Feature

KEY POINTS

- The loss of a chance approach is mandatory in commercial transaction cases where the alleged loss depends on the hypothetical actions of a third party.
- The loss of a chance approach does not apply to lost profit claims by an established business, because these claims do not require a claimant to establish that it had the opportunity to obtain a benefit from a third party as a matter of causation.
- Where the evidence is strong enough, it is permissible to make no discount for the loss of a chance.
- The claimant must show he/she would have acted honestly. This will be relevant where the alleged dishonesty is central to the claimed outcome.

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Loss of a chance in commercial transactions: where are we now?

Loss of a chance principles apply to claims for lost transactional opportunities when the counterfactual case depends on the actions of a third party. This article discusses the relevant principles, their application to transactional cases, and the impact of any wrongdoing by the claimant on the lost opportunity claim.

LOSS OF A CHANCE: THE GENERAL PRINCIPLES

As Lord Briggs said in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] A.C. 352 at [15]-[16]:

> "[The] assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions ... Commonly, the main difficulty arises from the fact that the court is required to assess what if any financial benefit the client would have obtained in a counterfactual world, the doorway into which assumes that the professional person had complied with, rather than committed a breach of, his duty of care."

Perry v Raleys reaffirmed that where a claimant's loss depends on what he or she would have done absent negligence, then this must be proved by the claimant on the balance of probabilities. However, to the extent that the supposed beneficial outcome depends on what a third party would have done, the claimant need only show that s/he had a "real and substantial chance" of achieving a better outcome than was in fact achieved. If this can be established, then the court applies a loss of a chance evaluation: *Perry*, above, per Lord Briggs (with whom the other judges agreed) at [20]-[21], approving the approach in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602.

This two stage approach engages two issues. The first is a traditional causation question, requiring the claimant to prove, on the balance of probabilities, that s/he would have taken any requisite steps to convert non-negligent advice into some financially measurable advantage. The balance of probabilities test applies, not least because the claimant is usually the best person to prove what s/he would have done in these circumstances: *Perry*, at [22]. This first question can be subject to the full rigour of a trial, so that a "trial within a trial" of this issue is generally permissible: *Perry*, at [24].

Further, in *Perry*, the Supreme Court added that, at this first stage, the claimant needed to prove that their hypothetical behaviour would have been honest: at [25]-[26]. As Lord Briggs noted, "the court simply has no business rewarding dishonest claimants". This appears to reflect wider public policy concerns to discourage both dishonest claims and subsequent professional negligence claims founded on dishonesty: at [27].

The second stage asks a further causation question about what would have happened after the claimant had taken the requisite initiating step. To the extent that it depends on counterfactual questions about how third parties would have behaved, the claimant needs only to prove that there is a real and substantial chance that they would have acted in the claimant's favour. If so, then the chance is evaluated by assessing, in percentage terms, the lost chance of a more favourable outcome. This is because "it is simply unfair to require the client to prove the facts in the underlying (lost) claim as part of his claim against the negligent professional": *Perry*, at [18]. Accordingly, the general rule is that when evaluating this lost chance, the court does not undertake a trial within a trial: *Perry*, at [24].

This two stage approach applies to both claims arising out of lost litigation and for the lost opportunity to achieve a better outcome in a negotiated transaction; *Perry*, at [22]. This article examines the second of these, which we will refer to as the "commercial transaction" cases.

ASSETCO PLC v GRANT THORNTON UK LLP

The approach to loss of a chance in commercial transaction cases was considered most recently at both first instance and on appeal in *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm), [2019] Bus L.R. 2291 (the first instance decision) and [2020] EWCA Civ 1151, [2021] PNLR 1 (the Court of Appeal decision).

The case concerned an admittedly negligent audit by the defendant auditor of the accounts of the claimant company (AssetCo) in 2009 and 2010. The audits failed to uncover the fraudulent activities of two of AssetCo's directors, relating to their conduct of and representations about the business, including its subsidiaries. It was common ground that if the auditor had acted with reasonable care and skill, then this would have revealed that AssetCo's business only appeared to be sustainable because of the dishonest representations of senior management. The result of this negligence was that AssetCo's assets were overstated by £120m, and AssetCo was said to be a going

concern, when it was in fact insolvent.

The true state of affairs was discovered in 2011. Thereafter, AssetCo appointed new management, entered into a scheme of arrangement with its creditors and engaged in a capital restructuring. Ultimately, it was able to survive, and returned to genuine profit. AssetCo sued its auditor, claiming that if the auditor had performed its duties competently in 2009, the same sequence of events would have occurred as in fact happened in 2011, so that AssetCo would or could have avoided considerable wasted expenditure in the interim. It was therefore critical to AssetCo's case that it lost a real and substantial opportunity to put in place such a scheme and restructuring with third party involvement in 2009.

