete the purchase of certain property. The Courts awarded to the claimants the difference between the price at which the property was subsequently offered to claimants and the price which they would have paid.

In May 1992, PP obtained retrospective planning permission for the use of the property as holiday flats. But that use was for a limited period only and not the whole winter period. Furthermore, it was subject to PP carrying out a substantial amount of work at a cost of £38,000 which they could not afford. Therefore, in January 1994, they sold the property for £140,000.

PP claimed damages for diminution in value of the property, the cost of obtaining planning permission and the loss of profits due to being restricted to carrying on the business of holiday letting for a limited period only.

The cost of obtaining planning permission was agreed. It was also agreed that the correct measure of damages was the diminution in value of the property.

The trial judge awarded diminution in the value of the property as at the time of purchase in the sum of £15,000. He further held that the claim for loss of profit was not within the scope of the duty of care owed by D in that it was no part of D's obligation to underwrite the operation of the proposed letting business.

PP appealed and D cross-appealed.

Held (Millett and Schiemann LJJ, Sir Brian Neill):

The diminution in value rule could not be applied indiscriminately and it was necessary to examine the facts of the individual case.

Where a claim was made for damages for negligence the assessment of damages could be approached in at least three possible ways, provided that it was remembered that it was necessary to decide for what kind of loss the plaintiff was entitled to compensation.

In an ordinary case, it might be possible to apply the diminution in value rule without difficulty.

This might be more difficult where the property was unusual or where, to the knowledge of the solicitor, it was being purchased for a particular purpose, or where a considerable interval had elapsed between the purchase and the defects coming to light. In that case, the court might have to consider the price which a hypothetical buyer might have been willing to pay had he known of the defects, and the estimated cost of removing or rectifying the defects might be the most reliable guide to the reduced market value.

CROWN OFFICE CHAMBERS

Thirdly, the negligent advice or other conduct of the solicitor might have led the plaintiff to enter into a transaction from which subsequently he had to extricate himself, and damages might be based upon the cost of extrication.

Although PP had to extricate themselves from the transaction, this was not a case which could be assessed by the cost of extrication method. The second way of assessing the damages fell to be applied. In order to use the property for holiday lets or as a hotel, a hypothetical purchaser would have had to carry out the regularisation works and to have obtained planning permission.

The loss was to be assessed by reference to the amount which the hypothetical purchaser would have had to pay had he wished to use the property for holiday flats and had he known of the facts.

For this purpose, a number of factors were relevant:

- there was no evidence as to the value of any comparable property;
- the purpose for which PP were buying the property was known to D firm;
- the absence of planning permission did not come to light until October 1989;
- if planning permission was to obtained, substantial regularisation works would have to be carried out;
- when liability was admitted, this admission contained an admission that the grant of retrospective planning permission would involve the carrying out of the regularisation works and the grant of planning permission;
- In order to use the property for holiday lets (or indeed as a hotel) the hypothetical purchaser would have had to carry out the regularisation works and to have obtained planning permission.

The diminution in value was assessed as the cost of carrying out the regularisation works together with the cost of obtaining planning permission.

The claim for loss of profits was rejected. The claim might have been appropriate had DD solicitors given a warranty as to planning consent. No such warranty was given. The lost profits were not caused by entering into the transaction and ex hypothesi, they could not have been earned had the transaction not been entered into.

More recently, Tughendat J accepted that there was a difference in the value of a lease to a developer where the lease was taken in the name of a company rather than an individual because of the potential effect on the prospects of resale.

Powell v Whitman Breed Abbott & Morgan (A Firm) **[2005] PNLR 1**

In 1997, P proposed purchasing a mews house in Belgravia held on a lease in the personal name of the vendors from the Grosvenor Estate. Her intention was to develop and renovate the house and resell it at a profit. She instructed WBAM to act on the purchase. Prior to completing the assignment of the lease, she had sought the advice of C, a partner in WBAM as to whether it would impede the subsequent resale of the house if the lease was assigned not to her but to a company nominated by her. In October 1997, he had advised her that if she took the assignment of the lease in a company name there was "sufficient case history and precedent that you will not have to sell in a company name."

Acting on that advice, she acquired the lease for £382,000 and it was assigned to a company, BP Ltd which she controlled. Subsequently, in June 1998, she purchased an extension of the lease to 99 years and renovated and extended the house. In February 2000, the house was placed on the market but although expected to sell in two to three months, it did not in fact sell until April 2001 and then at a lower than expected price of £820,000. In the meantime, P incurred the costs of the company, the house and the borrowing on the property. One of the reasons for the difficulty was the unwillingness of Grosvenor Estates to transfer the lease in a company name to an individual. P sued WBAH for damages. WBAH denied liability and also contested quantum.

As to quantum, P contended that since the purpose of the purchase was to develop and re-sell the house the appropriate date to establish the loss was the date when the house would have sold but for it being in a company name, that is May 2000. WBAH argued that the appropriate date was that of purchase in December 1997 and that as a consequence the claimant had suffered no loss. Additionally P alleged that she was entitled to damages suffered by her because of the liability for costs and servicing the bank borrowing between May 2000 and April 2001.

Held (Tughendhat J):

1. It was foreseeable that if incorrect advice was given to C on the implications of taking a Grosvenor Estate lease in the name of a company, then the consequences of that advice being

wrong might include there being a more limited class of potential purchasers and hence delay and other related losses on the resale of the property.

2. There was a difference between the value of the 97 year lease which C took in the company's name and the value which the same lease would have if taken in her own name. This was because there was a smaller class of potential buyers at the material time and the seller of a company lease had a significant risk of not finding a buyer for a considerable period of time which was much longer than the seller of an individual lease would normally wait. In those circumstances no precise evaluation was possible, but a figure of 6% of the value of the lease if granted in the name of an individual was appropriate. Damages should be assessed as at the date the advice was acted upon, namely December 1997. Since the value of such a lease in April 2001 had already been agreed, it was appropriate to arrive at the equivalent value for December 1997 by applying the agreed index and then take 6% of that value.

The Judge held that the appropriate level of compensation was to pay to C the monetary equivalent of any benefits of which she had been deprived, while requiring her to give credit for any compensating benefits flowing from her solicitor's breach of duty. Damages are generally assessed as at the date of the breach, unless justice requires that some other date be taken.

The date of assessment

It is necessary to take account of one further method of modifying the effects of the difference in value rule. From time to time, the Courts have been prepared to modify the general principle that damages should be assessed at the date of breach, where "justice requires" that some other date should be taken. In general, it seems that courts are reluctant to adopt this strategy. This is because, by moving the date, the Court often ends up taking account consequences which are not considered to flow from the breach, for reasons of causation or remoteness (for example changes in the value of money or property). It is worth noting that a refusal to apply a different date of valuation can work in favour of the Claimant as well as the Defendant.

***Wapshott v Davis Donovan & Co (A Firm); Kidd v Newbury (A Firm)* [1996] PNLR 361**

In 1986, K & H bought a leasehold flat from G, who had extended a house owned by him to provide 3 new apartments. The price paid was £38,000. D solicitors were instructed in connection with the purchase. In 1988, by which time, the value of the flat had risen to £58,000, K & H's first child had been born and they wished to sell the flat to move to alternative accommodation. They then discovered

that part of the extension incorporating the flat had been built on land belonging to the neighbouring house, then in the ownership of S. As a result, the flat was unsaleable. A further child arrived in 1991.

Meanwhile, in 1987, a property company, SD, bought the freehold of both properties from S and G respectively. But the company was unable to register the freehold title until 1990. In 1992, K & H successfully registered their leasehold title to the flat.

K & H bought an action against D alleging negligence in failing to notice the defect in title. The action was heard in 1992, when the flat was worth £45,000. Liability was admitted.

Master Trench held that the correct time for the assessment of damages was the date of purchase in 1986, not the attempted sale in 1988. In 1986, the defect in title rendered the flats worthless and no account should be taken of actual or hypothetical events thereafter. They were not entitled to damages for disappointment or inconvenience.

