

## Getting the measure of damages in property cases

By Richard Roberts

**Two recent property cases have led to interesting judgments on the assessment of damages, with implications further afield**

### Introduction

1. The Court of Appeal recently gave judgment in *Hooper and another v Oates* [2013] EWCA Civ 91 and *Whalley v PF Developments* (2013) CA Civ (Unrep), Lawtel AC9601647. In the former case it held that where a buyer has failed to complete the purchase of a property, damages need not be assessed by reference to its value at the date of breach. The illiquid nature of the property market justifies a departure from the usual rule. In the latter it was decided that it is open to a claimant to pursue heads of loss at trial which have not been pleaded, provided sufficient notice has been given.

### *Hooper v Oates* [2013] EWCA Civ 91

2. Mr and Mrs Hooper agreed to sell their property to the Defendant for £605,000 in February 2008. When the time came for completion he refused to proceed. The Claimants tried unsuccessfully to sell to a third party, but by the summer of 2011 they had given up and moved back in. In the meantime the property's value had fallen substantially.
3. In May 2009 the Claimants issued proceedings and succeeded in relation to liability. In March 2012 the matter came before the court for the determination of damages. The evidence was that the property's value was £600,000 at the date for completion but by September 2010 it had fallen to £495,000. The Recorder held that damages should be assessed by reference to the latter date, making them £110,000.

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4. The Defendant appealed, arguing that the market value at the date of the breach should have been used for the purpose of assessing damages, in line with the usual rule. The Court of Appeal dismissed his appeal. Giving the leading judgment, Lloyd LJ held:
- a. The availability of a market is a most relevant factor in relation to the date for assessment of damages for breach of a contract for the sale of land where the buyer fails or refuses to complete. It is hardly ever the case that there is a readily available market for the sale of land.
  - b. There being no suggestion that the vendors failed in their duty to mitigate, the fact that in the end they decided to retain the property made no difference to the principle for assessing their loss. The correct date was when the Claimants decided to cut their losses and move back in.
  - c. In cases where mitigation takes the form of a sale to a third party, the eventual resale price is likely to be the figure to be set against the contract price for assessment of damages, not because it represents the market value at the date of the breach but because it shows what loss has been suffered. If the property market has declined during that time it is of no avail for the defaulting buyer to say that this should not be laid at his door.
  - d. In the present case the seller only decided not to resell after taking reasonable steps to find a buyer. There was no basis for imposing the value as at the breach date on the vendor when, after taking steps with a view to mitigating his loss, he finally decided to retain the property upon the failure of his attempt to mitigate.
5. The decision will require some reconsideration of what was generally held to be the correct approach in such cases, and should be of assistance to claimants in similar circumstances. There are however wider implications for the law on damages in relation to any case where a seller is forced to go back into an illiquid market to mitigate a loss.

***Whalley v PF Developments (2013) CA Civ (Unrep)***

6. The Claimants claimed damages in respect of trespass caused by the Defendants wrongly erecting fencing on their land. The parties were ordered to file sequential witness statements in preparation for a hearing on remedy. The Claimants' witness

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statement set out the heads of damages sought, including several which had not been pleaded in the claim.

7. At the hearing the District Judge dismissed an application for an adjournment by the Defendants, having found that they were fully aware of every detail of the case. The court however then declined to make any award under the additional heads of loss in the witness statement, on the grounds that they had not been pleaded.
8. The Court of Appeal held:
  - a. The District Judge's refusal to award damages was, in principle, well founded; the claims needed to be pleaded. However in the circumstances the disciplinarian approach was inappropriate.
  - b. The directions for the filing of sequential witness statements meant that the heads of loss claimed had been made clear.
  - c. The Defendants had not objected to that approach: had they done so, the Claimants could and would have applied for permission to amend.
  - d. The Defendants had not been taken by surprise and had taken no steps to strike out that part of the Claimants' evidence asserting the additional claims.
  - e. By the time of the damages hearing both sides had known exactly the case on damages they were making and meeting. It was clear from the judge's findings in dismissing the Defendants' application for an adjournment that they were fully aware of every detail of the case.
  - f. (Per Lewison, L.J.) The purpose of Particulars of Claim was to define issues and warn each party what was to be dealt with. It was the giving of adequate notice that was important.
9. Some caution will be needed in applying this case elsewhere, as particular factors will not always be present – especially the sequential exchange of witness statements and the refusal of an adjournment, which emphasised the Defendants knew the case they had to answer.

10. It does demonstrate however that defendants should be asute in seeking a strike out of any evidence relating to heads of claim which were not pleaded. The failure to do so in this case was one of the reasons the Defendants were taken to have suffered no prejudice from the inclusion of those additional elements in the claim.
11. It remains to be seen whether the stricter approach to late amendments and procedure generally which the Jackson reforms may involve will mean that this case can be applied in future in a wider range of circumstances.

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