



# DRUCES<sup>LLP</sup>

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## **Litigation & Dispute Resolution Briefing Note: Professional negligence in the conduct of a property transaction**

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### **Relevant to**

Property owners, legal practitioners

### **Summary**

In the recent case of *Herrmann and Another v Withers LLP [2012] EWHC 1492 (Ch)* the Court held that a firm of solicitors had wrongly advised their clients that the high value property they were purchasing had communal garden access rights. This advice was negligent and the solicitors were liable to their clients in damages.

### **Facts**

In 2008 Mr and Mrs Herrmann, (“the Claimants”), instructed Withers LLP, (“the Defendants”), to act for them in the purchase of 37 Ovington Square, a property in the Knightsbridge area of London, at a cost of £6.8 million. During the course of their instruction and prior to completion the Defendants advised the Claimants that the property had the benefit of a statutory right to use the nearby garden in Ovington Square (“the Garden”) by virtue of the Kensington Improvement Act 1851 (“the 1851 Act”).

Following completion the Claimants sought to exercise the right to use the Garden but were challenged by the Gardens Committee (“the Committee”) who asserted that they had no right to do so. The Committee offered the Claimants the opportunity to purchase a 50 year licence to use the Garden. The Claimants refused this offer and in 2010 they commenced proceedings against the Committee and the Royal Borough of Kensington and Chelsea to seek to establish that they had a statutory right to use the Garden (“the 2010 action”). Sir William Blackburne held that the 1851 Act did not apply to 37 Ovington Square since the property did not directly front on to the Garden.

The Claimants then commenced proceedings against the Defendants in negligence, seeking as damages the reduction in the value of the property as well as the costs of the failed 2010 action.

### **The Court's Decision**

The Court found that although the Defendants' construction of the 1851 Act was not wrong per se, the Defendants ought to have reasonably considered the possibility that there was an alternative construction which would not have given the Claimants a statutory right. Mr Justice Newey said:

*"All in all, I have concluded that it was negligent of Withers to advise in unequivocal terms that the Herrmanns would have 'the right to enter and use the garden at Ovington Square.'"*

The Court also found that it was unlikely that the Claimants would have proceeded with the purchase if they had known that the property did not come with the right to access the Garden.

Having found that the advice of the Defendants was negligent, the Court went on to consider what the Claimants should be awarded in damages. The Court awarded the Claimants a sum representing the cost they would have incurred had they chosen to obtain a licence to use the Garden (£25,000, being the cost of the licence itself, and £10,000, representing the legal costs the Claimants would likely have incurred in obtaining the licence) and a sum representing the difference between the value of the property with a statutory right and its value with a licence (£65,000).

The Court held that the Claimants had unreasonably failed to mitigate their losses by refusing to accept the offer of a licence. Had the Claimants obtained a 50 year licence, they would have been able to use the Garden and could also have sold the property with the benefit of access to the Garden. The Claimants argued that one of the reasons for rejecting the offer of a licence was that they were optimistic that they would be successful in establishing that the property had the benefit of rights under the 1851 Act. However, the Court considered that the Claimants were not reasonably entitled to regard it as a foregone conclusion and expected the Claimants to take reasonable steps to avoid loss where possible.

The Claimants nevertheless sought to recover from the Defendants the costs they incurred in the 2010 action. With regards to those costs, the Court ordered that the Defendants pay to the Claimants a sum representing those costs, to be determined on an indemnity basis (which allows costs except where unreasonable in amount or unreasonably incurred) and not on the standard basis (which allows costs reasonably incurred and reasonable in amount), which were incurred by the Claimants up to the date when the licence should have been purchased.

### **Comment**

The case of *Herrmann and Another v Withers LLP* provides useful guidance on the scope of a solicitor's duty to their client, a claimant's duty to mitigate their loss and the assessment of damages in professional negligence cases.

### **Druces LLP**

This note does not constitute legal advice but is intended as general guidance only. It is based on the law in force in May 2012. If you would like further information please contact Marie-Louise King at [m.king@druces.com](mailto:m.king@druces.com) or on 020 7216 5562.