Hayes & Anor v Dodd

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
7 July 1988

1984 H. No. 3274

Court of Appeal (Civil Division)

1988 WL 624018

Before: Lord Justice Purchas Lord Justice Staughton Sir George Waller

Thursday 7th July 1988.

On Appeal from the High Court of Justice Queen's Bench Division (Mr Justice Hirst)

Representation

Mr David Neuberger, Q.C. (instructed by Messrs. Ince & Company) appeared on behalf of the Appellant.
Mr Q. Iwi (instructed by Messrs. Leigh Williams , Solicitors, Bromley) appeared on behalf of the Respondents.

Judgment

Sir George Waller:

This is an appeal from a decision of Hirst J. The appeal is against the quantum of damage, namely £105,748.81, including interest. The facts are fully set out in the judgment of the learned Judge. I will briefly summarise them.

The plaintiffs (respondents to this appeal) are husband and wife who ran a motor repair business in London. They decided to expand and to buy a motor repair business in Tenterden. The property on offer consisted of a leasehold workshop and open yard, together with a freehold maisonette on the main road. The means of access to the workship were two-fold, namely a narrow and inconvenient tunnel from the street, and a rear access at the back. The plaintiffs did not need the maisonette, but it had to be included in the sale. During the pre-contract negotiations, the plaintiffs and their solicitors, the defendants, received copies of two letters showing that the owners of the land over which the rear access ran was asserting that there was no right of way. This was a very serious matter, but about a week later the defendants informed the plaintiffs that the right of way was secure. This right of way was critical to the whole venture, because the narrow tunnel could only be used for small cars and for them this was inconvenient because the road had to be a two-way road. Within two or three days of completion the adjoining owner blocked the right of way, and within weeks the plaintiffs had only the narrow tunnel.

This was disastrous to the plaintiffs' plans. They tried to run the business; they put it up for sale, and after twelve months they gave up trying to run the business. Having placed the whole business on the market prior to closure, they also sought to sell the maisonette separately, and this remained on the market until it was eventually sold in May 1986 for £38,000, after a

number of intervening bids had fallen through. They a also tried to assign the lease of the workshop, but were unable to do so. Finally, in 1986, they had to sell their London business because of pressure from the bank. This reduced the size of their loan.

In considering his award of damages, the learned Judge first quoted the following passage from the judgment of Bingham L.J. in *County Personnel (Employment Agency) Ltd v. Pulver (1987) 1 WLR, 916* at p. 925, as follows:

> "The overriding rule was stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 A.C. 25 , 39, and has been repeated on countless occasions since: the measure of damages is 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation or reparation'.
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> "As Megaw L.J. added in *Dodd Properties (Kent) Ltd. v. Canterbury City Council (1980) 1 WLR 433* , 451: 'In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn's fundamental principle. If it appears not to conform, the judge should examine the question again to see whether the particular case falls within one of the exceptions of which Lord Blackburn gave examples, or whether he is obliged by some binding authority to arrive at a result which is inconsistent with the fundamental principle'."

The Judge then awarded damages on the basis of capital expenditure thrown away in the purchase of the business, expenses thrown away and damages for anguish and vexation.

When the plaintiffs bought the business and property, the price was £65,000. After that sale had been agreed the vendors apportioned the £65,000 as to £55,000 for the maisonette, £1,000 for the lease of workship and surrounding area, £1 for goodwill and £8,999 for workshop furniture and fittings. There was before us an argument about the reapportionment and its effect on damage calculation. I do not propose to go into the arguments, save to say that the apportionment is clearly artificial and everybody (and especially the defendant solicitors) would know this, and I therefore agree with the learned Judge that his re-apportionment can be accepted for all purposes.

Lease and Goodwill: The figure was £5,000 for the lease and £5,000 for the goodwill. This left £45,000 for the maisonette, which it was agreed was worth about £25,000.

