# NEWS

## No Chance – Court of Appeal rules not to extend "loss of chance" to commercial valuations

13 December 2010 Commercial Disputes

**In this article, we look at how the courts assess damages in "loss of chance" cases. Michael Axe also reports on the Court of Appeal's recent warning regarding the dangers of applying these principles to commercial valuations, which is likely to be of particular interest to valuers and surveyors.**

The "loss of chance" doctrine has evolved as a way of assessing the value of damages in cases where the claimant has lost a particular opportunity or chance as a result of the defendant's breach of contract or negligence. Damages for "loss of chance" are, by their very nature, less precise than damages which relate to a specific sum (such as repair costs or unpaid invoices) but the Courts have established a process for calculating the value of such losses.

**What is a "loss of chance" claim?**

A "loss of chance" claim will usually be one where the claimant's potential loss depends on the hypothetical actions of a third party, or where there is some other reason why the court cannot be sufficiently certain what would have happened if not for the defendant's actions. For example, if a professional advisor provided their client with negligent advice during commercial negotiations with the other side, the courts would be likely to apply the "loss of chance" doctrine to assess what the other side may have agreed to during the negotiations if the professional advisor had not been negligent.

Damages for "loss of chance" can also arise in cases where a claimant has been denied the opportunity to pursue a court claim due to a solicitor's negligence, and the court cannot be sufficiently certain in relation to what the result of the hypothetical court claim would have been. The same principles can arise in any number of scenarios however; in the 1911 case of *Chaplin v Hicks* the claimant sued for "loss of chance" damages because she had been denied the opportunity to participate in a beauty contest due to the defendant's breach of contract.

**How is "loss of chance" assessed?**

In very general terms, the assessment of damages for "loss of chance" is a two stage process.

Firstly, the court will assess what the maximum value of the claimant's "net profit" would have been if the claimant had been entirely successful. This is perhaps most easily illustrated in a case where the claimant was denied the opportunity to pursue a court claim due to a solicitor's negligence; the first stage will be for the court to assess what net amount (i.e. damages less irrecoverable costs) the claimant would have won had he been successful in that hypothetical court claim.

The second stage is to then apply a percentage discount to the anticipated "net profit", to represent the degree of risk that the claimant might have never actually obtained the expected "profit" at all. Returning to the example of the claimant who lost the opportunity to pursue a court claim, the percentage discount would in broad terms represent the claimant's prospects of winning the hypothetical court claim.

Normally (but not always, as illustrated below) it will be in a claimant's best interests to show that its claim is <u>not</u> a "loss of chance" claim if at all possible, so that the claimant can claim 100% of the damages claimed, rather than having a percentage discount applied to those damages.

08450 990045

**"Loss of chance" and commercial valuations**

In the 2010 case of *Law Debenture Trust Corp plc v Elektrim SA*, the Court of Appeal provided further clarification on when it would <u>not</u> be appropriate to apply the "loss of chance" doctrine.

In this case, the damages to be paid to the claimant included damages for the loss of a payment that was to have been calculated based on the "fair market value" of the defendant's assets. The key issue in calculating the "fair market value" of the defendant's assets was how to assess the value of certain shares that it held.

Unusually, it was argued by the claimant in this case that this was a "loss of chance" claim because the valuation of the shares was dependent on the hypothetical actions of a third party (i.e. the hypothetical investment bankers who would have had to value the shares had it not been for the defendant's breach of contract) and it was impossible to be certain how they would have approached the valuation. Perhaps surprisingly, in this case it was actually in the claimant's interest to argue that this was a "loss of chance" case, because the claimant put forward four possible approaches that the hypothetical investment bankers might have taken when valuing the shares, and one of the approaches could have produced a significant increase in damages, even if a percentage discount was then applied.

However, the Court of Appeal dismissed this argument, confirming that not every case where the court has to assess what a third party might have done will be treated as a "loss of chance" case. This was, for example, very different from a case where the court had to speculate how a third party may have acted during further negotiations.

The Court of Appeal confirmed that in a case such as this, rather than apply the "loss of chance" principles, the courts should do their best to estimate what a banker would have concluded the true value of the shares to be. The Court of Appeal acknowledged that this *"may not be easy, but if something of value has been lost, the court must do its best to estimate that value and should not too readily decide that it is a matter of chance what the true value of something as concrete as a share is likely to be"*.

The decision therefore appears to draw a distinction between claims relating to a "concrete" asset (such as a share) and those relating to more "intangible" assets (such as a right to pursue a court claim).

**The future of the "loss of chance" doctrine**

This judgment is seen as an important sign from the Court of Appeal that the "loss of chance" doctrine will not be extended further to be routinely applied in relation to commercial valuations. The Court of Appeal expressly warned that there are dangers in extending the doctrine to commercial cases, *"especially valuation cases where permutations may be almost infinite"*.

As a result of this decision, courts are now more likely to be reluctant to apply the "loss of chance" principles to general commercial cases, especially as many commentators felt that the doctrine was already being too widely applied. Judges will in future be more likely to focus on doing their best to estimate or assess what the true value of an asset is, no doubt with the assistance of expert evidence submitted by the parties.

For further information on this or any other issues relating to loss of chance claims, please contact Michael Axe by emailing Michael or by calling him on 08450 990045, or speak to your usual contact in the Commercial Disputes Team.

*This document is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from taking any action as a result of the contents of this document.*