LITIGATION COSTS AS DAMAGES IN PROFESSIONAL NEGLIGENCE ACTIONS:

Herrmann v Withers LLP [2012] EWHC 1492 (Ch)

Summary: In Herrmann v Withers, a claim against conveyancing solicitors which included a claim to costs the Claimants incurred in unsuccessful litigation for a declaration that the property they purchased benefitted from “garden rights”, Newey J held that the measure of damages was not to be limited by reference to the standard basis of costs in the CPR. The Claimants were entitled to be indemnified for their expenditure, which was part of the foreseeable loss caused by the Defendants’ negligence inasmuch as the costs were incurred in an attempt to mitigate. Newey J refused to adopt the approach in other recent decisions which limited the measure of loss to the litigation costs that would have been awarded on the “standard basis” in successful litigation. The first-instance decisions on this point are now inconsistent, although it is not yet known whether Herrmann will be appealed.

1. The decision of Newey J in Herrmann v Withers LLP [2012] EWHC 1492 (Ch) is the latest chapter in the sad history of Jeffrey and Mina Herrmann’s purchase of 37 Ovington Square (“the Property”) in Knightsbridge. Mr and Mrs Hermann had bought the Property for some £6.8 million in the belief that it benefitted from access to the communal gardens in Ovington Square (“the Gardens”).¹ Their conveyancing solicitors, Withers LLP (“Withers”), had taken the view that the abstruse Kensington Improvement Act 1851 (“the Act”) gave them a right of access, subject to the payment of a minimal precept on their Council Tax bill. Unfortunately, when Mr and Mrs Herrmann sought to exercise their purported rights, the Gardens’ committee (“the Committee”) barred them. Turning down an offer made by the Committee to purchase a long access licence, Mr and Mrs Herrmann sued the Committee as well as the Royal Borough of Kensington and Chelsea (“the Borough”), for a declaration as to their “garden rights”. They lost.²

2. By the date of the decision in that litigation, the Herrmanns had notified Withers of their intention to issue proceedings for professionally negligent advice in the course of the conveyancing. The claim was issued in 2010, and on 30th May 2012 Newey J handed down judgment. He held, not unsurprisingly on the facts, that although Withers' view of the operation of the Act was not negligent per se. Even Charles Harpum, the Herrmanns' barrister in the litigation against the Committee, had been on balance of the same view. However, the solicitors had nevertheless negligently failed to couch their advice on the existence of a right of access by reference to the risk that a court might find that the Property did not fall within the relevant statutory provisions. He also substantially reduced damages because of Mr and Mrs Herrmann's dogged refusal to accept the Committee’s licence proposal.

3. The real interest of the case for practitioners, however, is Newey J’s approach to one particular element of the claim: viz. Mr and Mrs Herrmann’s claim to the £55,906.28 in fees paid to their then-litigation solicitors Thring Townsend Lee & Pemberton (“Thring”) up to the date on which the licence would have been granted. Withers maintained that this measure, being put as an indemnity as to costs, was wrong, and contended instead that the best the Herrmanns could get was their reasonable costs of the litigation up to the relevant date.

4. A claim to “litigation costs” as damages is obviously unexceptional in solicitors’ professional negligence cases. However, for some time now the correct approach to quantification – and indeed the characterisation - of such damages has been a vexed question. Until the 1980’s, the rule had been that, where the victim of a wrong had incurred costs in previous proceedings against third parties, those costs could be recovered in full as damages against

¹ According to one of the expert valuers in Herrmann v Withers, the Gardens do not appear to have been much to write home about, particularly when compared to “the far lovelier communal gardens of Lennox Gardens” a short walk away.

² In the case reported as Herrmann v Royal Borough of Kensington & Chelsea [2010] EWHC 1706 (Ch).
the wrongdoer to the extent they had not been recovered otherwise: *Agius v Great Western Colliery Co* [1899] 1 QB 413.3

5. In 1986, the amendments to RSC Order 62 swept away the “party and party” basis of taxation of costs (which allowed only the recovery of costs “necessarily” incurred) and replaced it with the “standard basis” (which allowed costs reasonably incurred and reasonable in amount). This led to Scott LJ in *The Tiburon* [1992] 2 Lloyd’s Rep 26 at 35 opining obiter that a party entitled to litigation costs as damages could not “throw on to [the wrongdoer’s] shoulders costs unreasonably or unnecessarily incurred in the action against [the third party]. Ordinary mitigation of damages principles would stand in the way. The assessment of the amount of the recoverable costs would require the application of some yardstick... The standard basis formula, as set out in Order 62 r12(1), corresponds closely, in my opinion, to the yardstick that would have to be applied to a contractual or tortious damages claim.”

6. Scott LJ’s dictum, and its “mitigation” rationale, were applied by Carnwath J in *British Racing Drivers’ Club Ltd v Hextall Erskine & Co* [1996] PNLR 523, a professional negligence claim against solicitors. It would follow that, where a claimant has recovered costs on the “standard basis” against a third-party, he cannot recover the balance of his expenditure on litigation solicitors from a wrongdoer whose tort caused the litigation.

7. Then came the CPR, with its radical changes to civil costs rules. From the inception of the CPR, costs awarded on the “standard basis” must not merely be reasonable in amount but also proportionate to the matters in issue. The introduction of the concept of proportionality created difficulties for Scott LJ’s “mitigation” analysis in *The Tiburon*. Unlike reasonableness (an objective standard), proportionality introduces a discretionary element of assessment justified by policy considerations: see Colman J in *NatWest v Rabobank Nederland (No 3)* [2008] 1 All ER (Comm) 266, in which the Judge felt able to distinguish the previous line of authority because the prior litigation took place outside the jurisdiction.