The first instance decision

When do loss of a change principles apply?

At first instance, AssetCo contended that where a claimant is able to prove on the balance of probabilities that a defendant's breach has caused it to suffer loss, it is entitled to recover damages equal to the full amount of such loss, even where the claim depends on the hypothetical acts of third parties. Plainly, this was an attempt to sidestep the second stage of the test derived from *Allied Maples* and *Perry*, so as to escape any discount on quantification to reflect the prospects of the chance not arising. However, Bryan J refused to allow the claimant to elect to prove the action of the third party in this way: see the first instance decision at [411] and [415]. This conclusion was not challenged by AssetCo on appeal: see the Court of Appeal decision at [120].

This is confirmation, if it were needed, that the loss of a chance approach is mandatory in commercial transaction cases to which it applies. A claimant cannot choose whether to use it, depending on whether it suits his/her interests in a particular case.

When does loss of a chance not apply?

It is important to distinguish these lost chance commercial transaction cases from other commercial cases where the claimant does not seek to establish as a matter of causation that he has lost the opportunity of acquiring a specific benefit which is dependent on the actions of a third party. Instead the claimant, an established business, claims that it lost the opportunity to trade generally, and claims the loss of profits s/he would have made. This latter category of cases includes *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] Q.B. 477; *Vasilou v Hajigeorgiou* [2010] EWCA Civ 1475; and *Fiona Trust and Holding Corp v Privalov (No. 2)* [2016] EWHC 2163 (Comm), [2017] 2 All E.R. 570. In such a case, the court decides first if the claimant (or, as in the *Fiona Trust* case, the defendant) would have traded successfully. If the court finds that the relevant trading would have been profitable, it then makes the best attempt it can to quantify the loss of profits taking into account all the various contingencies which affect this.

As Bryan J noted in *AssetCo*, this is a different exercise to that undertaken in an *Allied Maples* case, because it does not require the court to find there was a real and substantial chance of the third party acting in a particular way, but to reach a conclusion on the balance of probabilities as to whether the relevant trading would have been profitable or not, and then to quantify it. The quantification exercise will include an evaluation of all the chances, great and small, involved in the trading: see *Parabola*, above, at [23] and the first instance decision in *AssetCo* at [441]-[442].

These are not loss of a chance cases at all, because the evaluation of the chance is a matter of quantification, not causation.

Application to the facts of the case

However, although Bryan J held that loss of a chance principles should apply, he ultimately accepted that AssetCo's alleged counterfactual was a "racing certainty" to have succeeded. This was largely because AssetCo's case was that it would have taken the very steps to save the business as it in fact took two years later. It also called witness evidence, including from the interim chairman in fact appointed, who said that he would have taken the same steps at an earlier stage. Neither factor prevented the application of loss of a chance principles: see the first instance decision at [415] and [460]. Nevertheless, Bryan J concluded that the changes of the alleged counterfactual occurring were so high, being either a certainty or in excess of 90%, that damages should not be discounted to reflect the chance the hypothetical events might not have occurred: at [586]-[608], [671], [704], [872]-[873].

The Court of Appeal decision

On appeal, the auditors argued that the trial judge had erred in failing to make a mathematical approach of multiplying all the contingencies together where he did not hold the chance to be 100%. Had a mathematical approach been applied, it would have inevitably resulted in AssetCo's damages being significantly discounted. However, at least by the time of the appeal, the auditors conceded that a strictly mathematical approach was not appropriate where the contingencies were not independent of one another: at [193]. The question on the appeal was which of the various "third party contingencies" relied on in AssetCo's counterfactual were independent.

The Court of Appeal held that there were four such contingencies, but concluded that the evaluation of these was a matter for the trial judge: see the Court of Appeal decision at [195-196], per Richards LJ, with whom the other members of the court agreed. It held that, having concluded the relevant independent contingencies were in excess of 90%, the trial judge was correct not to adopt a mathematical approach, as this would lead to an impossible – and meaningless – degree of precision: at [207]-[210].

Defendants may quibble with that analysis, particularly in high value cases. After all, in *AssetCo*, Grant Thornton was ultimately ordered to pay damages to AssetCo of approximately £14.86m. Had a mathematical model been adopted based, for example, on four independent contingencies valued at 95% each, this would have resulted in a reduction in damages in excess of £2.75m.

