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Horizon Mediation Scheme Non-Pecuniary Losses

Further to your recent instructions please find the information in relation to the types of non-financial losses which may be claimed in the Horizon mediation scheme.

The main heads of loss which potentially could be claimed under non-pecuniary losses are the following:

- Stress
- Inconvenience
- Disappointment
- Distress
- Damage to Reputation

The scope and recovery of each loss is dependent on the underlying cause of action.

1. Contract Claims

In contract claims it is established that subject to any express contractual provision, breach of a commercial contract does not give rise to an entitlement to damages for inconvenience, distress or disappointment.

In cases concerning consumer contracts, contractual claims for damages for distress, anxiety, disappointment and inconvenience have been successful, where the object of the contract was the provision of a non-monetary benefit.

As a result, it is very unlikely that a contract claim by a SPMR would be brought or succeed based on a non-monetary claim.

Quantum

In relation to quantum, a recent and successful case awarded damages of £10,000 (*Farley v Skinnners* [2002] 2 A.C. 732).

The main question examined by the House of Lords was could a buyer, who employed a surveyor to investigate whether a property in the countryside was seriously affected by aircraft noise, may in principle recover non-pecuniary damages against the surveyor for the latter's negligent failure to discover that the property was so affected.

The claimant, Mr Farley, not knowing at the time of the defect of which he should have been informed, incurred vast expense in altering the house to get it to a much higher standard (spending close to £100,000). The judge concluded that the appropriate amount of damages should, in his opinion, be modest. The degree of discomfort experienced by Mr Farley, although "real", was not very great. The judge even mentioned that he thought £10,000 may have been on the high side.

Taking this case example in the context of Horizon, a successful claim under this head of loss would result in damages of low thousands or even hundreds.

2. Tort

Negligence

In negligence, general damages must relate to a recognisable physical or psychological injury, before damages are awarded.

Under this type of loss, each case would need to be assessed on case by case approach to accurately assess the likelihood of successfully bringing a negligence case against POL and essentially examining whether a certain type of damage satisfied both that:



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- Loss was reasonably foreseeable and not the result of some intervening cause
- The damage fell within the scope (or extent) of the defendant's duty of care (this is very unlikely)

In relation to quantum, it is extremely difficult to assess the range of applicable damages as each case turns upon its own specific facts and there is little guidance on how losses are calculated. However it is highly unlikely that negligent damages could succeed against POL under this head of loss.

3. Defamation

The only relevant exception under the tort category of potential claims is defamation. As of 1 April 2013, general damages in tort have increased by 10% in cases involving pain, suffering and loss of amenity in respect of personal injury, nuisance, defamation, and all other torts which cause suffering inconvenience or distress to individuals. Again, this type of loss would have to be assessed on a case by case basis.

It is recognised in a number of judgements that today the ceiling for compensatory damages in defamation is in the region of £256,000. (*KC v MGN Ltd [2012] EWHC 483, QB para 26*). The damages ceiling must be examined in context therefore, any damages awarded against POL will be adjusted appropriately to the profile of the successful claimant, in all likelihood reducing the amount considerably.

4. Data Protection Act ("DPA")

Under s13 of the DPA, a data subject (ie. an SPMR) may bring a civil claim against POL for breach of the DPA. The SPMR can recover compensation for any financial loss and, potentially, for distress and inconvenience. There is little guidance on how these losses are assessed and no statutory controls on their value (ie. there is no duty to mitigate loss and no limit on recovering unforeseeable losses).

5. Malicious Prosecution and Wrongful Conviction

The tort of malicious prosecution results from the malicious institution of legal proceedings against a person. This civil action only applies where an on-going prosecution is abandoned or results in an acquittal.

Basic damages will depend upon the circumstances and degree of harm suffered by the SPMR (essentially measured in terms of the length of time and seriousness of the prosecution). Typical harms include loss of reputation and credit, humiliation, mental suffering and discomfort. Previous convictions are relevant to this figure in that a person with several prior convictions is unlikely to be as distressed by the prosecution as someone new to the court system.

Court guidance suggests that the figure should start at about £2,000. For prosecutions continuing for up to 2 years and the case coming before the Crown Court, an award of about £10,000 could be appropriate.

If the SPMR suffered an **economic loss** directly related to the original action, he can also recover the amount lost. This amount includes fees for counsel and court costs incurred by the SPMR in defending the original case.

Aggravated damages may be appropriate where there are aggravating features which would result in the SPMR not receiving appropriate compensation if simply the basic award was relied upon. Such features can include humiliating circumstances at the time of arrest.

Exemplary damages may be applied if POL's conduct has been particularly poor and has included oppressive or arbitrary behaviour which deserves the exceptional remedy of exemplary damages and where the award of basic and aggravated circumstances are deemed an inadequate punishment for POL. Where appropriate they are unlikely to be less than £5,000 but conduct must be particularly deserving of condemnation for an award of £25,000 to be given.

Special damages may be awarded for quantifiable losses suffered by the claimants, for example, for a loss of earnings due to the prosecution.

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6. Aggravated Damages in General

Aggravated damages provide compensation for mental distress or injury to feelings caused by the manner or motive with which a tort was committed, or by the defendant's conduct subsequent to the wrong. Such conduct or motive aggravates the injury done to the claimant and therefore warrants a greater or additional compensatory sum.

Such damages are not punitive and are not generally available in contract claims. In *Abbey Forwarding Ltd (in Liquidation) and another v Richard John Hone and others* [2012] EWCH 3525 (Ch) the court held that there is no general bar to an award for emotional distress in the context of a commercial dispute, but recovery would depend on the facts.

As aggravated damages are generally unavailable in contract claims and as discussed above under the other heads of loss in tort there is a minimal chance of successful claims being brought, it is highly unlikely these damages would be awarded. In relation to quantum, it is again extremely difficult to accurately assess the potential amount of damages arising from a successful claim.

7. "Exemplary" or "Punitive" damages

This category of damages is awarded in excess of the claimant's loss and is intended to punish the defendant. Punitive damages are awarded occasionally in tort cases to mark the court's disapproval of the defendant's conduct (in defamation actions) and they have been awarded in a commercial property case for failure to comply with statutory duty. Punitive damages are not awarded for breach of contract, as damages in contract are awarded on a compensatory basis.

Under present law, punitive damages cannot be awarded unless the wrongdoer's conduct falls into one or other of two limited categories:

- 1) Abuse of power by servants of government
- 2) Conduct which was motivated by the pursuit of profits

As a result of the above categories, it is highly unlikely that any exemplary/punitive damages would be brought or awarded.