



Concurrent claims in tort and contract: test for remoteness of damage

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In Wellesley, the Court of Appeal held that the contractual test for remoteness applies to claims where there is a concurrent liability in both tort and contract, overturning previous authorities that where there are concurrent claims in tort and contract the claimant is normally permitted to take advantage of the more advantageous rules in tort.

Wellesley: the facts

Wellesley Partners LLP was an executive research consultancy, specialising in head hunting in the investment banking sector. In 2008 changes to the partnership deed were made to facilitate new investments, including one of US \$5 million from a Bahraini bank, Addax.

The solicitors firm Withers was instructed to draft the changes to the partnership deed. A dispute later arose as to whether it had been instructed to draft the option for Addax to withdraw half of its capital contribution *within* the first 41 months of the agreement (as drafted) or only *after* 42 months of the execution of the agreement.

There was an unappealed finding by Nugee J that the instruction had been for the option to be exercisable after 42 months. Withers was thus negligent in its drafting of the option clause and, as a result, Addax was able to exercise its option over two years earlier than Wellesley had intended, which in turn prevented the firm opening a New York office and pitching for very profitable business from Nomura. The facts constituting negligence also amounted to a breach of contract.

The financial impact of the option issue was significantly exacerbated by the financial crash of 2009. Wellesley's loss of chance was held to be a very particular, and potentially very remunerative, opportunity that was reasonably foreseeable in tort, but (*obiter* below) not recoverable in contract because it could not reasonably have been contemplated when the parties entered the contract. Damages of more than £1 million had been awarded by Nugee J in relation to the negligence claim, but he did not allow recovery for losses said to arise from the failed Nomura US build out or the other profitable contracts which Wellesley argued had been consequent thereon.

Withers appealed on the ground that the contractual test for remoteness of damage should have applied.

Contractual or tortious test of remoteness of damage?

Withers argued for the contractual test to be applied on the basis that in professional negligence cases the parties are not strangers; their relationship is essentially contractual. Thus it was anomalous to apply the tortious test. The approach in *McGregor on Damages* 19th edition was cited in support, as was the key professional negligence damages authority (SAAMCO), in which the scope of the duty in contract and tort was defined by the contract test.

A solicitor who fails to exercise reasonable care in providing services to its client will be liable both in contract and in tort unless tortious liability is validly excluded (*Henderson*). The most recent House of Lords consideration of the rule which controls what damage is recoverable in contract was *The Achilles*.

There, the basic rule that a contract breaker is liable for the damage resulting from their breach, if at the time of making the contract a reasonable person in their shoes would have had damage of that kind in mind as not unlikely to result from a breach, was confirmed – albeit with Lord Hoffmann's addition of the 'assumption of responsibility' principle whereby those foreseeable losses which were not the kind or type of loss for which the contract breaker can be treated as having assumed responsibility (which may, for example, include the *extent* of liability such as banking and shipping markets) are excluded from the scope of recoverable loss.

In tort 'reasonable foreseeability' is the primary rule for determining what damage is recoverable, subject to the damage falling within the relevant duty of care. Where there is a statutory duty of care the scope of the duty is deduced from the context

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and purpose of the statute and, in the case of an implied contractual duty, the scope is that which the law regards as best giving effect to the express obligations in the contract (*SAAMCO*).

The recoverable damage in tort and contract therefore may often be the same, but will be narrower in contract where the damage is reasonably foreseeable (thus recoverable in tort) but highly unusual or unlikely (therefore not recoverable in contract).

Conclusion

The court unanimously held that the correct test for recoverability of damages should be the contractual one. In the lead judgment Floyd LJ justified the adoption of the more limited 'assumption of responsibility' remoteness test by saying that in the formation of the contract 'there exists the opportunity for consensus between the parties, as to the type of damage (both in terms of its likelihood and type) for which it will be able to hold the other responsible' (para 80). Nonetheless, the mere fact that the extent of loss could not be predicted at the date of the formation of the contract is not sufficient reason to hold that the contract breaker had not assumed responsibility for the loss (para 82).

Implications for the employment context?

In the employment context concurrent claims in tort and contract damages potentially arise in discrimination claims as the discrimination claim under the Equality Act 2010 is a statutory tort and, at the same time, as any discrimination will arguably be a breach of the implied term of mutual trust and confidence, as well as being a breach of explicit contractual terms regarding discriminatory behaviour. Psychiatric injury is often claimed on one or both bases in the employment tribunal.

Outside the discrimination context, personal injury claims arise most commonly brought in the tort of negligence, but may also amount to breaches of contractual terms. The entitlement to damages for psychiatric injury under the employer's duty of care in tort was established in *Walker*, and in contract in *Gogay*. (Damages for injury to feelings are not recoverable in contract, following *Addis* and *Johnson*.)

The *Wellesley* decision has clear implications for 'loss of a chance' cases for future earnings, which may flow from discriminatory exclusion from a particular job or contract (for example, *Cannock*) or loss of future earnings due to an injury/psychiatric harm. If the claimant is asserting a loss of chance of some future career progression or business development beyond the confines of the respondent employer (for example,

a likely move to a role in a more successful company, with pay in excess of that which career progression within the respondent company would have facilitated), the 'assumption of responsibility' test in the contract claim is likely to result in a substantially lower award than if the claim had been brought in tort/discrimination alone.

The emphasis in *Wellesley* on there being scope for negotiating terms within the process of forming the contract asks the question of whether the same approach necessarily applies in the employment context. The employee claimant might seek to distinguish their situation by saying that the inequality of bargaining power between employer and employee means that that opportunity for consensus between the parties as envisaged in *Wellesley* did not exist on the formation of their employment contract. The defending employer might retort that it would not have entered into the employment contract if it had contemplated the particular type of loss claimed by the claimant.

Until that question is resolved, claimants will face an increased need to consider the benefits and risks of bringing their claim both in contract and in tort.

KEY:

<i>Wellesley</i>	<i>Wellesley Partners LLP v Withers LLP</i> [2015] EWCA Civ 1146
<i>SAAMCO</i>	<i>South Australia Asset Management Corp v York Montague Ltd</i> [1997] AC 191
<i>Henderson</i>	<i>Henderson & ors v Merrett Syndicates Ltd & ors</i> [1995] 2 AC 145
<i>The Achilles</i>	<i>Transfield Shipping Inc v Mercator Shipping Inc</i> [2008] UKHL 48
<i>Walker</i>	<i>Walker v Northumberland County Council</i> [1995] ICR 702
<i>Gogay</i>	<i>Gogay v Hertfordshire County Council</i> [2000] IRLR 703
<i>Addis</i>	<i>Addis v Gramophone Co Ltd</i> [1090] AC 488 HL
<i>Johnson</i>	<i>Johnson v Unisys</i> [1999] IRLR 90 CA
<i>Cannock</i>	<i>Ministry of Defence v Cannock & ors</i> [1994] 918