DAMAGES AGAINST CONSTRUCTION PROFESSIONALS—CURRENT SITUATIONS

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INTRODUCTION

In this paper, I am going to consider the situation which arises where the claimant suing a construction professional has successfully surmounted any defences raised as to duty, breach, causation etc.

At that stage, it is tempting to assume that the claimant must now have a substantial claim. But this is not necessarily so.

I am therefore going to consider three typical situations which arise in claims against construction professionals for negligent design or supervision or advice. These are:

(1) The claimant puts forward a remedial scheme but has not yet carried out any work.

(2) The claimant, in addition to, or instead of, proposing such a scheme for future works, claims damages in respect of works which he has already carried out.

(3) The claimant, especially in a 'failure to advise' case, claims damages on a 'loss of a chance' basis.

FUTURE WORKS

The leading case is, of course, *Ruxley Electronics v Forsyth* (1996) AC 344. This was the famous 'shallow swimming pool' case.

The facts of *Ruxley* were exceptional and the decision of the House of Lords does not detract from the general proposition that the 'cost of cure' is the ordinary measure of damages. That is subject only to the exception that if the cost of remedying the defect is wholly disproportionate to the end to be attained, the damages ought to be measured by the value of the building had it been built as required by the contract less its value as it stands. This brings into play both the reasonableness of what is proposed and the claimant's intentions as to remedial works.

In my experience, defendants in these sorts of cases often try to make too much of *Ruxley*. *Ruxley* was, on its facts, an exceptional case. In most cases, the claimant will be entitled to the reasonable cost of remedial works. He will not have to satisfy the court that his building has been damaged by the defendant's negligence or that he is proposing to spend his damages in a particular way, the general position being that a claimant is entitled to do what he likes with his damages once he has received them.

However, *Ruxley* can be used to restrict a claimant's recovery. In *Birse Construction Ltd v Eastern Telegraph Ltd* [2004] EWHC 2512 Judge Humphrey Lloyd QC dealt with a case where a residential training college had been built with defects by the defendant construction company. However, he held that the claimants intended to sell the college without repairing the defects and that, in those circumstances, there could be no recovery of the cost of remedying defects which the claimants were not proposing to remedy before they sold.

There is a useful discussion of the relevant issues in the judgment, particularly at paragraphs 51 to 54. At paragraph 54 the judge expressed the position thus:

If a building owner disposes of property with defects attributable to some breach of duty by the defendant and for which the cost of reinstatement was the appropriate measure but does so without any reduction or loss on account of its condition then the loss that the law supposes is avoided and no damages are recoverable …

WORK ALREADY CARRIED OUT

In some cases, the claimant has carried out some or all of the remedial work prior to the trial. In those circumstances, a court will always have some sympathy with the party who has used his own money to deal with the defendant's breach.

That sympathy is often wrapped up with an appeal by the claimant to the 'Great Ormond Street' principle, i.e. reliance upon the well–known decision of Judge Newey in *Board of Governors of the Hospitals for Sick Children v McLaughlin & Harvey Plc* [1987] 19 Con LR 256.

This approach is summarised as follows at paragraph 8–037 of the current edition of *Keating*:

A claimant who acts upon apparently competent expert advice will normally be taken to have acted reasonably unless some quite clearly unreasonable course was adopted and unless perhaps the expert's proposals were outside the range of those which an ordinarily competent equivalent expert would have proposed so as to have been negligent.

Although, as I have noted, claimants are often keen to rely upon the Great Ormond Street principle, it is a striking fact that Judge Newey's decision has never, so far as I am aware, been expressly followed in any other case or approved by a higher court. Indeed, it is suggested that the tide of judicial opinion is moving in a different direction.

For example, in *Skandia Property UK Ltd v Thames Water* [1999] BLR 338 the Court of Appeal held that flooding to a basement caused by the defendant was not reasonably repaired by works to make the basement fully watertight. The basement had not been designed to be waterproof and the works were caused not by the damage due to the defendant's neglect but by the claimant's independent desire to secure the basement against water ingress for the future.

