Browne Jacobson

Gosden and another v Halliwell Landau and another [2021] EWHC 159 (Comm)

This claim addressed the question, of when the date for assessment of damages in cases of negligence should be determined and shows that when appropriate the Courts will depart from the default position.

22 February 2021

Summary

This claim addressed the question, of when the date for assessment of damages in cases of negligence should be determined and shows that when appropriate the Courts will depart from the default position.

Background

In 2003, the Defendant, a firm of solicitors, was instructed by the Claimant's mother, now deceased, to reduce the inheritance tax to be paid by the Claimant upon the passing of his mother, with whom he had recently reconnected and formed a close relationship.

The deceased owned and occupied a property in Kennington, South London, ("the Property") which she wanted her son to inherit on her passing. In order to reduce the inheritance tax payable by her son, she instructed the Defendant to enter her into an Estate Protection Scheme ("the Scheme").

The Scheme was such that the deceased was to live in the Property during her lifetime but upon her passing the Property would transfer to her son. As part of the Scheme, the Defendant was to enter a restriction on the title of the Property, such that the deceased could not sell the Property without the permission of the Claimant.

In 2010, the deceased entered into a civil partnership and left the bulk of her estate to her new partner. The Property was subsequently sold to a third party in late 2010 and the deceased passed away in April 2013.

The Claimant did not discover that the Property had been sold until 2015 when he enquired with the Defendant as to the status of the Property, which under the Scheme should have, by now, been transferred.

Negligence

Negligence on behalf of the Defendant was established and it was accepted that damages should reflect the value of the Property.

However, given the recent and significant rise in property prices, there was debate about at which time the value of the Property should be taken. It was this issue (amongst others) that the Court was to determine.

Departing from Default

The default position in cases such as this, is that damages should be determined at the date the wrongful act occurs or in tort the date at when the loss caused by the breach of duty occurs.

In this instance, the parties could not agree when the loss crystallised, i.e. the date of the mistake being made (2003), the date of the sale of the Property (2010) or the date of the deceased's death (2013).

At the date of sale in 2010, the property was valued at circa £785,000. It was this sum and date that the Defendant argued should be used to determine damages. The Claimant disagreed, citing the well-established rule that a Court can and indeed should depart from the default position where it needs to, in order to adequately compensate the Claimant.

The Defendants did not agree and argued that if there was to be a departure from the default position then that departure should only be to the date that the deceased passed away (2013), at which time the property was valued at circa £875,000. In turn the Claimant's argued that damages should be assessed at the date of trial.

Judge Pelling QC agreed with the Claimants that in this instance it was appropriate to depart from the default position but only to adopt the date that the deceased passed away as the correct date for assessment (2013). As it was this date when the loss effectively crystallised.

In his judgment Judge Pelling QC said that the reason for departing from the default position was that the Scheme was clearly meant to take effect from the date at which the deceased passed away, it was at that date that the true loss occurred. The Judge also made reference to the fact that the Claimant would have been under compensated were an earlier date to have been used to assess damages and over compensated were the date of the trial to have been used.

Comment

Decisions in which there is a departing from the default position can often be met with dismay given it can often lead to uncertainty. In this instance there was clear reasoning provided by the Judge and the only way to correctly compensate the Claimant was to alter from the default position.

The take away point from this decision is that, when appropriate, the courts will determine limitation and date of loss differently. The negligent act in question occurred in 2003, of that there can be no doubt. However, this was not the date used for limitation purposes, nor was it the date on which the Claimant discovered the error. The appropriate date was when the loss crystallised, the date of the deceased's passing.

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