HANDLE WITH CARE: SUMMARY JUDGMENT AND STRIKING OUT IN PROFESSIONAL LIABILITY CASES

This article considers the pros and cons of a defendant applying for summary determination (summary judgment or strike out) in a professional liability claim and, by reference to three recent decisions, suggests some practical lessons that can be learned.

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A well-timed and well-prepared application for summary judgment or to strike out can be a powerful weapon in the defence of a professional liability claim. On the other hand, the temptation to seek summary determination in the face of an apparently unmeritorious claim must sometimes be resisted.

This article considers the pros and cons of applying for summary determination and, by reference to three recent decisions, suggests some practical lessons that can be learned.

THE CONUNDRUM

A successful claim for professional negligence has a number of key ingredients including duty, negligence, loss and causation. It must also be brought in time.

In many cases it will appear, during protocol, that one or more of these ingredients is lacking. The claimant may, however, not see it that way. Particularly if the allegation of negligence is well founded, or if the perceived loss is substantial, the claimant may want his day in court and proceed to issue his claim form even though there are substantial flaws in the claim.

Those representing the defendant face a difficult tactical decision. One possibility is to push ahead to trial, confident of ultimate success, but also hoping that a claimant faced with a defendant keen to bring on the trial may ultimately back down. Much more tempting is to seek disposal of the claim on a summary basis, either by way of an application for summary judgment under CPR 24.2(a) or by way of an application to strike out under CPR 3.4(2)(a).

THE BENEFITS

The upside to disposing of the claim on a summary basis is significant.

- Firstly, the defendant (and his insurer) achieves closure. The claim is over.
- Secondly, it removes the risk, however small it may have been, that the claimant would succeed at trial.
- Thirdly, there is a significant saving in costs (probably recoverable in part) and in the management time involved for the defendant in a full-blown trial (entirely unrecoverable).

- Fourthly, the adverse publicity of a trial in open court is avoided. This is particularly significant if the professional has acted negligently, but there is some other flaw in the claim.

THE RISKS

However ill-founded the claim may seem to be, it can be difficult to persuade a judge that the claim should not be allowed to proceed to trial. If an application for summary disposal fails then:

- At best, a defendant who made an unsuccessful application will end up paying the costs of that application.
- At worst, the defendant may end up paying the costs of the application and of an appeal whilst also giving the impression that it wants to avoid a full trial (an impression which may well be correct).
- An important interlocutory decision in the claimant's favour may well leave him more determined to see the case through to trial than he otherwise would have been.

THE CASES

These competing considerations are well illustrated by three recent cases.

The surveyor

In *Tiuta International Ltd v De Villiers Chartered Surveyors Ltd [2016] EWCA Civ 661*, Tiuta sued the surveyor which had provided three valuations (in February, November and December 2011) of a partly completed residential development over which Tiuta took a first legal charge as security for a loan made available to the developer. The initial loan was based on the February valuation. Additional funds were thereafter made available by way of refinancing based on the December valuation, and secured by an entirely new charge. The borrower defaulted and Tiuta's security was not expected to realise sufficient to cover the monies outstanding. Tiuta sued De Villers alleging that the December valuation was negligent.

By its defence, De Villers argued that Tiuta had no claim in respect of the sums initially advanced, because that loss had already been suffered before the allegedly negligent valuation was prepared. Tiuta argued that the refinancing was, as a matter of fact, a separate transaction to the original advance (even though the proceeds had been used to discharge the original advance) and had to be viewed on its own.

De Villers applied for summary judgment on this issue and the deputy judge agreed that the loss attributable to the first advance had not been caused by the (alleged) negligence in relation to the December valuation.

On appeal, the Court of Appeal (Moore-Bick and King LJJ, McCombe LJ dissenting) disagreed. The appeal was allowed and the application therefore failed. In a postscript to his judgment Moore Bick LJ observed (at paragraph 22) that one difficulty with the application was that it had (necessarily) proceeded on the basis of two assumptions:

- Firstly, that the December valuation was negligent as alleged.
- Secondly, that the proceeds of the refinancing had been used to discharge the initial advance.

It followed that if, in the long run, either of these points was determined against the claimant, then the application and the appeal "may both prove to have been a waste of time and money". It also followed that one of the arguments which De Villers sought to run (that the court should look at the substance of the second transaction, not the form) was, because of the assumed facts, probably not open to it on the summary application.