The *Great Ormond Street* case was not apparently cited or relied upon in *Skandia* and indeed Waller LJ said as follows at page 344:

... simple reliance by a plaintiff on an expert cannot be the test as to whether a plaintiff has acted reasonably in making an assumption, albeit, provided the plaintiff has provided the expert with all material facts and the expert has made all reasonable investigations, the advice will be a highly significant factor ...

Similarly, in *Ministry of Defence v Scott Wilson Kirkpatrick* [2000] BLR 20, the Court of Appeal again declined to award damages upon the basis put forward by the claimant, namely that it had acted reasonably in following professional advice as to the appropriate remedial works. This was essentially on the basis that although the remedial works carried out were reasonable, they had not been caused by the breach of contract of the defendant.

Of course, both of those decisions are causation orientated and turn on their particular facts. In neither, was Great Ormond Street doubted as such.

Hot off the press on this particular topic is a judgment of His Honour Judge Peter Coulson QC in *McGlinn v Waltham Contractors Ltd & Ors* (2007) EWHC 149 (TCC). The whole *Great Ormond Street* issue arose in that case and the judge deals with the matter in detail at Section K of his judgment (paragraphs 787 to 848). For various reasons, as explained

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in those paragraphs, the learned judge felt able to distinguish *Great Ormond Street* on the facts.

However, the defendants expressly asked the judge to hold that *Great Ormond Street* was wrongly decided and should not be followed. The learned judge rejected this invitation but nonetheless confined *Great Ormond Street* to a relatively limited ambit as explained at paragraph 827 of the judgment:

... it might well be said that his (Judge Newey's) decision is authority for the relatively narrow proposition that, if two remedial schemes are proposed to rectify a defect which is the result of the defendant's default, and one scheme is put in hand on expert advice, the defendant is liable for the costs of that built scheme, unless it could be said that the expert advice was negligent. For what it is worth, I consider that, subject to one potential vital qualification, set out below, this narrow proposition is generally in accordance with other authority and correct in law ... The important qualification that needs to be made is outlined by Waller LJ in Skandia to this effect: although reliance on an expert will always be a highly significant factor in any assessment of loss and damage, it will not on its own be enough, in every case, to prove that the claimant has acted reasonably....

LOSS OF A CHANCE

Claimants often assert, particularly where they complain of failure to advise and particularly where the damages issues are difficult, that they have lost a 'chance' of some benefit. They then seek to say that if the court takes the view that they had a 30% chance of obtaining this benefit that they should then recover 30% of the otherwise available damages.

These arguments may sound attractive at first blush but they need to be approached with some care.

Firstly, if the chance in question depends solely upon what the claimant would have done if properly or differently advised, loss of a chance does not really arise at all. It is for the claimant to prove, in the ordinary way, on the balance of probabilities that he would have acted differently in some specific respects: see *Sykes v Midland Bank* (1971) 1 QB 113 and *Allied Maples v Simmons & Simmons* (1995) 1 WLR 1602.

Secondly, even if it is a true loss of a chance case depending upon the hypothetical action of a third party, it is still for the claimant to show on the balance of probabilities, before any recovery is possible, that they had a substantial chance of the third party acting in such a way as to benefit the claimant. Then, and only then, does the court begin to consider the percentages.

The difficulties lying in the way of this sort of claim are illustrated, in the construction context, by another decision of Judge Humphrey Lloyd in J *Sainsbury Plc v Broadway Malyan* (1999) PNLR 286. The claimant was the owner of a superstore in Chichester destroyed by fire. The defendants were the architects and the claimant claimed damages on the basis that if the defendants had properly designed the superstore a wall would have contained the fire for sufficient time to allow the fire brigade to prevent it is spread.

The architect settled against the claimant on this basis and then sought contribution from another party. That other party contended that the settlement was unreasonable because, in truth, the claim was for the value of a lost chance that the third party i.e. the fire brigade would have contained the fire. The judge held that there was only a 35% chance that the fire brigade would have contained the fire in any event so that the settlement made on the 100% basis was unreasonable.

Adrian Williamson's paper was previously presented at a seminar to Mayer Brown Rowe Maw on 21 March 2007. Reprinted with permission.
