PERRY v RALEYS

Loss of Chance Re-visited

Introduction

The decision of the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5 has been hailed as the first revisiting of Loss of Chance claims for 14 years. It is certainly a welcome review of the governing principles in a clear and authoritative single judgment by a unanimous Supreme Court, handed down by Lord Briggs, and will prove a valuable working tool for practitioners, insurers and mediators. However two things stand out: first, the review is restricted to claims against solicitors, while making clear that they are of general application; second, it is a wholehearted endorsement of the principles and approach adopted in Kitchen v RAF Association [1958] 1 WLR 563 (a 'lost litigation' case) and refined in Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602 (a 'loss of bargain' case) – though with one interesting, if fairly obvious, added ingredient.

The Facts

In very brief summary, the claimant, a former miner, had a claim for compensation for VWF under a government scheme. The defendant solicitors acting for him settled his claim for general damages but did not advise him about his possible entitlement to a further 'Services' award. He claimed for the loss of opportunity to bring such a claim. The solicitors admitted breach but defended causation on the basis that no chance of any value had been lost. They asserted that, due to a pre-existing disability not admitted by the claimant, he did not fulfil the conditions required to qualify for a Services award. Therefore he was never in a position to pursue such a claim honestly.

The trial judge conducted a full trial on the issue over two days with cross-examination of the claimant and his family and with medical evidence, and found on a balance of probabilities that the claimant had failed to prove that his claim for a Services award would have been an honest one. The Court of Appeal allowed his appeal on the grounds that the judge had erred in conducting a trial within a trial on the issue of honesty, with the result that he had required the claimant to prove that he would have had a successful claim, rather than assessing his prospects of success on a 'loss of chance' basis. The Supreme Court reversed the decision of the Court of Appeal.

The Supreme Court Decision

The two Court of Appeal decisions referred to above – Kitchen v RAF and Allied Maples v Simmons & Simmons - established a two-stage approach to the causation hurdles required to be surmounted in any loss of chance case, expressed in Allied Maples in the form of two questions and commended by Lord Briggs as a "sensible, fair and practicable dividing line". The importance of the Supreme Court's decision, beyond its express approval of the Allied Maples two-stage approach, is twofold. First, it analyses and confirms the elements of causation that a Claimant is required to prove on a balance of probabilities, where appropriate by means of a full-scale trial within a trial, and the elements that it would be unfair to require a Claimant to prove by means of a full trial and therefore need to be approached by means of an enquiry into the value of the lost chance. Second, it confirms the so-called 'threshold' required by both Kitchen and Allied Maples but adds to it a new ingredient – a requirement of honesty.

The two questions are as follows:
Question A: Had the Claimant received competent advice / service from his solicitor, would he have proceeded differently as a result? Therefore, in a 'lost litigation' case (as for example Kitchen or the Perry case itself) the question is whether he would in fact have pursued his claim in the lost litigation in question. In a 'loss of bargain' case (as for example Allied Maples) the question is whether he would in fact have pursued a better bargain in the lost negotiation in question.

Question B: If the answer to Question A is 'yes', the next question is: what would the third parties involved have done in response? Therefore, in a 'lost litigation' case the question is what the other parties to the litigation, the witnesses and finally the judge in the underlying litigation would have done. In a 'loss of bargain' case the question is what the other parties to the negotiation would have done.

The first issue addressed by Lord Briggs in his judgment is where the dividing line falls between the requirement for proof on a balance of probabilities after a full trial and the requirement for an assessment of the lost chance after an enquiry by the court, and the justification for that distinction. His reasoning can be summarised briefly as follows.

Question A is a question the evidence for which is wholly within the Claimant's command, and therefore it is for him to prove on a balance of probabilities, just as in any other case where causation requires to be proved. He is the person best placed to say what he would have done, and to call whatever evidence he can command to prove it. Therefore, unless there is some special reason that would render it unfair to do so, a full trial of Question A on normal principles must be conducted. Lord Briggs emphasised:

"Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried"

That hurdle must be surmounted on a balance of probabilities and is therefore a 'win/lose' issue. If the court finds that it is 49% likely that the Claimant would have acted differently, he loses outright; if 51% likely, he moves on to Question B with no discount at this stage.

The final element of causation that the Claimant is required to prove on a balance of probabilities, before moving on to Question B, is the 'threshold' issue of whether the chance that was lost was something of real or substantial, or more than negligible, value.

That requirement was conceded in both Kitchen and Allied Maples and confirmed by Lord Briggs, albeit with the added ingredient: we will return to it at the end of this paper.

The answer to Question B is the point at which the burden of proof on a balance of probabilities in full trial ends and the loss of chance assessment finally comes into play. The judgment acknowledges that the question of what the relevant third parties might have done in the underlying counter-factual circumstances that never occurred, or will only occur in the future, cannot normally be proved with any certainty, and it is unfair on the Claimant to expect him to assume that burden of proof on a balance of probabilities – particularly as very often (for example in the 'lost litigation' cases arising from delay) the solicitors' very negligence has rendered it impossible to conduct a fair trial of the underlying issue. Therefore, per Lord Briggs:

"… where the question for the court is one which turns on the assessment of a lost chance rather than upon proof upon the balance of probabilities, it is generally inappropriate to conduct a trial within a trial."