Rent: The defendants argue that the Judge should not have awarded all the rent claimed because the plaintiffs should have surrendered the lease at a very much earlier date. We were referred to the correspondence and, in my opinion, the plaintiffs behaved reasonably at all times over possible action. At one stage it appeared wiser to keep everything together. Then there was a time when the landlord would not accept surrender without all the arrears of rent being paid. I agree with the Judge that "rent down to the date of the writ is recoverable".

Interest: The defendants argued that it was unforseeable that the maisonette should remain unsold for so long, and that much of the interest was therefore too remote. It is clear from the Judge's judgment that he did not accept this submission. As I have already indicated, when dealing with the rent, the plaintiffs were acting reasonably.

The Judge awarded the plaintiffs 80 per cent. of the interest because of the true value of the maisonette at the time of sale, and the defendants argue that the proportion should have been much less. The Judge was making a rough estimate which should not readily be criticised. However, the defendants submit that it was wholly wrong. In my opinion the Judge's assessment is fair. In considering how to apportion the original price of £65,000, he has deducted the £10,000 paid by the plaintiffs from the over-payment for the maisonette, leaving £65,000. £10,000 of that is the balance of the over-payment, which leaves £45,000 as the amount for which the defendants are responsible. £45,000 is near enough 80 per cent. of £55,000.

Rates and Insurance: I agree with the Judge that these were recoverable. I also agree with the Judge that the redundancy payments were not too remote. Similarly with travelling expenses, conveyancing costs and life insurance.

Plant: It was ultimately agreed before us that this loss of £7,561 was due. However, I agree with Staughton L.J. that interest on this sum was not due.

Sale price of the maisonette: The Judge gave no credit for the increase of £13,000 in the price for the maisonette when it was sold. In this I think that he was in error. On the other hand the plaintiffs were not allowed 20 percent of the interest charges because of the over-payment. In these circumstances they should not have to give credit for the whole £13,000. There are various ways of calculating the figure, and I am prepared to accept that adopted by my Lords.

Mental distress: I have considerable sympathy with the Judge's award, because the plaintiffs, a married couple in business together, clearly suffered great anxiety and distress. However, I agree with Staughton L.J. that this is not a case in which the important principle of deciding whether or not damages for anxiety should be awarded in what is really a purely commercial contract. Accordingly, I would disallow this part of the claim.

It follows from what I have said above that I agree with the summary of damages set out in the judgment of Staughton L.J., and would allow the appeal to that extent.

Lord Justice Staughton:

(A) Basis of assessment

The first question in this appeal relates to the basis on which damages should be assessed. Like Hirst J. I start with the principle stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 A.C. 25 , at page 39:

> “You should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

One must therefore ascertain the actual situation of Mr and Mrs Hayes and compare it with their situation if the breach of contract had not occurred.

What then was the breach of contract? It was not the breach of any warranty that there was a right of way; the solicitors gave no such warranty. This is an important point: see *Perry v. Sidney Phillips & Son (1982) 1 WLR 1297* . The breach was of the solicitors' promise to use reasonable skill and care in advising their clients. If they had done that, they would have told Mr and Mrs Hayes that there was no right of way; and it is clear that, on the receipt of such advice, Mr and Mrs Hayes would have decided not to enter into the transaction at all. They would have bought no property, spent no money, and borrowed none from the bank.

That at first sight is the situation which one should compare with the actual financial state of Mr and Mrs Hayes. I will call this the "no-transaction method". There are, however, authorities which show that instead one takes for the first element in the comparison the situation which the plaintiff would have been in if the transaction had gone through in accordance with his legitimate expectations. This I call the "successful transaction method". Thus, in Perry's case, the plaintiff recovered from negligent surveyors the difference between the value of the house at the date when he bought it if it had not been defective, and its actual value at that date. However, it appears to have been found, or assumed, in that case that the plaintiff would still have bought the house if he had been given correct advice as to its condition, albeit at a lower price. It was not a case where he would never have entered into the transaction at all.

