

*Oxford Property Investments Limited
(1) & Sapphire Developments Solihull
Limited v Peter Lyn & Partners*

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Oxford Property Investments Limited (1) & Sapphire Developments Solihull Limited v Peter Lyn & Partners [2023] EWHC 624 (Comm)

Introduction

This relatively straightforward conveyancing negligence case provides a useful reminder of what a claimant must positively plead when advancing a case on loss of profits, and an interesting application of the scope of duty/duty nexus question following *Manchester BS v Grant Thornton* [2021] UKSC 20.

Factual and Procedural Background

In essence, the Defendant was instructed by the Claimants to act in the purchase of a property in Solihull ('the Property'). The Claimants sought damages for loss of profits which they claimed had been caused by the loss of the transaction. The Defendant sought to strike out this element of the claim. The First Claimant had discontinued its claim by the time of the application hearing. The Second Claimant sought to amend its claim to include the loss of 2 other properties ('the Other Properties').

This hearing was a determination of both of those applications, and a further security for costs application by the Defendant.

The Defendant had been instructed by the Claimants to act in its purchase of the Property. In the course of that transaction, allegedly, the Second Claimant made a non-binding oral agreement with a developer. Under the terms of this agreement, the developer, rather than the Second Claimant, would purchase the Property. In exchange, the Second Claimant would be paid a finder's fee of £1 million.

It was the Second Claimant's case that it had instructed the Defendant to draft a deed recording the terms of this non-binding agreement. A consultant at the Defendant had, allegedly, assured the Second Claimant that it would not need to acquire development should it wish to complete the transaction itself.

The Second Claimant alleged that, when the purchase completed, the developer had denied that it had ever agreed to pay it £1 million, and that the agreed finder's fee was only £500,000. In the absence of a binding agreement, the Second Claimant accepted this sum. It alleged that, on the Defendant's advice, it had been assured that it would be protected in its dealings with the developer, and therefore had not obtained development finance to purchase the Property for itself should the need arise. Furthermore, it alleged that the Defendant was negligent in failing to execute a legally binding document which recorded the oral agreement reached between the developer and Second Claimant.

It claimed both:

1. The £500,000 it did not receive due to the lack of any binding document for the £1 million finder's fee agreement; and
2. In the alternative, the alleged loss of profits from the development of the Property (an estimated £15.1 million).

The amended pleading also sought to claim loss of profits caused by the loss of the Other Properties.

The objections raised by the Defendant

The Defendant objected to the claim (both as originally pleaded, and on the amended basis sought by the Second Claimant). Some of these were simple objections to the factual basis of the claim, however, it also argued that:

1. The loss of profit claim (in relation to the Other Properties) was too remote to be recoverable; and
2. The loss of profits claim (in relation to both the Property and the Other Properties) was outside the scope of the Defendant's duty. On the basis of the pleaded case, it argued, the harm against which law would impose a duty to take care was the potential loss of the finder's fee, not any loss of profits.

Remoteness

In relation to the first ground (which only applied to the anticipated amendments), the court found that these losses *were* too remote. The court applied the contractual test, as per *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 and held that the loss of profits claim was too remote because Second Claimant had failed to allege, in its proposed amendments, that the Defendant was aware that loss of profits would result from the alleged breach. Therefore, the loss of profits could not be within the reasonable contemplation of the parties.

Scope of Duty

The court considered the six principles from *Manchester BS v Grant Thornton* [2021] UKSC 20, and considered that (2) and (5) were relevant for present purposes:

(2) What are the risks of harm to the claimant against which the law imposes a duty on the defendant to take care (the scope of duty question)....

(5) Is there a sufficient nexus between a particular element of the harm for which the

claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above (the duty nexus question).

The court reminded itself of the Supreme Court's dicta in *Manchester BS* that the mere fact that the Defendant owes a duty of care does not mean that that duty will extend to every type of harm which might be suffered as a breach of that duty. Rather, the scope of the duty is assessed by an objective reference to the reason *why* the advice is being given.

The Second Claimant had argued that the Defendant's duty extended beyond ensuring that the developer honoured its oral agreement, but that the Defendant was guiding the whole decision making process. The court held that, even taking the pleaded case at its highest, this argument did not have a reasonable prospect of success. The Second Claimant's purpose in retaining the Defendant was to procure a binding agreement with the developer reflecting its oral agreement or obtain development finance to complete the purchase on its own behalf. The Defendant's duty did not extend to every kind of harm which might result from a breach of its duty, as the authorities made clear. On the Second Claimant's own case, the harm against which the law would impose a duty on the Defendant was the risk of losing the finder's fee or the opportunity to purchase the Property using development finance. There was no real link between this type of harm, and the loss of profits caused by the loss of the transaction.

Conclusions

The case is primarily of interest for 2 reasons:

1. The court's conclusion on remoteness highlights the importance of pleading all facts necessary to substantiate the losses claimed. The Second Claimant had failed to specifically aver that the Defendant would be aware it would suffer a loss of profits if the transaction was lost. The judgment is not entirely clear as to what was pleaded. However, presumably the Second Claimant had failed to allege that it had communicated its intentions to develop the Other Properties and make the profits claimed.
2. It is an interesting post-*Manchester BS* analysis of the duty nexus element. The court's analysis was unfortunately not as detailed as it could have been. The court concluded that there was no 'real link' between the loss of profits and the nature of the duty, without fully explaining why this was the case. However, the decision does suggest that, since *Manchester BS*, courts will be more reluctant to allow claims for peripheral losses even where the breach was arguably a 'but for' cause of those losses.

The case is certainly a reminder to Claimants to properly particularise all the factual elements of their case which show that the losses claimed are not too remote. To Defendants, it demonstrates that a strike out applications may be worthwhile if a pleading has been poorly particularised, and/or some of the losses sought seem peripheral or speculative.

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought