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WESTERN TRUST & SAVINGS LIMITED v. TRAVERS & CO. (A FIRM)

COURT OF APPEAL (Butler-Sloss and Phillips L.JJ. and Sir John Balcombe): October 30, 1996

Professional negligence—Loan secured by way of legal mortgage—Report on title failed to disclose that property was in co-ownership and subject to an existing charge—Mortgage repayments in arrears—Action for possession—Value of property adequate to cover loan despite defects in title—Action adjourned and not pursued—Action for professional negligence against solicitors—Nominal damages—Whether loss caused by solicitors' negligence—Whether failure to mitigate loss

In 1987 the plaintiffs offered a loan to H secured by way of legal mortgage. The defendant solicitors, who acted for H and the plaintiffs, provided the plaintiffs with a report on title. That report failed to inform the plaintiffs that Mrs H was also a registered owner of the property to be mortgaged and also of a charge in favour of a bank, B. They expressly represented (i) that they had made all necessary searches and inquiries and had satisfied themselves that there were no entries which materially affected the value or saleability of the property and (ii) that there were no onerous easements, restrictions or matters adversely affecting the property. In reliance on the report, the plaintiff advanced £25,250. In fact, early in 1988 the defendants were instructed by H to transfer the property into his sole name. The plaintiffs however, had refused to agree to a transfer because of arrears outstanding on the acocunt. In August 1988 the plaintiffs commenced possession proceedings against H. The proceedings were adjourned and the plaintiff did not apply for their reinstatement until November 1990. However, those proceedings also came to a standstill. After a series of failed negotiations with the defendants' indemnity insurers between 1990 and 1993, the plaintiffs issued proceedings for damages against the defendants for professional negligence. Mr District Judge Moon assessed damages in the sum of £1 and ordered the plaintiff to pay the defendants' costs. Although he was satisfied that the plaintiffs would not have entered into the transaction but for the defendants' negligence, the plaintiffs had not taken reasonable steps to mitigate their loss. They had not pursued alternative remedies, including the possession proceedings at a time when the value of the property was such that most, if not all, of the debt would have been cleared by H's half share. On appeal to the Court of Appeal:

Held, dismissing the appeal, that the plaintiffs had failed to prove that any loss had been caused by the defendants' negligence; alternatively, the defendants had proved that the plaintiffs had failed to mitigate their loss. Having regard to the value of the property at the material time, and the fact that this gave a very substantial cushion over the outstanding advance, the defects in relation to the security did not render it inadequate to cover the plaintiffs' advance.

Cases referred to:

(1) *Banque Bruxelles Lambert SA v. Eagle Star Insurance Company Ltd* [1996] 3 W.L.R. 87, HL.

(2) *Bristol and West Building Society v. Mothew* [1996] 4 All E.R. 698; [1997] 2 W.L.R. 436.

(3) *London and South of England Building Society v. Stone* [1983] 1 W.L.R. 1242; [1983] 3 All E.R. 105; [1983] 127 S.J. 446; (1983) 267 E.G. 69; (1983) L.S.Gaz. 3048, CA.

(4) *Pilkington v. Wood* [1953] 1 Ch. 770; [1953] 3 W.L.R. 522; [1953] 2 All E.R. 810; 97 S.J. 572.

Appeal by the plaintiffs, Western Trust and Savings Limited, from an

order of District Judge Moon dated October 2, 1995, assessing the plaintiff's damages in a claim for professional negligence against the defendant solicitors., Clive Travers & Co. (A Firm), in the nominal sum of £1. The facts are set out in the judgment of Phillips L.J.

Colin Braham for the appellant plaintiffs.
Rhodri Thompson for the respondent defendants.

BUTLER-SLOSS L.J. I will ask Phillips L.J. to give the first judgment.

PHILLIPS L.J. This is an appeal by the plaintiffs with the leave of the single Lord Justice from an order made by District Judge Moon on October 2, 1995 whereby in assessing the plaintiffs' damages, pursuant to an order dated April 19, 1994, he assessed those damages in the nominal sum of £1 and ordered the plaintiff to pay the defendants' costs.

The claim in respect of which damages fell to be assessed was a claim for professional negligence on the part of the defendant firm of solicitors in relation to advice that they had given in respect of the property which it was proposed should form the mortgage security for an advance to be made by the plaintiffs.

The background facts are as follows. Mr and Mrs Harding bought the property, 55 Chaulden House Gardens, Hemel Hempstead, in 1985. It is not clear whether Mrs Harding was married to Mr Harding or whether she was what is usually described as his common law wife.

In January 1987, Mr Harding applied to the plaintiffs for a loan. A mortgage valuation was effected, dated February 25, 1987, and the defendant solicitors were instructed to act on behalf of both the plaintiffs and Mr Harding. The plaintiffs in due course offered a loan to Mr Harding on condition that they obtained a first legal mortgage over the property. The plaintiffs instructed the defendants that if they had any reason to believe that the borrower proposed to create a second charge the advance was not to be completed without the plaintiffs' prior written consent.

At the time of the loan application both Mr Harding and Mrs Harding were registered as owners of the property. There was an existing mortgage on the property in favour of the Abbey National Building Society and there was a also a charge in favour of Barclays Bank. The defendants provided the plaintiffs with a report on title, dated May 11, 1987. In this report on title the defendants failed to inform the plaintiffs that Mrs Harding as well as Mr Harding was a registered owner of the property nor did they inform the plaintiffs of the existence of a charge in favour of Barclays Bank. Furthermore, the defendant expressly represented in their report to the plaintiffs, *inter alia*, (a) that they had made all necessary searches and enquiries and satisfied themselves tht there were no entries which materially affected the value or saleability of the property and (b) that there were no onerous easements, restrictions or matters adversely affecting the property.

In reliance on the report on title the plaintiffs advanced to the defendants a loan of £25,250 in favour of Mr Harding on May 12, 1987 and took a legal charge over the property, dated May 13, 1987, which named Mr Harding alone as the borrower. On May 15, 1987 the defendant discharged the Abbey National charge, using £19,243.91 of the plaintiffs' advance. They then accounted to Mr Harding for the balance of the advance. Notwithstanding the interest in the property of Mrs Harding, the defendants succeeded in registering the charge in favour of the plaintiffs at the Land Registry.

It was not until early 1988 that the plaintiffs became aware of the involvement of Mrs Harding. I propose at this point to read some of the relevant correspondence in relation to that matter. On March 22, 1988 the plaintiffs wrote to the defendant referring to earlier correspondence and saying this:

> We note that you did the original conveyancing for this [property] and at that time you indicated on your Report on Title that the property was vested in the sole name of Mr. B. V. Harding, therefore we are most disturbed to note that the property is now vested in the joint names of Mr. and Mrs. Harding and that you now propose to do a Property Transfer.
>
> We look forward to receiving your comments on this matter within ten days from the date of this letter and would also ask you to return the Title Deeds to this office.

To this, the defendant replied on April 4:

> We regret to say you appear to be correct in this matter. However, we understand Mrs. Harding vacated the property some time ago and as stated in our letter of the 9 March is anxious to complete the purchase of an alternative property.
>
> In the circumstances please confirm we can immediately proceed with the Transfer into the sole name of Mr. Harding which is required urgently by all parties concerned.

To this the plaintiffs wrote on 18 April:

> We do not wish to appear unduly obtuse, but your original Report on Title indicated that the property in question was vested solely in Mr. Harding's name, which information was totally consistent with all the information and documentation we have on file.
>
> This being the case, we do not understand the reference or necessity to even consider the transfer of property into Mr. Harding's sole name.

A little later in the correspondence the defendants wrote to the plaintiffs:

> ... we are at present proceeding with the transfer of the above property into the sole name of Brian Harding.
>
> This is in accordance with instructions received from Mr. Harding at the instigation of his wife who apparently wishes to proceed with the purchase of an alternative property. Apparently she has not resided at the property for some time and claims no interest.
>
> Indeed we understand it is a requirement of your goodselves that the property be in the sole name of Mr. Harding and we would refer you to our letter of the 20 May.
>
> We enclose a copy of the draft Transfer for your information.

To this, the plaintiffs' solicitors replied:

> Thank you for your letter dated 19th July 1988 addressed to our Client Company.
>
> We have taken our Client's instructions, and we are not prepared to agree to the draft Transfer at this time in view of the substantial arrears outstanding on the account.
>
> Upon clearance of the arrears then this matter may proceed.

By this stage, as perhaps the intervention of solicitors for the plaintiffs

indicates, Mr Harding had ceased to make the contractual repayments under the mortgage agreement and on June 1, 1988 the plaintiffs had served a formal demand upon him. Possession proceedings against Mr Harding were begun by the plaintiffs in the Hemel Hempstead County Court in August 1988.

I now pick up the story as recited by the district judge at page 121 of the bundle:

> For reasons ... for which no explanation has been proferred when the Planitiff's Solicitors commenced proceedings in the appropriate County Court they only issued against Mr. Harding, these having a return date of 29 November 1988 whereupon the proceedings were adjourned to 18 January 1989. In the bundle of docunments there is contained a report of what transpired at that Hearing which again was adjourned. The next hearing was listed for 15 March 1989. At that date these proceedings were adjourned generally but again no explanation has been advanced to me for this.
>
> The Plaintiff's solicitors only applied to reinstate these proceedings some twenty months afterwards (in November 1990) and were given a return date of 12 December 1990.
>
> Notwithstanding the information imparted to them in January 1989 no action at all appears to have been taken and on the hearing not surprisingly the Registrar ordered the addition of Mrs. Harding as a Defendant to the proceedings. Since that date those proceedings have been at a standstill and nothing further has been done in respect thereof.

What then happened, in short, is that the plaintiffs turned their attention from the possession proceedings to the defendants. After some considerable correspondence between the plaintiffs and the defendants, on November 15, 1990 solicitors acting for indemnity insurers of the defendants, Mills and Reeve, entered the arena. The plaintiffs and their solicitors then became involved in discussions with Mills and Reeve as to what action should be taken. The plaintiffs offered to assign their interest under the charge to the defendants, no doubt in exchange for payment of the outstanding sums due under the loan. That invitation the defendants declined. Mills and Reeve then indicated to the plaintiffs' solicitors that they considered that rather than pursuing the possession proceedings the more fruitful avenue would be to seek an order for sale under section 30 of the Law of Property Act 1925. Again an offer was made to assign the interest under the charge to the defendants and that offer was refused. The plaintiffs did not consider it appropriate to follow Mills and Reeve's suggestion of instituting proceedings under section 30 of the Law of Property Act. In due course, on January 27, 1993, they issued the present proceedings, claiming damages against the defendants.

At this point it is appropriate to make reference to an agreed valuation schedule of the property. In May 1987, its value ws £57,000; in December 1988, its value was £79,500; in June 1989, £76,500; In December 1989, £74,000; in June 1990, £71,000; in December 1990, £68,000; in June 1991, £66,000; in December 1991, £65,000; in June 1992, £59,500; in December 1992, £56,500 and in March 1995, £60,000.

Having set out these relevant facts I turn to the law. The relevant law is clearer to this court than it was to the district judge and the parties at the time

that the reference was heard by him. That is because this court has the benefit of the decision of the House of Lords in *Banque Bruxelles Lambert SA v. Eagle Star Insurance Company Ltd*,[1] whereas at the time of the reference the parties and the district judge would have had reference to the decision of the Court of Appeal in that case which was reversed by the House of Lords. Notwithstanding this it does not seem to me that the difference of approach between the Court of Appeal and the House of Lords to the assessment of damages is critical in this case.

By way of summary of the relevant law, as it can now be seen to be, I would cite some passages from the judgment of Millett L.J. in *Bristol and West Building Society v. Mothew*[2] which is reported by the New Law Publishing Company, a decision of July 24, 1996, for that also was a case involving solicitors' negligence in relation to advising the plaintiff on a mortgage advance.

At page 5, Millett L.J. dealing with the position at common law, said this:

> Where a plaintiff claims that he has suffered loss by entering into a transaction as a result of negligent advice or information provided by the defendant, the first question is whether the plaintiff can establish that the defendant's negligence caused him to enter into the transaction. If he cannot his claim must fail. But even if he can, it is not sufficient for him to establish that the transaction cause him loss. He must still show what (if any) part of his loss is attributable to the defendant's negligence. This is usually treated as a question of the measure of damages rather than causation, and for convenience I shall so treat it in this judgment, but it must be acknowledged that it involves questions of causation.

Then at page 7 he summarised the approach of Lord Hoffmann in the *Banque Bruxelles Lambert* case as follows:

> Lord Hoffmann distinguished between a duty to advise someone as to what course of action he should take and a duty to provide information for the purposes of enabling someone else to decide upon his course of action. In the former case, the defendant is liable for all the foreseeable consequences of the action being taken. In the latter case, however, he is responsible only for the consequences of the information being wrong. The measure of damages is not necessarily the full amount of the loss which the plaintiff has suffered by having entered into the transaction but only that part if any of such loss as is properly attributable to the inaccuracy of the information. If the plaintiff would have suffered the same loss even if the facts had actually been as represented the defendant is not liable.

Where a plaintiff has been induced to advance money by reason of negligent misrepresentation as to the attributes of the security that is to be provided for the loan the measure of damage will normally reflect the defects in the security. The onus will be on the plaintiff to prove that he has suffered loss because of the absence of those attributes upon which he had relied in entering into the transaction. Where the security is worthless the limit of loss recoveable will normally be the value that the security would have had

[1] [1996] 3 W.L.R. 87.
[2] [1996] 4 All E.R. 698.

without the defects. Where the security has some value, but less value than it would have had without the defects, the limit of loss recoverable will normally be the difference between the value that the security has and the value that it would have had without those defects. Where a plaintiff enforces his security he will be in a good position to prove his loss, having regard to these considerations. Where he does not enforce his security, proof of loss presents greater difficulties. In the latter situation it is not easy to distinguish between the duty of the plaintiff to prove his loss and the duty of a defendant who alleges failure to mitigate to prove the extent to which failure to mitigate has affected the financial position of the plaintiff. It seems to me that essentially these two sides of the same coin.

In the present case it was for the plaintiffs to prove the consequences of the defects in the security. Before the district judge they advanced their case on the premise that the security was worthless. They contended that in the circumstances prevailing they could not reasonably be expected to persevere in attempts to enforce their security and therefore their loss was the whole sum advanced that should have been adequately secured had the security not been defective, coupled with the loss of use of that sum up to the trial. In money terms, the claim that they advanced was nearly £50,000.

The defendants contended before the district judge that the plaintiffs had failed to establish the necessary causation in respect of their loss and also alleged that the plaintiffs had failed to mitigate their damage. The defendants contended that it was unreasonable not to have enforced the security. The judge dealt with these submissions as follows at page 126. He said:

> It is clear that this was presented as a "no transaction" case on the hearing, so dealing with this aspect at this stage I am satisfied that this is the correct basis to approach the matter.

This passage in his judgment was a reference to the approach of the Court of Appeal in *B.B.L.*, but the effect of the finding was that the judge was satisfied that the plaintiff would not have entered into the loan transaction but for the negligence of the defendants' solicitors so that the plaintiffs had crossed the first hurdle in proving their case. They still had, however, to establish causation. The learned judge went on:

> However Mr. Thompson argues that even if this is the correct basis to approach the matter the Plaintiffs have suffered no loss. He sets out in his argument under paragraph 2 various points as to the question of causation ... He also thereafter deals with the vital issue of mitigation accepting as previously noted that the onus is upon him to show that the Plaintiff has failed to deal with this aspect of the matter.
>
> I have not set out all of his points here nor do I intend to do so in the same way that I did not set out the contrary arguments of Mr. Braham, merely drawing attention to the fact that these points have been made and are well in my mind in coming to the conclusion that I have in this case.

So the judge did not expressly address the issue of causation. He went straight to mitigation which was, as I have indicated, the other side of the coin. He said this:

> The question of mitigation then falls to be considered. It is in my view

> correct to say that the Plaintiff should take reasonable steps to mitigate its loss. So this vital question needs to be examined in detail.
>
> The points raised in this context by Mr Braham's skeleton will be dealt with in the order he sets them out.

I then move to what seems to me to be the critical passage in his judgment under the heading: "Continuation of the possession proceedings."

> I have already set out what I understand the chronology of the Proceedings in the Hemel Hempstead Court to be. I do not understand them at all. Beyond any doubt the Plaintiff's solicitors were aware before these were despatched to the Court that they were incorrect and that as they were seeking possession the 'owners' of the property would both have to be served and become parties in the proceedings. Yet what do we see? They received notification that the first hearing was adjourned (presumably because of non-attendance) and after the second hearing in December and the full report from their agents (also drawing attention to the position of Mrs. Harding) not only is nothing done then, it appears that some eighteen months later they merely seek a further hearing date. An order was then made to add Mrs. Harding, nothing is done from 1990 to date. No application was made to dispense with service or to substitute by affixing the summons to the property. These solicitors are well aware of procedures when borrowers are untraceable and in appropriate cases surplus proceeds can be dealt with. So there is no reason why this action was as it were left in mid air.
>
> It must also not be overlooked that at this time the value of the property in question was such that most if not all of the then debt would have been cleared from Mr. Harding's one-half share, according to the agreed valuation schedule.
>
> No reason has been stated as to the conduct of these proceedings from inception to 1990 nor since and I have to find that in no way can the Plaintiff satisfy me that in relation to these proceedings it has taken reasonable steps. It could and should have done. Nor do I think that to have done so could be regarded as speculative.

The judge then went on to deal with alternative courses of action open to the plaintiff. They could have brought proceedings under section 30 of the Law of Property Act or they could have brought subrogation proceedings on the basis that they had discharged not merely Mr Harding's but also Mrs Harding's liability to the Abbey National, in the sum of nearly £20,000.

The learned judge's findings amounted, it seems to me, essentially to this. Had the plaintiffs acted reasonably they would have enforced their security and thereby recovered the amount advanced. Thus, on these findings, not merely could it be said that they had failed to act reasonably in mitigation of damage. It could be said that they had failed to establish that the deficiencies in the security were causative of any loss to them.

Before us Mr Braham has argued that the learned judge was fundamentally wrong in his approach. He should have held that the proposed mitigation was speculative and that the plaintiffs were under no duty to embark upon it. In support of this submission, Mr Braham first referred us to the case of *Pilkington v. Wood*.[3] That was also a case of

[3] [1953] 1 Ch. 770.

solicitors' negligence where it was suggested that the plaintiff should have mitigated damage flowing from a defect in title which the solicitors had not adverted to by suing the vendor of the property in question on the implied covenant of title that exists under section 76 of the Law of Property Act 1925. Harman J. rejected that contention at page 776. He said the proposition advanced was that:

> ... it was the duty of the injured party [on the facts of the case] to embark on litigation in order to mitigate the damage suffered. This is a proposition which, in such general terms, I am not prepared to accept, nor do I think I ought to entertain it here, because I am by no means certain that the foundations for it exist.

He went on to find that on the facts of that case it would not have been a reasonable course to take.

The facts of that case were, in my judgment, very different from the facts in the present case. In the present case the litigation in question was no more than a possession action which is an ordinary feature of enforcing security, with which the plaintiffs in this case will be well familiar and which would have been a necessary step whether or not there were defects in the security. Such litigation is in no way analogous to the action that was proposed in *Pilkington*.

