Barrowfen Properties Ltd v. Patel [2025] EWCA Civ 39

I enjoyed enormously Professor David Spiegelhalter's recent LSE lecture *The Art of Uncertainty: living with chance, ignorance, risk and luck*, available for the time being at https://www.youtube.com/watch?v=tvLsQyfVDTQ. (The lecture is associated with his recent book on the subject.) It may help any of us on our thinking of loss-of-a-chance and the use of percentages.

The computation of damages in such cases is often intriguing - see the discussion last year in the Court of Session in *Centenary 6 Ltd v. TLT LLP* [2024] CSIH 13.

The Court of Appeal's decision in *Barrowfen Properties Ltd v. Patel* has left open the way to a review by the Supreme Court of an important aspect of the computation. The Court of Appeal has given the relevant party, solicitors Stevens & Bolton LLP, until 20 February to decide whether to apply for permission. The point in question concerns the relationship between a benefit which has in fact come to the claimant along with the damage, and the percentage chance of any particular counter-factual having come about if the defendant had not acted in breach of duty. If, for example, the claimant has suffered the loss of a 60% chance of something having eventuated which would have gained the claimant £1,000 if it had, but has in fact garnered a benefit of £500, should the damages award be £100 [(1,000 x 60%) – 500] or £300 [(1,000 – 500) x 60%]?

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The "outbreak of hostilities between the family members" concerned in *Barrowfen Properties Ltd* left the Courts to consider extremely complex facts around Barrowfen's intended, and eventually changed and completed, development of a valuable London site. The Court of Appeal has very largely upheld the decisions of Leech J. as to what Barrowfen should recover against Mr Girish Patel ("Girish") for his breaches of fiduciary duty to Barrowfen, and against Stevens & Bolton LLP for negligence. Each was in breach of duty during two phases of the Battle of Barrowfen; in the first phase Girish's brothers eventually managed, entirely properly, to wrest control of Barrowfen from Girish, and in the second they fought off his attempt to recapture it.

The first phase led to what the Judge had termed "the Company claims", and the second to what he termed "the Administration claim." The fullest account of the facts appears in the first of his three judgments [2021] EWHC 2055 (Ch). The judgment of the Court of Appeal is effectively that of Snowden L.J., with whom Newey and Lewis L.JJ. agreed.

What actually happened? - some core facts

Barrowfen was ultimately owned by family interests of Girish and his two brothers. For a time he was the properly-appointed managing director. In due course the brothers wanted to oust him from that position. But for some dishonest manoeuvring by him, and the negligence of Stevens & Bolton, they would probably have been successful in 2014 and in a position to set about a then development plan for the site, referred to as the "Amended Original Development Scheme". As it was, they only achieved unobstructed control of Barrowfen in September 2016.

By about that time the Amended Original Development Scheme was no longer commercially attractive. A different development project, the "Revised Development Scheme", had become a possibility. In December 2016 Barrowfen proposed that scheme; in due course it was implemented, work starting in about August 2018 and completing in mid-2021.

What was claimed?

The financial claims were principally for the loss of rental income during the period of delay. There were substantial ancillary claims, but for present purposes it is sufficient to refer to the loss of rental income claims.

The "counter-factual(s)": what if the defendants had not breached their respective duties?

A first possible scenario would have been the brothers taking control of the board of Barrowfen by September 2014 and proceeding with the Amended Original Development Scheme by January 2015. The Judge's (unappealed) conclusion was that the overall chance of this outcome was 60%.

A second possible scenario would have been the brothers taking apparent control in December 2015 (as they in fact did) and being told (as they should have been but were not) of Girish's improper scheming to have Barrowfen put into administration (which scheming obstructed their control until the scheming was eventually stopped). The Judge's (unappealed) conclusion was that in that event there was an 80% chance that Barrowfen would have avoided administration and commenced the Amended Original Development Scheme by April 2016.

The implications of the counter-factual scenarios, and the contrast with the actuality

The Amended Original Development Scheme would have taken 20 months to complete, so in scenario (1) it would have been completed by the end of August 2016, or in scenario (2) by December 2017. These were to be contrasted with the actual fact of the Revised Development Scheme having been completed in about April 2021.

Important financial implications

On completion of whichever Development Scheme, Barrowfen was / would have been able to receive rent for the redeveloped property. The delay, therefore, had caused loss of rental income. But another implication of what had happened was that the capital asset created by the Revised Development Scheme was different from that which would have been created by the Amended Original Development Scheme.

The Judge held that the capital asset actually created was more valuable than that which would have been created under the Amended Original Development Scheme. He concluded that the Revised Development Scheme had produced a "developer's profit" of £12,628,412, whereas the Amended Original Development Scheme would have produced a developer's profit of £10,120,230. The defendants argued that credit should be given for the difference between the two, £2,508,182, against the claims for lost rent.