8. Despite Colman J’s undisguised view that *British Racing Drivers* should not be followed, the approach adopted by Carnwath J has continued to be followed in cases in which the prior litigation has been conducted under the CPR. Evans-Lombe J did so “willingly” in *Mahme Trust Reg v Lloyds TSB Bank plc* [2006] EWHC 1321 (Ch). He said at [68] that, “where the costs of litigation are sought to be recovered as damages the appropriate method of assessment is the amount which would be awarded on assessment by a costs judge on the standard basis.” There was no reason why a claimant should be entitled to run up unreasonable costs in the litigation and then look to a prior wrongdoer to indemnify him. In Evans-Lombe J’s view, the rationale may be that the incurrence of costs in excess of those which would be awarded by a costs judge would not be a foreseeable consequence of the relevant wrongdoing.

9. This rationale is unconvincing: not only is the incurrence of irrecoverable costs an everyday occurrence in litigation, but Evans-Lombe J’s tentative explanation may also be contrary to principle. In tort, a wrongdoer is liable for any type of damage which a reasonable person would have foreseen as being a real risk of the wrongdoing, and it does not matter that the quantum of loss suffered exceeds what would have been foreseen. To divide “litigation costs” into “foreseeable costs assessed on the standard basis” and “unforeseeable excess costs” appears to fall foul of this rule.

10. In *Redbus LMDS Ltd v Jeffrey Green & Russell* [2007] PNLR 12, HHJ Behrens (sitting as a Judge of the Chancery Division) heard strong argument to the effect that the approach in *British Racing Drivers* ought not to be followed. Although opining that this is really now a question that needs to decided by the Court of Appeal, Judge Behrens followed Carnwath J and Evans-Lombe J both as a matter of judicial comity and because of his own concerns.

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3 In “Costs as Damages” [2009] LQR 468, Louise Merrett gives an excellent analysis of the problem of the “assessment” of costs as damages and the policy considerations underpinning the various rationales for recovery. The article does not appear to have been cited to Newey J.

4 And see, to similar effect, *Lonrho plc v Fayed (No 3)* [1993] 1 WLR 1489.
about the steadily-increasing amounts of costs in civil litigation, particularly if a third-party such as a Defendant in a professional negligence action had no means of challenging them.

11. Such was the background to the argument in Herrmann v Withers. Notwithstanding the line of authorities adopting Carnwath J’s approach, Newey J struck out on his own. In his view, it is now wrong to say that costs assessed on the standard basis correspond to the yardstick that would be applied to a damages claim. To confine a Claimant to costs on that basis would not be “fully consistent with the general principle that a Claimant can recover for losses and expenses reasonably incurred when trying to mitigate”.

12. In my own view, Newey J’s approach is the right one. It is properly concerned with the rules on mitigation of loss and applies them correctly. Mr and Mrs Herrmann reasonably initiated the litigation against the Committee and the Borough. They were advised by Counsel that their claim was more than merely arguable. Had they not initiated the litigation, they would doubtless have been told that they had failed to mitigate their loss. The litigation was a step taken in mitigation, notwithstanding that it did not ultimately diminish their loss. The argument that a sum claimed for litigation costs is excessive because it is claimed on a basis which would exceed the sum that would be applied by a court in an inter-partes assessment is wrong because, if litigation costs are recoverable at all, it follows that it has been held that the steps taken in mitigation were foreseeable. So, the position taken in British Racing Drivers not follow from any legal logic but would work only if a principle of policy may be invoked.

13. But there is no need to invoke policy. A Claimant may recover as damages expense incurred by him in reasonably attempting to mitigate even where the mitigation fails: Wilson v United Counties Bank [1920] AC 102. The key word is “reasonably”. It provides the answer to the concern expressed by HHJ Behrens in Redbus that a Defendant should not be the Claimant’s indemnifier. A Claimant may not recover unreasonable expenditure in mitigation. Excessive claims, for instance the cost of instructing an overly-specialist firm for simple litigation or having a partner carry out routine work, may be attacked by virtue of the obligation that steps in mitigation must be reasonable (or at least not unreasonable, the burden not being a high one for the claimant).

14. Although these sorts of challenges may sound similar to the arguments that would be made on an assessment they are conceptually quite different. The use of this objective yardstick does not equate the analysis to the approach on a costs assessment under CPR Part 44. The burden is not on the Claimant to justify his expenditure, except in the general sense that he must establish that it was foreseeable. Instead the burden is on the Defendant to establish that the costs of mitigation are unreasonably high. Given that if litigation was foreseeable in principle it follows that the Defendant’s wrongdoing was prima facie the cause of the Claimant’s expenditure, there is a satisfying merit to an analysis which requires the Defendant to shoulder the burden of establishing that any particular costs expenditure was unreasonable.

15. Thus, although Newey J said at [116] that he accepted that “the relevant costs should be paid on the indemnity basis”, the rationale was slightly subtler than this. It is not a binary choice between “standard” and “indemnity”. Instead the result of Newey J’s analysis appears to be that prima facie the Herrmanns were entitled to the costs they incurred in mitigation – and there was no (recorded) argument put to him that the fees run up by Thring were the result of unreasonable steps taken in mitigating.

16. The first-instance decisions are now, therefore, inconsistent. This is evidently a debate which will require the input of a higher court. Given, however, the amounts at stake in Herrmann, I would not expect that it would be appealed on this point alone. The judgment records that the Claimants were seeking (as an indemnity) £55,906.28, while the Withers were arguing that their reasonable costs to Thring could not exceed £55,000.00. Even if Newey J had found in favour of Withers, the ultimate saving may well not have been more than £1,000.00.

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