The other authority relied upon by Mr Braham was the case of *London and South of England Building Society v. Stone*.[4] There, on the very special facts of that case, the majority of the Court of Appeal held that it would not have been reasonable for a lender to pursue borrowers who were financially stretched to recover the costs of remedying physical defects in the security, to which the defendants had negligently failed to draw attention. The distinction between that case and this appears from this passage in the judgment of Stephenson L.J. at page 1262 where he said:

> What the valuer is contending is that the lenders ought to have done something and that must, in my opinion, be an assertion that they should have mitigated the damage flowing from the worthlessness of the security. They should have had recourse to what Devlin J. [that was the first instance judge] regarded as another item of security than the mortgaged property, but surely a security in a different sense not by itself securing a loan, namely the borrowers' contractual obligation under the first convenant in the deed.

In this case what the learned district judge considered that the plaintiffs should have done is to have had recourse to the very security which is the subject matter of the dispute.

Mr Braham has also urged that we should attach significance to the fact that the defendants were not prepared to provide an indemnity to encourage the plaintiffs to take further legal action nor were they prepared to take an assignment of the rights that they suggested the plaintiffs had. In my judgment these matters have very little relevance. It is for this court to decide what should or should not reasonably have been done by the plaintiff in the circumstances of the case, not for the defendant or their solicitors. In my judgment Mr Braham's submissions simply cannot be reconciled with the

[4] [1983] 1 W.L.R. 1242.

concession that he has made that the security in this case still had value notwithstanding its defects. It only had value because enforcement would have been worthwhile. The reason that the plaintiff did not proceed with possession proceedings was, it seems to me, that they had been advised that they had a cast iron case against the defendants for professional negligence. So they did, but the advice overlooked the fact that they would also have to prove causation and were under a duty to mitigate their loss. Had there existed no possibility of a claim against the defendants I am in no doubt that the plaintiffs would have proceeded to enforce their security. The judge rightly concluded that they should have done so, and that they failed to mitigate their loss or, putting it the other way, to realise the value of their security.

It remains to consider whether the implied conclusion of the judge that the security would have been adequate to cover the indebtedness was a proper conclusion. Would the plaintiffs have extinguished their loss had they proceeded with the possession proceedings? One can put out of the way the charge in favour of Barclays Bank because Barclays agreed that that charge, which was in relaiton to a very small sum, should be deferred to the plaintiffs' security. Having done so, I am in no doubt that the learned judge's conclusion was correct that had the plaintiffs proceeded to enforce their security there would have been a recovery sufficient to cover that indebtedness. The possesion action would have been likely to proceed smoothly unless Mrs Harding sought to intervene and to rectify the register. At the material time, in 1988, there is no indication that she would have done so. On the contrary, all the indications are that she was asserting no interest in this property and was perfectly willing to have the property transferred into the sole name of Mr Harding.

Why the plaintiffs objected to that course is not clear to me. We are told by Mr Braham that it would have been contrary to their policy. That I simply do not understand in the circumstances of this case. It seems to me that if there was such a policy it was designed to meet very different circumstances.

Having regard to the value of the property at the material time and the fact that this gave a very substantial cushion over the outstanding advance, as a result of the rise in the property market, my conclusion is that the defects in relation to the security did not render it inadequate to cover the plaintiffs' advance. Whether one says that the plaintiffs have failed to prove that any loss was caused by the defendants' negligence or that the defendants have proved that the plaintiffs failed to mitigate their damage and could have mitigated it entirely away, the answer is the same and it is that reached by the district judge that only nominal damages should be recovered.

For these reasons, I would dismiss this appeal.

SIR JOHN BALCOMBE. I agree that this appeal should be dismissed for the reasons given by Phillips L.J. I add only this. Even if an order for possession against both Mr and Mrs Harding might not of itself have been sufficient for the plaintiff's purposes because the registered charge under which the plaintiff would have to make title was signed by Mr Harding alone, once Mrs Harding had been made a party the plaintiff would certainly have been able to obtain an order against her to enable them to realise their charge by way of subrogation and they could then have sold the property and realised the balance of their debt out of Mr Harding's interest in the property.

BUTLER-SLOSS L.J. I also agree with both judgments and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors—Curtis, Plymouth; Mills & Reeve, Cambridge.

Reporter—David Stott.