

Dispute Resolution
Case Law Update
Rosling King LLP



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The Court of Appeal has confirmed that, in professional negligence claims where there is a concurrent cause of action in tort and contract to take care in carrying out instructions, the test for recoverability is to be the more restrictive contractual test, as opposed to the wider tortious test. This decision also confirms the approach to be taken in loss of chance cases dependent on the actions of a third party.

The Facts

The Defendant solicitors were instructed to act for the Claimant in the preparation of a limited liability partnership agreement (“LLPA”). The members of the LLP were to inject capital into the Claimant. One of the Claimant’s members was to be Addax Bank BSC (“Addax”). Addax and the Claimant agreed that Addax was to have an option to withdraw its investment. In error, the Defendant solicitors drafted the option so that Addax could exercise its option *within* 41 months of the LLPA being entered into, rather than *after* 42 months. As a result of the Defendant’s error, Addax withdrew its investment much earlier than was anticipated by the Claimant. Consequently, the Claimant found itself unable to fund its business expansion into the USA and, more particularly, enter into a potentially lucrative contract with another company, known as Nomura.

At first instance, applying the tortious test for recoverability, the Court held that the Defendant had been negligent in drafting the LLPA and was therefore liable for the Claimant’s loss of a chance to expand its business into the USA. The Defendant appealed, arguing that the more restrictive contractual test should have been applied on the basis that the expansion into the USA and benefit of the Nomura contract was not within the reasonable contemplation of the parties.

The Decision on Appeal

The Court of Appeal held that, where there is a concurrent cause of action in both tort and contract, the test for recoverability should be the same and should be the contractual test i.e. the type of damage which occurred must be within the contemplation of the parties as not unlikely to result from the breach. The Court considered it appropriate to apply this test, rather than the more generous “reasonably foreseeable” tortious test, on the basis that, where there is a concurrent cause of action, the parties have had an opportunity to draw special circumstances to each other’s attention at the time of the formation of the contract. The Court held that “*it made no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract*”. However, on the facts of this case, the fact that the contractual test applied was of no assistance to the Defendant.

In relation to the loss of a chance to enter into a contract with Nomura, the Court confirmed that the correct approach was for: (1) the Claimant to prove, on the balance of probabilities, that it would put itself in a position to potentially benefit from the Nomura work; and (2) that there was a “real and substantial” chance that Nomura would have awarded at least some work to the Claimant. However, the Court held that mere proof of these two elements did not mean that the chance of obtaining the Nomura contract was 100% guaranteed. Accordingly, it was correct for the trial judge to reflect the chance of obtaining the Nomura contract in the

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quantification of damages.

Commentary

Although, on the facts of this case, the more restrictive contractual test had no effect on the damages recoverable from the Defendant, it is possible to envisage circumstances where this restriction could in fact limit a litigant's recovery. Litigants should therefore be sure to seek professional legal advice on recoverable damages before pursuing any form of litigation. This case is also a useful reminder of the approach that the Court will take to loss of chance cases dependent on the actions of third parties.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.