The financial adviser

In *Denning v Greenhalgh Financial Services Ltd [2017] EWHC 143 (QB)*, Mr Denning sued his former financial advisers alleging that when (in August/September 2008) they were first instructed to advise him in relation to his investments, they should have considered the advice which he had been given by previous advisers (in August 2000). He went on to argue that the August 2000 advice had been negligent, that Greenhalgh should have advised him of this fact, and that if they had done so he would have sued his former advisers and recovered substantial damages from them.

Greenhalgh applied for summary judgment and/or to strike out, and advanced three separate arguments as follows:

- It was not within the scope of its duty to consider and advise upon the August 2000 advice.
- Even if it had given the advice contended for, any claim against the original advisers would, by September 2008, already have been time-barred.
- Mr Denning could not establish that he would in fact have sued his former advisers in 2008 in any event.

In relation to the second and third arguments, the judge concluded that, even though Mr Denning's arguments were substantially weaker than Greenhalgh's, it would not be appropriate to grant summary judgment (or strike out), because it could not be said, at such an early stage, that no other facts or evidence would come to light which might support Mr Denning's case and because the full extent of the arguments could not be fairly determined on paper at such an early stage.

In relation to the first argument, however, the judge allowed Mr Denning's counsel "considerable latitude in written and oral submissions to range beyond the pleaded position", but still concluded that on the "unchallengeable facts" Greenhalgh was not, as a matter of law, under the duty contended for. The application therefore succeeded.

The solicitor

In *Williams and another v HCB Solicitors Ltd [2017] EWCA Civ 38*, Mr Williams and his company claimed against the solicitors who had drafted the documentation by which Mr Williams sold his shares in three companies to Firstmain. As part of the transaction, Firstmain agreed that one of the companies sold would sell certain rights to Genesis which Genesis would then licence back.

Firstmain failed to pay part of the purchase price, and alleged that Genesis had failed to pay the purchase price for the rights, such that they had not in fact been transferred to Genesis and no licence fees were due to it.

The claimants argued that HCB had been negligent in drafting the documents, and that this negligence allowed Firstmain to dispute the transfer of the rights and the validity of the licence. The claimants also alleged that this caused a third party to withdraw from an agreement in principle for the use of the rights, causing substantial loss and damage.

HCB sought summary judgment, arguing that the was no doubt about the fact that the rights had been transferred to Genesis, such that the true cause of any loss suffered by the claimants was the fact that Firstmain took an obviously bad point. The judge agreed that it was plain that the rights had been transferred. He went on to allow the application on the basis that the agreements drafted by HCB had in fact been effective to do what was required, meaning that the lost business opportunity could not have been caused by any breach on the part of HCB.

Although it was common ground on appeal that the judge had been correct to conclude that the rights had been transferred, the Court of Appeal disagreed with his conclusion. Longmore LJ concluded that HCB "undoubtedly have a strong case" but that it would not be appropriate to grant summary judgment, not least because "controversial points about the scope of duty should, in principle, be decided at trial once the full facts are known rather than by way of summary judgment" (*paragraph 27, Williams*).

LESSONS TO LEARN

Strings to your bow

There is no point in making multiple applications just for the sake of it, but if you can advance an application for summary disposal on more than one ground it will always be better to do so. Thus:

- Combine an application to strike out with an application for summary judgment.
- Identify, if possible, different but complimentary grounds in support of the application.

Give 'em enough rope

Obviously you do not want to assist your claimant to resist your application, but if you give them an opportunity to respond to your points before applying you will flush out any counter-points at an early stage. More to the point, if the claim is fundamentally flawed then a claimant's response (or inability to respond) may well further illustrate this. Thus:

- If you have a good time-bar defence, or other knock-out point, ask the claimant in correspondence what, if any, answer it has (or push the claimant to serve a reply).
- If the claimant has not stated a sufficient link between alleged negligence and the loss claimed, push for further information.
- If the loss alleged is not adequately described, push for further information.

In short, if the claim, as pleaded, is fundamentally flawed then this might be due to poor drafting or it might be indicative of a poor case. If you give the claimant the opportunity to correct the former then your chances of establishing the latter can only improve.

Be realistic about facts

Any application for summary disposal will either proceed on the basis of assumptions, or of facts which are not (or cannot be) challenged. For the purposes of a summary application:

- Assume that all facts alleged by the claimant are true.
- Test whether your arguments work on the basis of this assumption.
- If not, the application is unlikely to succeed, but it may be worth seeking to define a preliminary issue for trial.