In *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co. (1987) 1 WLR 916* , the plaintiffs took an underlease of property on terms which included an unattractive rent review clause, on the advice of the defendants which was held to be neligent. Bingham L.J. (at p. 925) after stating the general rule in a passage which has already been cited by Sir George Waller, continued:

> "(2) On the authorities as they stand the diminution in value rule appears almost always, if not always, to be appropriate where property is acquired following negligent advice by surveyors. Such cases as *Philips v. Ward (1956) 1 W.L.R., 471; Pilkington v. Wood (1953) Ch. 770* ; *Ford v. White & Co. (1964) 1 W.L.R. 885* and *Perry v. Sidney Philips & Son (1982) 1 W.L.R. 1297* , lay down that rule and illustrate its application in cases involving both surveyors and solicitors.
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> "(3) That is not, however, an invariable approach, at least in claims against solicitors, and should not be mechanically applied in circumstances where it may appear inappropriate. In *Simple Simon Catering Ltd. v. Binstock Miller & Co. (1973) 228 E.G. 527 the Court of Appeal* favoured a more general assessment, taking account of the 'general expectation of loss'. In other cases the cost of repair or reinstatement may provide the appropriate measure: the *Dodd Properties case (1980) 1 W.L.R. 433* , 456 per Donaldson L.J. In other cases the measure of damage may properly include the cost of making good the error of a negligence adviser: examples are found in Braid v. W.L. Highway & Sons (1964) 191 E.G. 433 , and *G. + K. Ladenbau (U.K.) Ltd. v. Crawley & de Reya (1978) 1 W.L.R. 266* .
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> "(4) While the general rule undoubtedly is that damages for tort or breach of contract are assessed as at the date of the breach (see, for example, *Miliangos v. George Frank (Textiles) Ltd. (1976) A.C. 443* , 468 per Lord Wilberforce), this rule also should not be mechanistically applied in circumstances

> where assessment at another date may more accurately reflect the overriding compensatory rule. The *Dodd Properties case (1980) 1 W.L.R. 433* , both affirms this principle and illustrates its application".

The court rejected diminution in value as inappropriate in that case and remitted the damages for assessment by a Chancery Master. The basis of assessment seems to have been the no-transaction method, since the plaintiffs were to recover what they had paid to rid themselves of the unattractive underlease, with the possible addition of goodwill which they might have established if they had set up in business elsewhere.

The difference between the two methods is unlikely to be of importance in a case which concerns some commodity that is readily saleable, such as peas or beans, and if there is no difficulty or delay in ascertaining that a breach has occurred. A plaintiff who has agreed to buy beans at the current market price and has received a quantity which is defective can sell them forthwith and realise their actual value. If he intended to perform a profitable subcontract, he can buy other beans in the market for that purpose. In such a case it makes no difference whether damages are assessed on the no-transaction method, so that he recovers the price paid less the sum realised on disposition of the defective beans, or on the successful-transaction method, which gives him the difference between the value of sound beans and the value of defective beans.

However, this case is not concerned with a readily saleable commodity; it took Mr and Mrs Hayes nearly five years from the date of their purchase to dispose of the maisonette; and another year expired before they were free from the obligations imposed by the lease of the workshop and yard. During all that period they were incurring expenses, such as rent and other items, together with interest on the money which they had borrowed from the bank. Furthermore, they did not receive, until the first year had almost expired, any acknowledgment by the defendants that there was in fact no right of way; that only happened on 6th July 1983, whereas they had completed their purchase on 28th July 1982, and the right of way had first been challenged two days later.

I am quite satisfied that Hirst J. was entitled to award damages in this case on the no-transaction basis, and that he was right to do so. Indeed it may well be that Mr and Mrs Hayes were, as he held, entitled to elect between that method and the successful-transaction method; but I need not express any concluded view on that. So they should recover all the money which they spent, less anything which they subsequently recovered, provided always that they acted reasonably in mitigating their loss. But they were quite properly denied any sum for the profit which they would have made if they had operated their business successfully.