D appealed on the grounds that the Master was wrong to find that the leases with the defects were valueless, that the award of damages overcompensated PP because it took no account of the fact that they were entitled to retain the leases and that the interest calculation was in error. PP cross-appealed on the ground that the difference in value should have been assessed as at the date when the breach was discovered.

Held on appeal (Beldam, Hobhouse and Aldous LJJ):

1. The correct date for assessment of damages was 1986, since there were no special circumstances calling for the substitution of a later date in order properly to quantify K & H's loss.
2. The finding of the Master that in 1986, the flats were worthless would not be upset.
3. The Master had been correct to take no account of the possibility of K & H eventually obtaining registration.
4. K & H did have a right to damages for the inconvenience and distress of being forced to live in an overcrowded flat, since such loss was a foreseeable result of D's breach of duty.

In relation to the date of assessment, Beldam LJ quoted extensively from the judgments in the *County Personnel* case because it seemed "to encapsulate the principles on which damages ought to be assessed." He also referred to Ralph Gibson LJ in *Watts v Morrow*. In his view, there was no reason to

depart from the ordinary rule. He noted that the Master had taken some account of fluctuating property values when awarding the rate of interest and considered that this was justifiable in the circumstances.

He concluded that the Master was entirely correct to ignore events which had occurred since 1986 in order to determine the value of the defective leases in 1986. The submission that PP would be overcompensated was rejected.

On the other hand, where, a conventional approach will offend against the general compensatory principle, the Court may vary the date to be applied.

Snipper v Enever Freeman & Co **[1991] 2 EGLR 270**

P was the occupying lessee of a house for a term of 88 years. She engaged D solicitors to take such steps as might be necessary to obtain an extended lease of the house pursuant to the provisions of the Leasehold Reform Act 1967 as amended. D solicitors successfully secured a reduction of rateable value for the purposes of the Act on account of improvements. But they failed to serve the notice claiming an extended tenancy within the time-limit laid down by the Act.

In an attempt to mitigate her loss, P took proceedings in the County Court. These were compromised by agreement between P and her landlords whereby she was granted an extension of her lease. She had however, lost the right to acquire the freehold.

The matter came before Mr Justice Sheen for assessment of damages. It was agreed that D solicitors should pay the costs of the litigation. More difficult was the assessment of P's loss resulting from the fact that, but for D's negligence, she would have been entitled to obtain the freehold of her house.

D calculated her "basic loss" as at the date of breach of duty of the solicitors – taking the difference between the value of the freehold and the value of the lease, less the cost of acquiring the freehold and adding interest to the date of trial. D then sought to deduct the benefit of what P had obtained by way of mitigation (that is, the value of the extension to the lease as at the date of trial). Since the value of property had increased in the meantime, this meant that P's loss was said to be only £10,814.

The Judge disagreed with this approach. He held that, had P gone into the market after discovering the truth and sold the lease, she would have been entitled to her "basic loss", that is, the difference between the value of her lease and the freehold. Since both parties had agreed that it was right to take into account P's attempts to mitigate her loss, it was no longer appropriate to assess damages as at the date of breach. If D was to have the benefit of the fact that P had acquired an extension of her lease,

damages should be assessed as at the date of the compromise when, for the first time, P could realise the improved value of her house. There should be only one date of assessment. Accordingly, damages were assessed as being the value of the freehold as at the date of compromise, less the cost of obtaining the freehold and the value of the extended lease (together with the costs of obtaining the extended lease).

Again, the central question is the scope of the Claimant's duty of care. In SAAMCO, the HL cited with apparent approval the decision in ***McElroy Milne v Commercial Electronics Limited*** **[1993] 1 NLZR 39**.

A solicitor negligently failed to ensure that a lease granted to his developer client contained a guarantee from the lessee's parent company. The result was that the developer, who had intended to sell the property with the benefit of the lease soon after completion, found himself in dispute with the parent company and was unable to market the property for more than 2 years, during which time the market fell.

