# Court of Appeal applies *Wellesley* to a claim against lawyers

December 2016

**On 21 December 2016 Lord Justice Jackson and Lord Justice Patten overturned a loss of chance judgment for £2,000,000 against lawyers on the grounds that the damage was too remote. It also held, in the alternative, that the principles outlined in *SAAMCo* would prevent any recovery since the type of loss was outside the scope of duty of the lawyers.**

*Timothy Wright v Lewis Silkin LLP* [2016] EWCA Civ 1308 is an appeal against a first instance decision of Mr Justice Hamblen in 2015. The claim arose out of the terms of an employment contract between the claimant and a media group called Deccan Chargers which was the Indian Premier League franchise holder for Hyderabad from 2009.

The claimant had misunderstood an English choice of law clause in the contract to include an exclusive jurisdiction provision for the resolution of disputes in the English courts. He had intended that the contract should include such a provision following advice from a third party. The judge held that the lawyers were at fault, through a misunderstanding, in failing to advise him on the issue of jurisdiction. In fact, their advice would have been not to include such a clause but the judge held that the claimant would have ignored that advice.

The contract provided for a payment of £10,000,000 upon termination and was signed on 24 May 2008. The contract was terminated by constructive dismissal in January 2009 but thereafter Deccan declined to pay the £10,000,000 termination payment. The claimant issued proceedings in England in January 2009 but initially encountered service difficulties and later encountered delay as a result of Deccan unsuccessfully seeking to challenge the jurisdiction of the English court.

The claimant ultimately obtained judgment against Deccan in July 2012. He subsequently took steps to enforce the judgment in India but there was no realistic prospect of enforcing it. The claimant's case was that if there had been an exclusive jurisdiction clause he would have obtained judgment earlier and Deccan would have met the judgment voluntarily. This was because prior to July 2012 Deccan would have been concerned not to lose its IPL franchise and the IPL (through the Board of Control for Cricket in India) was able to, and did exert pressure on franchisees to meet their third party obligations or risk losing the franchise.

The judge held that if the contract had contained an exclusive jurisdiction clause the judgment (obtained in July 2012) would have

## Any comments or queries?

**Nick Bird**
Partner
+44 20 3060 6548
nick.bird@rpc.co.uk

**Tina Campbell**
Senior Associate
+44 20 3060 6847
tina.campbell@rpc.co.uk

been obtained a year earlier in June 2011. He assessed the various contingencies in the claimant's causation case and came to the view that had the judgment been obtained earlier there was a 20% chance that Deccan would have paid the £10,000,000 termination payment. Accordingly, he awarded the claimant £2,000,000.

## Remoteness before Hamblen J

The judgment at first instance was handed down four months before the decision in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146. That was the Court of Appeal decision in which RPC successfully argued that in cases involving concurrent duties of care in tort and contract, the contractual measure of damages should apply. The contractual test can be more favourable for defendant professionals. In summary, it involves consideration of whether a reasonable person in the defendant's position would, at the time of making the contract (ie the retainer), have damage of the kind claimed in mind as not unlikely to result from a breach.

In the absence of that authority, the case on causation and loss was decided by Hamblen J applying the ordinary loss of chance principles.

## Remoteness before the Court of Appeal – *Wellesley* and *SAAMCo*

The Court of Appeal applied its decision in *Wellesley* (see above) and examined whether the loss claimed by the claimant was the kind of damage that a reasonable person in the position of the lawyers would have had in mind as not unlikely to result from a breach at the time that they entered into the retainer.

The claimant had incurred around £40,000 of legal costs attributable to arguing the jurisdiction challenge taken by Deccan in the English courts. The Court of Appeal held that this was recoverable. It was precisely the kind of loss that the parties would have had in mind as likely to result from the breach. The court gave an example of other loss that might have been recoverable. It said that if Deccan had succeeded in its jurisdiction challenge then any additional losses that were incurred in enforcing the contract in India would be recoverable.

The £40,000 was a tiny part of the claim. The claimant had brought the claim in order to recover his lost £10,000,000 and that failed. The Court of Appeal held that the loss of the 20% chance of recovering the £10,000,000 was not something that someone in the position of the defendant would have had in mind as "not unlikely" to result from the omission of an exclusive jurisdiction clause. The 20% chance of Deccan voluntarily paying a June 2011 judgment had been lost as a result of the delay but it was the financial difficulty that Deccan encountered thereafter and the consequent withdrawal of the franchise by IPL that had actually disinclined Deccan from paying out. That was not something that a reasonable person in the position of the defendant would have had in mind. Accordingly, it was not recoverable pursuant to the *Wellesley* test and the claimant's case failed.

The Court of Appeal held, in the alternative, that the claim would also fail on an application of *SAAMCo* principles. The loss of a 20% chance that Deccan would voluntarily meet a judgment debt in order to preserve their reputation in circumstances where enforcement would be ineffective was not a loss that was within the scope of the lawyers' duty.

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16791

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000