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Case Note: *Perry v Raleys Solicitors (A Firm)* [2019] UKSC 5

Nothing to Prove

In *Perry v Raleys Solicitors (A Firm)* [2019] UKSC 5 the Supreme Court has recently clarified the law on causation in professional negligence cases by restating as the guiding principle what Lord Briggs (delivering the judgment of the court) called *the sensible, fair and practicable dividing line* laid down by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602.

This dividing line separates two factual scenarios: first, the case in which the client of the negligent advisor was required to take some positive step (if competently advised), typically commencing a legal claim; second, the case where the outcome for the client depended on the response to the claim by a third party, and where the question the court is asked to resolve relates to the financial or other benefit (if any) that the client might have obtained in a counter-factual world where the professional advisor had complied with his duty of care. Sometimes these two scenarios coincide, as they did in *Allied Maples* itself.

Allied Maples had made a corporate takeover of assets and businesses within the Gillow group of companies. In that process, it was negligently advised by its solicitors in relation to seeking protection against contingent liabilities of subsidiaries within the Gillow group. The Court of Appeal was unanimous in the statement of principle (although not its application) that Allied Maples would have been better off, competently advised, but only if (i) it had raised the matter with Gillow and had sought improved warranties and (ii) if Gillow had responded by providing them. Point (i) had to be proved by Allied Maples on the balance of probabilities, but point (ii) was to be assessed upon the basis of the lost chance that Gillow would have responded favourably.

The distinction arises because, in the first case, the taking of some positive step by the client (in receipt of competent advice) is an essential element in the chain of causation. The client is therefore required to prove on the balance of probabilities what he would have done. This will result in an all or nothing outcome. If he proves (even on the narrowest balance) that he would have brought the claim within time, he suffers no discount in the value of his claim to account for the substantial possibility that he might not have done so. On the other hand, if he fails to prove (however narrowly) that he

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would have taken the relevant initiating action, he gets nothing on account of the less than 50% chance that he might have done so.

Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, the Supreme Court clarified that there was no reason in principle or justice why either party to the professional negligence proceedings should be deprived of the full benefit of an adversarial trial on that issue. In the case on appeal before the Supreme Court the trial judge had conducted such a trial on causation, and the claim had failed because he determined that, on the facts found by him, Mr Perry would not have been able to make an honest claim for a Services Award within the rules and procedure of the Vibration White Finger compensation scheme. The Supreme Court overturned the decision of the Court of Appeal (that a forensic investigation of that kind at the trial was contrary to principle as this amounted to a trial within a trial), allowed the appeal and restored the trial judge's decision.

By contrast, where the court is concerned with the second scenario, it remains generally inappropriate to conduct a trial within a trial. In claims against solicitors the client typically already has a pending claim, which is something of potential value by the time the negligent conduct occurs, and which is lost because of the solicitors' negligence. Here, there is nothing that the client has to prove, on the balance of probabilities, what he would have done, had his solicitors acted competently, to bring such a pending claim into existence.

Second scenario cases fall on that side of the dividing line established in *Allied Maples* where the court is concerned to value the loss of a chance, rather than to enquire whether the client has proved that he would have acted in a particular way relevant to the existence of a chain of causation between the solicitors' negligence and his loss. In addition to *Kitchen v Royal Airforce Association* [1958] 1 WLR 563 and *Allied Maples* Lord Briggs referred to the following second scenario examples as being in line with general principle:-

- Client's pending claim struck out by solicitor's negligent failure to comply in time with a procedural step: *Mount v Barker Austin* [1998] PNLR 493

- Client's pending counterclaim against insurer's claim for an indemnity under his policy of insurance struck out for want of prosecution due to his solicitors' negligence: *Hanif v Middleweeks* [2000] Lloyds Rep PN 920

- Client's pending claim struck out for want of prosecution due to his solicitors' negligence: *Sharif v Garrett & Co* [2002] 1 WLR 3118

- Client's pending claim allowed to be struck out by her solicitors' failure to serve Particulars of Claim in time: *Dixon v Clement Jones* [2005] PNLR 6

In those cases causation issues were taken into account, together with all other relevant issues, when the court came to consider the value of the lost claims and applied any necessary discounts for contingencies. But, since in all of them the client had already taken the initiating step prior to the occurrence of the solicitors' negligence and the underlying claims were honestly brought, the client had to prove nothing about what he would have done in order to benefit from his solicitors' careful conduct of the proceedings.

Although Mr Perry's case fell into the first scenario where the court was entitled to try causation at the professional negligence trial, the Supreme Court's clarification of the principled approach to be adopted by the courts dealing with cases on either side of the dividing line is most welcome and confirms the correct approach to evaluating causation in lost chance cases in line with previous authority.

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