Feature

Biog box

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This is likely to be a particular issue in commercial transaction cases, where the relevant counterfactual may involve a significant number of steps, each of which will require careful analysis. In fact, there may be several potential outcomes, so that in weighing up the lost chance, the court has to weigh up the respective chances of each: see *Moda International Brands Ltd v Gateley LLP* [2019] EWHC 1326 (QB) [2019] P.N.L.R 27, at [185]-[186]. As Freeman J observed in that case, the court sometimes assesses the separate chances of each outcome, and sometimes it averages them off. Nevertheless, once a substantial chance has been identified, the court is bound to come up with a figure, however rough the assessment: [187]-[188].

It is clear from *Perry* that this quantification exercise should not generally be subject to a trial within a trial. It is also clear that evidence from the relevant third-party decision maker(s) may be of limited assistance, at least where it cannot be shown to be demonstrably reliable. Thus in *AssetCo*, the trial judge was rather more impressed by the evidence of third party witnesses about what they would have done, which was consistent with what they subsequently did, than was the case in *Moda*, where the relevant witness was relatively disengaged: see the first instance decision in *AssetCo* at [607]-[608], [639] and [687] and *Moda* at [178].

AssetCo shows that where the evidence is strong enough, it is permissible to make no discount for the loss of a chance. This is likely to overcompensate claimants. Conversely, the requirement that the claimant demonstrate that s/he had a real and substantial chance seemingly excludes cases which have less than a 10% prospect of success: see *Harding Homes (East Street) Ltd v Bircham Dyson Bell* [2015] EWHC 3329 (Ch), per Proudman J at [167]-[168]. This is likely to undercompensate claimants. These appear to be two sides of the same coin. Both demonstrate that, at least at the extremes, the court will favour relative simplicity over mathematical precision, and accepts that the approach is necessarily imprecise.

The relevance of the claimant's wrongdoing

Both *Perry* and *AssetCo* grappled with the appropriate treatment of a claimant's wrongdoing in loss of a chance claims. The result in *Perry* was that the claim failed, because the claimant could not establish that he would (or could) have made an honest claim for the relevant award if competently advised: *Perry*, at [44]-[48]. The claim in *AssetCo* succeeded, but AssetCo's damages were subject to a 25% reduction to reflect its contributory negligence, and this finding was not subject to appeal: the Court of Appeal decision, at [2]-[3].

This issue is likely to be of considerable practical importance, because it appears one effect of the present pandemic has been an increase in fraud. If so, then it is likely that there will be an increase in the number of claims against professionals for failing to take appropriate action which could or would have uncovered the fraud.

Perry was a case about the lost opportunity to institute a legal claim. Nevertheless, it is clear from the reasoning that there is no distinction between lost litigation and lost transaction cases, so that the requirement that the claimant prove the requisite initiating step be an honest one should apply in both cases: at [22] and [25]. That said, this requirement is likely to be much more easily satisfied in a commercial transaction than is the case in relation to a legal claim, where the claimant is required to confirm the truth of his/her account. It therefore appears unlikely that the alleged honesty of a claimant will be a significant feature in the majority of commercial transaction cases. However one can see that it might arise if the commercial benefit could only be obtained by dishonesty (eg the need for a dishonest misrepresentation as to the claimant's creditworthiness or experience in order to obtain the contract) or if the profitmaking transaction was founded on dishonest conduct (eg an unlawful cannabis factory).

However, in order to give rise to an impediment the dishonesty must be central to the claimed outcome. It should also be noted that there is a stark contrast of judicial approach between *Perry* and the Supreme Court's subsequent decision in *Stoffel & Co v Grondona* [2020] UKSC 42, [2020] 3 W.LR. 1156. Mrs Grondona had been involved in a mortgage fraud. The solicitors were unaware of this but had negligently failed to register her title and she did not have the benefit of the property when the mortgage lender sued her for her debt. The Supreme Court permitted her claim against the solicitor as a matter of policy. Seemingly the policy divide falls between the pursuit of an unlawful profit and protection from an avoidable loss. However, the policies expressed in *Perry* and *Grondona* are extremely difficult to reconcile. The tension between the two may need to be explored in future commercial transaction cases where the dishonesty is, or is said to be, central to the alleged outcome. ■

Further Reading:

- Three years post-*Rubenstein*: causation and loss revisited (2015) 8 JIBFL 513.
- Opportunity doesn't knock twice: recovering damages for consequential loss (2015) 3 JIBFL 142.
- LexisPSL: Dispute Resolution: Practice Note: Loss of a chance damages.