That dividing line was laid down clearly in Allied Maples, and Lord Briggs goes on to conduct a review of succeeding solicitors' negligence cases to show that, properly analysed, every case (with a possible question-mark over Dixon v Clement Jones [2005] PNLR 6) has complied with that requirement. He points out that conceptual confusion has arisen as a result of the many cases where, on the particular facts, Question A is simply not a live question and therefore not separately addressed in the relevant judgment. Kitchen itself is an example in point, as is the well-known case of Mount v Barker Austin [1998] PNLR 493. In those cases (and numerous others) the claimant had either started proceedings or instructed solicitors to start proceedings, which were subsequently lost due to delay in issue or procedural failure or want of prosecution. Therefore the question of what the Claimant, properly advised, would have done was already answered and required no trial or finding by the court, allowing it to move straight on to Question B. In Lord Briggs' words:

"… when the negligent conduct occurred, the client already had a pending claim which could be treated as something of potential value, thereafter lost because of the solicitors' negligence. By contrast with the Allied Maples case and indeed this case, there was

nothing which the client had to prove, on the balance of probabilities, that he would have done, had his solicitors acted competently, to bring such a pending claim into existence."

Therefore the critical dividing line identified in Allied Maples between Question A, the answer to which is required to be proved fully in a full trial, and Question B, the answer to which is not required to be proved but is subject to assessment in percentage terms after enquiry, has been confirmed by the Supreme Court and, on proper analysis, is shown to be a consistent principle running through all lost chance decisions. Lord Briggs summarised the principle as follows:

"To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant on a balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends on a loss of chance evaluation…"

The Threshold: As explained above, the 'threshold' that was accepted without argument in both Kitchen and Allied Maples is the final causation hurdle a claimant has to surmount on a balance of probabilities before moving on to Question B. The Supreme Court has now expressly approved it, and has added the new ingredient of honesty to the mix.

In Kitchen it was accepted that, in the words of Lord Evershed MR:

" … it is not enough for the plaintiff to say: 'Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side and they would have had to pay me something in order to persuade me to go away'."

Equally, in Allied Maples a similar threshold was accepted. In the words of Stuart Smith LJ:

"the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage."

Those principles have been accepted and applied in every subsequent 'lost litigation' and 'loss of bargain' case and are expressly repeated and approved in Lord Briggs' judgment.

The new ingredient he adds to the mix is the requirement that the claimant must prove, on a balance of probabilities in a full adversarial trial if necessary, not only that the claim or bargain he was deprived of the chance of advancing was a real and substantial one and of more than nuisance value, but also that it would have been an honest one.

As explained above, the issue arose because, in the trial at first instance, the defence had asserted that the claimant could not honestly have brought the claim he had lost the chance to bring, and the judge had conducted a full trial of that issue on evidence, and found on a balance of probabilities that he could not prove his claim would have been an honest one.

The Supreme Court approved the judge's approach to this issue, and Lord Briggs added the requirement of an honest claim to the 'threshold' requirement of a real and substantial chance:

"If nuisance value claims fall outside the category of lost claims for which damages may be claimed in negligence against professional advisers, then so, a fortiori, must dishonest claims".

He justified that approach with a mixture of policy and common sense:

"That simple conclusion might be thought by many to be too obvious to need further explanation, but it may be fortified in any of the following ways. First, a client honestly describing his condition to his solicitor when considering whether to make a claim for personal injuries would not be advised to do so if the facts described did not give rise to a claim. ... Secondly, the court when appraising the assertion that the client would, if properly advised, have made a personal injuries claim, may fairly assume that the client would only make honest claims, and the client would not be permitted to rebut that presumption by a bald assertion of his own propensity for dishonesty. Thirdly, the court simply has no business rewarding dishonest claimants."

Finally, Lord Briggs justified the decision to subject this issue to a full trial on evidence on a balance of probabilities, rather than assessing it as part of the evaluation of the lost chance:

"Simple facts of that kind, plainly relevant to the question whether Mr Perry could have brought an honest claim if competently advised, do not in themselves fall within either of those categories of futurity or counter-factuality which have traditionally inclined the court to adopt a loss of chance type assessment. They are facts about Mr Perry's actual

physical condition at the relevant time … If one asks without reference to authority whether there would be any unfairness subjecting his assertion that he would have made a claim … to forensic analysis … the answer would be 'no'. Nor would it be, on the face of it, unfair to subject his oral evidence about those matters, and that of his alleged family assistants, to a searching comparison with other evidence …"

Conclusion

As can be seen, apart from the common-sense addition of honesty to the 'threshold' test discussed above, Perry v Raleys does not break any new ground. But it is a valuable review and endorsement of the established approach to lost chance claims against professionals first promulgated in Kitchen over sixty years ago and refined in Allied Maples over twenty years ago. In particular, it is a useful reminder that both primary causation (ie Question A) and the establishment of the loss of something of value (ie the 'threshold') must both be proved on a balance of probabilities in a full trial if necessary, and that is just as much of an imperative in lost chance cases as in any other claim for professional negligence. The lost chance evaluation (ie Question B) is only reached if causation is proved in the usual way, and properly analysed it is not a causation question at all but forms part of the assessment of the quantum of loss. It is that critical distinction that has tended to become blurred in recent cases, and that the Supreme Court has now firmly reasserted.

Independent Mediators

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