(B) Mitigation

At first sight it is surprising that, although Mr and Mrs Hayes eventually received an admission that there was no right of way on 6th July 1983 (coupled with a denial of negligence by the defendants), they did not sell the maisonette until June 1986, and were not free of the obligations in the lease of the workshop and yard until 8th May 1987. They took the view, on advice, that they would do better to sell both properties together. Only when that proved impracticable did they sell the maisonette separately, and that after several prospective offers had fallen through. Having considered the correspondence, I agree with Sir George Waller and the trial Judge that they did not act unreasonably. With hindsight they might have agreed to a surrender of the lease at an earlier date, so that rent did not continue to accrue; but they were placed in a difficult situation through the fault of the defendants, and I would not criticise them for failing to adopt that course.

Consequently Mr and Mrs Hayes were entitled to the sums which the Judge awarded under the following heads:

Rent	…	£14,875
Rates	…	£2,200
Insurance	…	1,125
Travel	…	1,400

together with interest. The defendants' argument for abbreviating interest on the money borrowed from the bank also fails, although there is another point on that item which I consider later.

(C) Apportionment of purchase price

The global figure of £65,000 which Mr and Mrs Hayes paid was apportioned at the suggestion of the vendors' solicitors as follows:

Maisonette	…	£55,000
Lease of workshop and yard	…	1,000
Goodwill	…	1
Plant	…	8,999

I agree with the Judge and Sir George Waller that this apportionment was not conclusive as to the amount in fact paid for individual items. Naturally the Court should not condone any attempt by the vendors to deceive the Inland Revenue — not that there was any evidence of such an attempt. And it may be that Mr and Mrs Hayes would be bound, in any discussion of their own tax affairs, to abide by the figures which they had agreed to. But I see no reason why they should be bound by those figures when seeking to recover damages from the defendants.

Why, one may ask, is any apportionment necessary? If Mr and Mrs Hayes are entitled to recover all they have spent less any credits received, why does it matter how the £65,000 was divided? The answer is because the Judge, no doubt at the suggestion of one or both of the parties, left the capital cost of the maisonette out of account. There is no complaint about his decision in that respect, subject to one point which I consider later.

The Judge's revised apportionment was as follows:

Maisonette	…	£45,000
Lease of workshop and Yard	…	5,000
Goodwill	…	5,000
Plant	…	9,000

(£1,000 appears to be missing without explanation, but nothing turns on that). The Judge found, and it is now accepted, that Mr and Mrs Hayes paid too much, since the maisonette was worth only £25,000 at the time. That will have an effect on interest.

At this stage I can deal with the lease and the good will. Neither in fact had any value, and neither could be resold to produce any credit; indeed, the lease had a negative value, since it imposed a liability to pay substantial sums in rent. So Mr and Mrs Hayes can recover the total of £10,000 which they spent on those two items. The negative value of the lease is compensated by the award, which I have already upheld, of a sum equal to the rent paid.

The plant was sold in October 1983 at a loss of £7,561. At one stage the defendants maintained that there was no evidence of the actual value of the plant at the date of the purchase. After Counsel had listened to the evidence of Mr Hayes on the tape recorder, that submission was withdrawn.

(D) Interest

Mr and Mrs Hayes financed the initial purchase (i) by borrowing £55,000 from the bank, and (ii) with £10,000 of their own money. Interest accrued on the bank loan and was added to the principal debt from time to time.

Hirst J. allowed bank interest as part of the claim, in the sum of £32,000. He treated the cost of the lease and the goodwill, which he found to have been £10,000 for those two items, as financed with the plaintiffs' own money, and awarded interest separately on that sum. He also awarded interest on other items of the claim, except the damages for mental distress.

Two objections have been taken to the Judge's conclusions under this head. The first relates to his treatment of the bank interest. It was said that the overpayment which Mr and Mrs Hayes made of £20,000, either for the maisonette or for the package as a whole, should not be visited on the defendants; the interest on that part of the purchase price could not be said to have been caused by their breach of contract. The Judge accepted that argument to some extent. He allowed only 80 per cent. of the interest charged by the bank, and disallowed 20 per cent.

In fact the £20,000 formed 36 per cent. of the sum of £55,000 which was borrowed from the bank. The Judge recognised thathe was not adopting a strictly mathematical proportion. He said:

> “I do not think it is appropriate to divide the various items into watertight compartments when we are concerned with a package deal. In such a situation I consider that the plaintiffs were entitled to view the business as a whole and should not be criticised if they did not make nice calculations of each individual component. However, I think that some allowance must be made for such very substantial overpayment.”

In my judgment the Judge was entitled to adopt that approach. Mr and Mrs Hayes did in fact become liable for all the interest charged by the bank. But for the defendants' negligence they would not have had to pay any of it. Because some of it was interest on the amount which they paid in excess of the value of what they were buying, even if there was a right of way, the Judge thought it right to make a deduction, but not the full proportion of the overpayment. It was somewhat like a deduction for contributory negligence — although I do not for one moment enter upon the topic of contributory negligence in the law of contract. The assessment of damages, and more particularly of interest as damages, is not always an exact science. I would not alter the Judge's treatment of this item, and so I allow the sum of £32,000 for bank interest.

The second point is that there is duplication as to one item in the interest calculations. The revenue expenses such as rent, etc., were not paid either out of the £55,000 bank loan or out of the £10,000 originally invested in the project by Mr and Mrs Hayes. So presumably they came out of their pockets from time to time. The same is true of other smaller items in the claim, except for the loss on the sale of the plant. Purchase of the plant had been financed from the bank loan. It was therefore double counting to award, as the Judge did, both interest on the loss on the disposal of the plant (£7,561) and interest on the bank loan. I would disallow the amount awarded as interest on £7,561.

(E) Sale price of the maisonette

This came to £38,000, when it was eventually received in June 1986. The defendants say that they should have credit for the increase over its value of £25,000 when it was bought as part of the package. The Judge said this about it:

> "As regards future bank interest, fortunately the amount awarded in this judgment will be sufficient to pay off the loan and so I make no award for future bank interest. This makes it unnecessary to consider the defendants' alternative claim for the profits, if any, on sale of the maisonette".

I am afraid I do not follow the logic of the second sentence; it may be based simply on the way that the defendants' Counsel argued the case.

Before us it was said for the defendants that the Judge had excluded the maisonette entirely from his calculations; about that Mr and Mrs Hayes do not complain; nor could they do so, since the capital sum paid for the maisonette exceeded what it was worth, by a considerable amount.

That argument is sound so far as it goes. But the Judge has not excluded the maisonette entirely. He has allowed interest on the bank loan, which was used in part to fund the purchase of the maisonette. The defendants should therefore have some credit for the increase in value which resulted from that purchase, and from the retention of the maisonette for four years thereafter.

I find it more difficult to decide how much of the increase in value should go to the credit of the defendants. Again, this may have to be a rough and ready calculation. In the end I am content to accept a suggestion made by Purchas L.J. in the course of the argument, that as the defendants are now required to fund 80 per cent. of the bank loan, they should have credit for 80 per cent. of the increase in value. That is 80 × (£38,000 − £25,000)÷100, or £10,400

(F) Sundry items

The only other item allowed by the Judge which was challenged on grounds of any substance was £500 for term life insurance. That was required as security for the bank loan. Since the basis of assessment is a comparison of what Mr and Mrs Hayes spent with what they received, I would allow this item. If, unfortunately, a claim on the policy had arisen, it may be that the sum realised would have been a credit to be deducted from the damages payable by the defendants. I say nothing about that point; it does not arise in this case.

(G) Mental distress

Hirst J. awarded £1,500 to each of the plaintiffs under this head. There can be no doubt, and it was accepted in this Court, that each of them suffered vexation and anguish over the years to a serious extent, for which the sum awarded was but modest compensation. There is, however, an important question of principle involved.

For my part I would have wished for a rather more elaborate argument than we received on this point, before deciding it, since the law seems to be in some doubt. But I would be most reluctant to impose on Mr and Mrs Hayes, on top of their other misfortunes, two or three days of scholarly argument as to whether and in what circumstances damages can be awarded for mental distress consequent upon breach of contract in a business transaction, possibly at their expense, when the sum involved is only £3,000 or roughly 3 per cent. of their total claim. The difficulty is that almost any other case where a plaintiff claims to have suffered mental distress would present a similar problem, that the individual plaintiff ought not to be expected to bear the burden and perhaps also the cost of an elaborate argument. If, as I think, the law needs clarification, it is to be hoped that a case can be found where that will be provided by the House of Lords. Or it may be that the Law Commission can supply it.

Like the Judge, I consider that the English courts should be wary of adopting what he called “the United States practice of huge awards”. Damages awarded for negligence or want of skill, whether against professional men or anyone else, must provide fair compensation, but no more than that. And I would not view with enthusiasm the prospect that every shipowner in the Commercial Court, having successfully claimed for unpaid freight or demurrage, would be able to add a claim for mental distress suffered while he was waiting for his money.

In a sense, the wrong done to Mr and Mrs Hayes in this action, for which they seek compensation under this head, lay in the defendants' failure to admit liability at an early stage. On 6th July 1983 the defendants acknowledged that there was no right of way, but denied negligence. Had they on that very day admitted liability and tendered a sum on account of damages, or offered interim reparation in some other form, the anxiety of Mr and Mrs Hayes, and their financial problems, could have been very largely relieved. But liability was not admitted until January 1987. I believe that in one or more American States damages are awarded for wrongfully defending an action. But there is no such remedy in this country so far as I am aware.

In Perry's case, damages were awarded for the distress, worry, inconvenience and trouble which the plaintiff had auffered while living in the house he bought, owing to the defects which his surveyor had overlooked. Lord Denning, M.R., at p. 1302, considered that these consequences were reasonably foreseeable. Kerr L.J. stated a narrower test, at page 1307:

> “So far as the question of damages for vexation and inconvenience is concerned, it should be noted that the judge has awarded these not for the tension or frustration of a person who is involved in a legal dispute in which the other party refuses to meet its liabilities. If he had done so, it would have been wrong, because such aggravation is experienced by almost all litigants. He has awarded these damages because of the physical consequences of the breach which were all foreseeable at the time. The fact that in such cases damages under this head may be recoverable — if they have been suffered but not otherwise — is supported by the decision of this court in Hutchinson v. Harris (1978) 10 B.L.R. 19 .”

I would emphasise the reference to physical consequences of the breach.

I am not convinced that it is enough to ask whether mental distress was reasonably foreseeable as a consequence, or even whether it should reasonably have been contemplated as not unlikely to result from a breach of contract. It seems to me that damages for mental distress in contract are, as a matter of policy, limited to certain classes of case. I would broadly follow the classification provided by Dillon L.J. in *Bliss v. South-East Thames Regional Health Authority (1987) ICR 700* at p. 718:

> "Where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress".

It may be that the class is somewhat wider than that. But it should not, in my judgment, include any case where the object of the contract was not comfort or pleasure, or the relief of discomfort, but simply carrying on a commercial activity with a view to profit. So I would disallow the item of damages for anguish and vexation.

(H) Summary

After the minor alterations which should in my view be made, the table of damages awarded would read as follows:

	Damages	**Interest**
1. Lease of workship and yard	£5,000	£3,000
2. Rent	14,875	3,832
3. Rates	2,200	1,100
4. Insurance	1,125	440
5. Bank interest	32,000	—
6. Redundancy	329.81	200
7. Goodwill	5,000	3,000
8. Travel	1,400	750
9. Loss on disposal of plant	7,561	—
10. Conveyancing costs	4,040	2,400
11. Life insurance	500	150
12. Various	9,360	4,185
	£83,390.81	£19,057

The totals cannot be reconciled with those in the table provided to us at the hearing, simply because the latter appear to have been added up incorrectly. But as I haveonly noticed this on doing my own addition, it may be that Counsel can offer some

other explanation. Subject to that, and to a possible point about the costs incurred in selling the maisonette, I would assess the damages as follows:

	£83,390.81
	+ 19,057.00
	£102,447.81
less 80 per cent of sale price of maisonette:	10,400.00
	£92,047.81

That figure should be substituted for the total sum of £110,000 awarded by the Judge, which included £3,000 for mental distress. I would allow the appeal to that extent.

