A Case Study on Professional Negligence involving Actuaries and Pension Administrators

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1 Introduction

1.1 Professional negligence is a complex and challenging area of the law. As professionals, we are all alert to the need to perform our jobs to the highest standard. However, there are always going to be occasions where mistakes are made and this can result in professionals being held liable for potentially significant losses which can arise from their errors.

1.2 Negligence is an area of the law which is relevant to all professionals and the number of cases going to court has been increasing in recent years. This is due to a variety of factors including an increased awareness by clients of the potential for negligence claims in recouping losses and the growing complexity of the work professionals do, making it more difficult to get advice right on each occasion.

2 What is professional negligence?

2.1 Professional negligence occurs where a professional fails to perform his responsibilities to the required standard. Establishing the boundaries of what duty is owed by the professional, who that duty is owed to and what losses the professional can be held liable for is challenging and much will depend on the particular facts of the case.

2.2 Broadly, the legal tests which must be satisfied for a successful professional negligence case are as follows:-

2.2.1 **Is a duty of care owed by the professional to the claimant and what is the scope of that duty?**

(a) For professionals, such as actuaries and administrators, there will usually be a duty to act with a reasonable standard of care under both contract law and the law of tort. The scope of the professional's duty of care will depend on the specific facts of the case, but key factors in determining the duty will include:-

(i) the wording of the engagement letter and any other contract terms;

(ii) whether the professional has made any specific claims to a particular level of expertise;

(iii) the purpose for which the professional is providing their advice or carrying out their work;

(iv) the level of knowledge or experience of the claimant.

(b) It is possible for a professional to owe a duty of care to third parties who are not in a contractual relationship with the professional, for example, an administrator may owe a duty of care to individual members of a pension scheme, even though the administrator's contract is with the scheme trustees.

(c) If there are any statutory standards for the professional or publications by their professional body setting out what is expected of them in their role, the court will take this into account in determining the scope of the professional's duty of care. The court will imply such terms into the contract and potentially other implied terms.

2.2.2 **Has the professional breached their duty of care?**

(a) The professional will be judged on an objective basis. The courts will need to determine (often via expert witness evidence) what could reasonably have been expected of a similar professional acting in the same circumstances.

(b) The professional may be held to an even higher standard of care if they have indicated to the claimant that they have a particular level of expertise.

2.2.3 **Did the breach of duty by the professional cause the loss that is being claimed for?**

(a) A professional negligence claim can only succeed if the claimant can show that the breach of duty by the professional caused the loss that is being claimed for. If the loss would have occurred anyway, regardless of the negligent action of the professional in question, the claim will fail (known as the "but for" test).

2.2.4 **Damages**

(a) The level of damages which can be claimed for will depend on the type of negligence claim that has been brought. Generally, if there is a claim for negligent breach of contract, the claimant will be entitled to be put in the position they would have been in had the contract been fulfilled. Where the claimant is bringing a negligence claim under the law of tort, they are generally entitled to be put back in the position as if the negligence had never occurred.

(b) The losses that can be claimed for must generally be foreseeable losses and can be reduced by the courts where it can be shown that the claimant contributed to the losses through their own negligent actions (known as contributory negligence).

(c) The contract terms may be relevant in considering the level of losses as the contract, for example, may exclude liability for loss of profit and may include a cap on liability. The enforceability of such clauses will need to be considered.

(d) The claimant cannot recover damages for any part of the loss that they could have avoided by taking reasonable steps (known as the duty to mitigate).

2.3 The courts will also need to decide whether the claimant has brought their negligence claim within the applicable limitation period. This is generally six years from the breach of contract or six years from the damage occurring in a tort claim, but the time period can be extended where the claimant did not know, and could not reasonably have been expected to know, about the negligence and the damage that had been caused (referred to as "latent damage").

3 Case Study

3.1 We have devised a case study to take you through some of the issues which could arise in a professional negligence claim against an actuary and an administrator of a pension scheme. Please refer to the slides accompanying this talk for an outline of the case study facts.

Please do not rely on this document or the slides accompanying this presentation in place of legal advice.