

BTOview

Assessing Loss - When it pays to break the rules

Comedy and quantum seem unlikely bedfellows. They do, however, share one thing in common; timing is everything.

When assessing loss, the question often arises: On what date should my loss be calculated? In both England and Scotland, the default position is that loss is assessed on the date when the wrong occurs. In *Gosden v Halliwell Landau* 2021 EWHC 159 (Comm) the High Court in England underlined that this rule is more mercurial than its categorisation might suggest.



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Gosden concerned a property in London belonging to a Dr Weddell who wished to leave it to her son (one of the claimants) after she died. In order to mitigate potential inheritance tax, Dr Weddell consulted solicitors who advised setting up a trust. In April 2003, a trust in favour of the claimant was established. Dr Weddell remained the registered owner of the property.

It was intended that the trust contain a restriction preventing the property being sold without the consent of the trustees. The solicitors failed to register this restriction.

In October 2010, Dr Weddell sold the property without the knowledge or consent of the trustees. At that point the property was said to be worth between £710,000 and £785,000. Had the restriction been registered, the sale would not have taken place.

In March 2013, Dr Weddell passed away, by which point the property was worth £875,000.

When the action against the solicitors was raised in June 2017, the property was worth £1,250,000.

It was agreed that the loss to the son was the value of the property, but the question was: What was the appropriate date for calculating the value of the property?

The Defendants argued that the usual rule should apply (i.e. the date the loss crystallised). That was said to be when the property was sold in October 2010, at which point the property was lost to the son.

The son argued that the usual rule should be departed from and that loss should be assessed at the date of trial on the basis that, but for the negligence, he would now own a property worth £1.25M.

In rejecting both dates, the court opted to value the property at the date of Dr Weddell's death.

The court explained that where "*it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong*" the usual rule should be departed from.

Had the date of sale been used, the damages would have failed to compensate the Claimant for the rise in the property's value between the date of sale and date of death. Equally, had the property fallen in value between those dates, an assessment at the date of sale would have overcompensated the Claimant.

Assessing Loss - When it pays to break the rules cont'd.

In addition, whilst the Claimant would have been entitled to the property in 2013 (had it not been sold), he was not entitled to the proceeds of a wrongful sale which took place in 2010. Thus, it was in 2013 that the claimant did not receive what he ought to have, had the negligence not occurred.

The court explained that the son "*was entitled to receive the Property at the date of the death of [Dr Weddell] and assessing loss by reference to its value at that date adequately compensates the [son] for the loss he suffered as a result of the defendants' negligence.*"

The case underlines the position that, in assessing loss, the courts will depart from the normal rules in order to properly compensate a party when necessary.

Above all, remember that sometimes rules are there to be broken.

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