The issues in the Court of Appeal

There were three issues:

1) Was the Judge correct to rule that credit should be given for the developer's profit against the claims for lost rent? The Court of Appeal upheld his decision.

2) Was the Judge correct to rule that that credit should be deducted from the lost rent claims before, rather than after, the application of any percentage to address the degree of probability of any particular counter-factual outcome? The Court of Appeal upheld his decision.

3) Was the Judge's decision on interest correct? This was the only issue on which the Court of Appeal did not uphold his decision.

The first issue

Barrowfen argued that the fact that the development had (substantially) not been sold, but had been retained, should mean that the developer's profit should not be held to reduce the damages recoverable in respect of loss of rentals. This argument was not on the basis that the benefits of the actual redevelopment should be ignored, but on the basis that the unrealised profit reflected the increase in future rentals (because the property was better) and should, argued Barrowfen, take account of the finance costs of continuing to hold the property. The Judge and the Court of Appeal rejected this argument. The Court of Appeal considered the matter in terms of the principles of "Mitigation losses and gains", in accordance with the principles in *British Westinghouse Electric & Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd* [1912] A.C. 673 and the associated matter of causation (citing in particular *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2017] UKSC 43 [2017] 1 W.L.R. 2581). Once the actual development had been completed, Barrowfen had successfully mitigated its loss of rental income because it was able to receive rentals from the developed property, and, as the Judge had said "the causative effect of the breaches of duty by Girish and S&B came to an end on the completion of the development".

The second issue

To recapitulate and expand:

- If there had been no breaches of duty at all, there would have been a 60% chance of the Amended Original Development Scheme commencing in January 2015. Barrowfen would have received the rents much earlier but not the extra developer's profit.

- If there had been breaches of duty in what were termed the Company claims but not breach of duty in what was termed the Administration claim, there would have been an 80% chance of the Amended Original Development Scheme commencing in April 2016. Again, Barrowfen would have received the rents earlier but not the extra developer's profit.

The Judge held that the case was indistinguishable from the Court of Appeal decision in *Hartle v. Laceys* [1999] Lloyd's Rep. P.N. 315, and that damages in each claim should be assessed by identifying the loss (mainly the rent), then deducting the £2,508,182, and then applying the relevant percentage. In effect what he did was to examine each of the possibilities separately:

- the 60% possibility of the first counter-factual scenario, relevant to the Company claims
- the 32% possibility of the second counter-factual scenario, relevant to the Administration claim (32%, being (100-60) x 80%)
- and, inferentially, the 8% possibility of the counter-factual scenario of neither of the first nor the second having occurred.

The Court of Appeal was only concerned with the question I illustrated at the outset of this note: to what figure does one apply the percentage? Snowden L.J. first expressed his own view as to what the result should be, and he agreed with the Judge. He then considered *Hartle v. Laceys* and was satisfied that his view of the *Barrowfen* case was consistent with it.

My reading of the judgment is that the key sentence approving the Judge's method is this, in paragraph 125:

> "That had the correct arithmetical effect of requiring Barrowfen to give credit for a total of 92% of the £2,508,182."

This statement is, of course, consistent with the overall conclusion that there was a 92% chance that if there had been *no* breaches of duty then there would have been loss of rent

but no extra developer's profit (60% chance of scenario one plus 32% chance of scenario 2 – which had to be considered separately because they did not involve identical periods of rent loss.

The point on *Hartle v Laceys*

In granting Stephens & Bolton permission to appeal on the application-of-percentages point Lewison L.J. had expressed the view that the case was indistinguishable from *Hartle v. Laceys*, and that the Court of Appeal would be bound to dismiss the appeal on the point; he decided that it was a special circumstance that Stephens & Bolton might wish to challenge *Hartle v. Laceys* in the Supreme Court and that giving permission to appeal the point kept open that possibility of challenge. Everyone will have known that in *Hartle v. Laceys* only one party was represented (as it happens, by me, subject to the professional duty one has to the unrepresented party), and that the Court of Appeal had found *Hartle v. Laceys* a difficult case.

The interest point

The appeal did yield one change to the decisions of Leech J., reducing the amount awarded in respect of interest from £520,014 to £352,684. The minutiae of the difference between these figures do not matter other than to the parties, but at least one of the reasons for the need to reduce the award does. This is that difficult analysis is needed where claims are made both for interest as damages and for statutory interest (whether under the Senior Courts Act 1981 or the Judgments Act 1838) and that it is helpful if the full analysis is available in the skeleton arguments for the consequential matters hearing.

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