The CA held that the developer was entitled to the difference between what the property would have fetched if sold soon after its completion with a guaranteed lease and what it eventually fetched two years later. The solicitor's duty was to take reasonable care to ensure that his client got a properly guaranteed lease. He was therefore responsible for the consequences of his error, which was producing a situation in which the client had a lease which was not guaranteed. All the reasonably foreseeable consequences of the situation were therefore within the scope of the duty of care. The CA decided this question by asking whether the client had reacted reasonably to his predicament.

Loss of profit

In considering claims for loss of profit, it is necessary to draw a distinction between cases where, but for the negligence, the transaction would still have gone ahead, and those where it would not. ***McElroy Milne*** can also be considered as a straightforward claim for loss of profit falling within the former category, arising out of the Defendant's breach and falling within the scope of the duty of care.

Similarly in ***G & D Ladenbau (UK) Ltd v Crawley & De Reya*** **[1978] 1 WLR 266**:

The plaintiffs instructed the defendants, a firm of solicitors, to act for them in relation to the purchase of a plot of vacant land which they intended to develop and for which they had applied for planning

permission. The defendants instituted enquiries before the sale but failed to search the commons register in order to find out whether any rights of common had been registered against part of the land.

Following completion of the sale, the plaintiffs started negotiations to sell the land to B Ltd. The solicitors for B Ltd carried out a search of the register which showed that rights of common had been registered against the land. In fact, the entry had been made by mistake but the encumbrance, which had to be removed from the register, caused the conveyance to B Ltd to be delayed and the plaintiffs suffered financial loss. They assessed their loss as being extra fees to other solicitors, interest on a mortgage for the land between the date when the sale to B Ltd would have taken place and when it did take place and interest on the profit they should have received during the same period.

Mocatta J held, giving judgment for the plaintiffs that:

1. The defendants' failure to search the register was negligent.
2. That, since the defendants knew that the plaintiffs intended to develop part of the land and let or sell the remainder, they should have reasonably contemplated that if they failed to secure an unencumbered title, the plaintiffs would be likely to be put to expense and lose profits on resale and accordingly, the damages, to be assessed by the master, should take into account such expenses.

In those cases where the transaction would not have gone ahead, clearly there can be no claim for loss of profits arising out of the failed business. But, had the claimants been advised appropriately, no doubt they would have invested their time and efforts elsewhere. In principle, there seems to be no reason why a claim cannot be made for the profits which would have been made by obtaining an alternative business. Bingham LJ recognised this in the ***County Personnel*** case. In rejecting such claims, the Courts have suggested that the loss is too remote. But, surely such loss is reasonably foreseeable where the solicitor is informed about the purpose of the transaction? Doubts about the recoverability of losses due to impecuniosity have been laid to rest by the decision of the House of Lords in ***Lagden v O'Connor*** [2004] 1 AC 1067.

In my view, provided that proper evidence can be obtained, there is no reason in principle why a claim cannot be advanced for the loss of profits which would have flowed from an alternative transaction. Whilst, in ***Hayes v Dodd***, PP were clearly not entitled to recover their loss of profits from the motor repair business which failed, there is no reason why they should not have been able to claim the loss of

CROWN OFFICE CHAMBERS

the fruits of their labours the business which they would have acquired, but for their solicitors' negligence.

Summary

1. In solicitors' negligence cases, the Courts rightly accept that methods of quantification other than the difference in value rule may be appropriate.

2. Alternative methods of assessment include (i) the cost of extrication; (ii) the cost of meeting the expectation; or (iii) modifying the difference in value rule, for example by varying the date of assessment.

3. The reason for this is that the scope of the duty owed by solicitors, as opposed to valuers, will vary and often extends beyond providing information as to value.

4. Accordingly, it is important to follow the approach advocated by Lord Hoffmann in SAAMCO and consider the scope of the duty owed before looking at the measure of damages due.

5. The claim is generally for breach of contract or breach of the duty in care in tort, not for breach of warranty. Thus, it is essential to examine the evidence as to what would have happened, if there had been no breach.

6. Equally, in considering which method of quantification of loss is appropriate, the Court will look at the steps which have in fact been taken by the Claimant.

7. Quantification will take place within the framework of the rules of remoteness and causation.

8. Any proposed method of quantification should be considered carefully in order to determine whether it in fact provides fair compensation to the Claimant.

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