Lord Justice Purchas:

The circumstances against which this appeal comes before the Court have been fully set out in the judgment of Sir George Waller and need not be repeated here. Liability has been admitted, albeit at a late stage, and so the issues raised on this appeal relate solely to the assessment of various heads of damage for which Hirst J. awarded compensation in the sum of £105,748.81p, including interest. As a result of the breach of the appellants, the respondents bought the maisonette and workshop which they in fact did buy in July 1982. The respondents were experienced and successful proprietors of a small garage business. It is inconceivable that had they not been assured that there was a reasonable means of access to the workshop where the activities of motor repair were to be carried out, they would have dreamed of buying the property. Furthermore, there was no reasonable course open to them by which they could have mitigated their damages by acquiring the right of way which was a fundamental requirement of their business. For these reasons I agree that the proper method of assessment is that described by Staughton L.J. as the “no transaction method”. The measure of damages is that figure which, so far as it practical in the circumstances, achieves the maxim restitutio in integrum .

The first and main issue was whether the respondents acted reasonably to mitigate the damage in disposing of the property. It has not been submitted by the appellants that it was unreasonable for them to continue for a short time to see if the operation was viable without the right of way. They cannot be blamed for trying this course.

However, the appellants say that after the close of the business on 7th October 1983, which was followed by the sale of the equipment between that date and 10th October, the respondents should have mitigated their loss by accepting an offer made by the landlords to accept a surrender of the lease of the workshop. They could then have placed the maisonette on the open market as a separate property. The appellants relied upon a letter written by the landlords dated 28th March 1984 enquiring whether the respondents would surrender the lease of the workshop on the basis that the value of the unexpired lease was worth less than the value of the dilapidations, etc. This, it is said, was an invitation to the respondents to rid themselves of the burden of the lease of the workshop, which was by then unused and from the burden of complying with the covenants to keep the premises in a proper state of repair, and, at the same time, to achieve the rapid disposal of the maisonette. However, when the correspondence is examined in a little more detail, it appears that about that time the respondents had received an offer for both the garage and maisonette combined, and were in negotiations over it. At the same time it must be remembered that the appellants were still denying liability, although they had ceased to dispute that there was no right of way and had advised the respondents to consult other solicitors. Against this whole context I am unable to accept Mr Neuberger's submissions that the damages flowing from the breach should be cut off at this point.

Much later, in April 1986, when the question of the surrender of the lease was again mooted, the landlords were only prepared to accept a surrender on the terms that arrears of rent, which by then had become considerable, were discharged out of any settlement terms when the case against the solicitors was concluded. Again, this was a solution which was unacceptable.

With the determination of this first main point a number of the items of the "Schedule of Damages", which was helpfully prepared and put before the Court, become resolved. Thus, the amounts for rents, rates, insurance and travel, together with the appropriate increments for interest, were properly awarded by the learned Judge, The amount awarded for "bank interest" also survives this attempt to reduce it.

At the suggestion of the vendor's solicitors, the amount of £65,000 paid by the respondents was apportioned:

The maisonette	**…**	**£55,000**
The lease of the workshop		
and yard	…	1,000
Goodwill for the business		
acquirec	…	1
Plant	…	8,999

These figures on their face are arbitrary and do not relate to reality. The Judge revised this apportionment so as realistically to represent the value of the assets acquired in the following figures:

The maisonette	**…**	**£45,000**
The lease of the workshop		
and yard	…	5,000
Goodwill for the business		
acquired	…	5,000
Plant	…	9,000

As Staughton L.J. has remarked, this apportionment totals £1,000 less than the figure in the first apportionment. The figure of £45,000 represents an overpayment on the commercial value of the maisonette of £20,000. The respondents contributed £10,000 and borrowed £55,000 from the bank. When awarding damages for the bank charges, the learned Judge reduced these by a factor to represent the over-value of the maisonette, but ignored the £10,000 cash contribution by allotting that against the lease of the shop and yard and the goodwill of the business. Therefore, the figure for £32,000 bank interest represents the reduced amount (80 per cent.) of the interest charges over the whole period.

The approach of the Judge is described in the passage cited from his judgment in the judgment of Staughton L.J., namely, that he took an overall adjustment which he thought did justice between the parties and reflected the submission that the appellants should not bear the whole brunt of the interest charges arising out of the fact that the respondents paid more than they should have done for the maisonette. Like Staughton L.J. I would not disturb the exercise of the Judge's discretion in reaching this “round sum figure”.

The Judge did, however, allow a figure of interest on the sum of the loss on the sale of the plant, namely £3,400, on a capital investment of £7,561. As Staughton L.J. has described, this was a capital payment which was financed out of the bank overdraft. The interest charged on this overdraft has already formed one of the heads of damages, namely £32,000, and it is “double accounting” to allow £3,400 in addition on this amount. I agree that this figure should be disallowed from the assessment of damages made by the learned Judge.

The credit to be given against the damages arising out of the sale of the maisonette at £38,000 was another matter in dispute. On the one hand it was said that the defendants ought to have credit for the whole of the increase over its true value at the date of purchase, namely £25,000, namely £13,000 credit; as against this it was submitted that adjustments had to be made because of changes of land values in order to take into account the effect of inflation on any other vehicle into which the respondents might have put their funds. Of course, this again is ignoring the damages given in respect of the bank charges which enabled the respondents to buy the house in the first place. The arbitrary solution to this problem which affords a degree of discount from a total allowance by way of credit against damages for the full £13,000 is the formula which I ventured to suggest during argument and which has found favour with Staughton L.J. I have not departed from my views as expressed at that time, although I recognise it is a completely arbitrary formula but nevertheless one, I would think, is acceptable as a solution. I agree, therefore that credit in the sum of £10,400 should be given in respect of the sale of the maisonette. The only other aspect of the claim in respect of which I wish to add any words relates to the heading “mental distress”. There are authorities upon which Mr Iwi relied to support the learned Judge's judgment in this regard. In the case of *Perry v. Sidney Phillips & Son (1982) 1 WLR 1297* , the plaintiff recovered damages for distress, inconvenience and trouble arising as a result of the negligence of a surveyor. I agree with the approach adopted by Staughton L.J. reflecting, as it does, the judgment of Dillon L.J. in Bliss v. South-East Thames Regional Health Authority (1987) 1 CR 700 at 718, namely that damages of this kind are only recoverable when the subject matter of the contract or duty in tort is to provide peace of mind or freedom from distress. I would approach this special and restricted head of damage rather in the same way as the courts approach the question of pecuniary loss dissociated from physical damage caused by negligence. Damages of that nature are recoverable only when the special relationship between the parties involved demonstrates that the one has in mind liability to pay pecuniary loss, and the other relies upon that assumption of responsibility. It is a very far cry from a submission that damages can be recovered by a litigant who is involved in the frustration and hassle inevitably arising out of a breach of contract or tort of this sort, including that involved in seeking his remedies at court. Even in the cases of persons unduly susceptible to these pressures, I doubt whether damages would be recoverable under this head.

As a result of the figures contained in the summary in the judgment of Staughton L.J. I would agree that the figure of £92,047.81p should be substituted as the total sum of damages to include interest in this appeal, and I would allow the appeal to that extent.

Order: Appeal allowed. Appellant to pay one quarter of respondents' costs in the Court of Appeal. Costs in court below to stand. Legal aid taxation of respondents' costs.