NEWS

Out of Time – the dangers of time limits in professional negligence claims

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Michael Axe in our Commercial Disputes Team looks at some recent cases which have highlighted the difficulties that arise when trying to assess when the time limit for bringing a Professional Negligence claim will expire.

The general rule for negligence claims is that they must be brought within 6 years of the date when the damage in question was suffered. This might sound like an easy rule to apply, but that is not always the case.

When the damage in question is physical damage to property, it is often very easy to identify when the damage was caused. However, when the damage in question is a purely economic loss, or even the loss of an opportunity, it can be far more difficult to define precisely when that loss was "suffered". Because of these problems, claimants often find that the 6 year time limit for bringing a claim has already expired by the time they issue proceedings, because the loss was deemed to have been suffered at an earlier date than they had calculated.

To complicate matters further, in certain circumstances where the claimant was not even aware of the relevant facts at the time the damage was suffered, it is possible to extend the deadline by a further 3 years from the date when the claimant knew (or ought reasonably to have known) about the relevant facts.

Thankfully, the Courts have attempted to provide some guidance to help parties navigate through this technical minefield.

A reduction in the value of an asset

One of the oldest cases that is still referred to today is the 1982 Court of Appeal case of *Forster v Outred & Co*, in which a firm of solicitors provided the claimant with negligent advice in 1973 in relation to security she was providing over her home for a loan made to her son. In 1975 the lender demanded repayment of the loan from the claimant, which she complied with. In 1980 the claimant issued proceedings against the solicitors for the negligent advice, and she argued that the proceedings were issued within the 6 year time limit because she suffered her loss in 1975 when she repaid the loan.

However, the Court of Appeal disagreed, ruling that she had suffered her loss in 1973 when she entered into the security agreement. The reasoning for this decision was that as soon as she executed the mortgage in 1973 as security for the loan, the value of her property was reduced because it was no longer a property free from incumbrances. Accordingly, her loss was suffered in 1973, and so by the time she issued proceedings in 1980, the 6 year limitation period had expired.

Purely contingent liabilities

An apparent exception to the general principles set out in the *Forster v Outred & Co* decision arose in the 2006 House of Lords case of *Law Society v Sephton & Co*. In that case, the defendant accountants had negligently approved the accounts of a solicitor who had, in fact, misappropriated approximately £750,000 of his clients' money between 1990 and 1996. As a result of the solicitor's misappropriations, a number of his former clients made claims against the Solicitors' Compensation Fund (which is managed by the Law Society). Between 1996 and 2003, the Law Society paid out approximately £1.25m (including interest) in discretionary compensation to the solicitor's former clients. The Law Society issued a claim against the negligent accountants in 2002, but the accountants claimed the Law Society were out of time.

The question for the House of Lords to consider was when had the Law Society suffered damage – was it when each misappropriation by the solicitor occurred, when each claim for compensation was made, or when each claim was resolved (given that the compensation was discretionary)?

The House of Lords confirmed that *"the possibility of an obligation to pay money in the future is not in itself damage"*. The House of Lords went on to say that *"a contingent liability is not as such damage until the contingency occurs"* because *"unless and until a remote contingency eventuates the claimant is not expected to issue proceedings which he would not normally issue or wish to issue unless and until that point arrives"*.

In this case, as each misappropriation by the solicitor had only given rise to the "possibility" that a claim for compensation might be made against the Law Society at some point in the future, the Law Society did not suffer any damage at the time of the misappropriations (1990-1996), but only when the claims for compensation were actually made (1996-2003). The claimant was therefore in time on this occasion.

Actual loss or contingent liability?

Interestingly, the decision in *Law Society v Sephton* is distinguishable from the decision in *Forster v Outred & Co*, because in *Forster* the existence of the contingent liability (the mortgage) depressed the value of an existing asset (the mortgaged property) causing "instant loss", whereas in *Sephton*, the contingent liability stood alone and was therefore not considered "actual damage" until the contingency occurred.

It is also important to bear in mind that the *Sephton* decision will only be relevant where the case involves a "purely contingent liability". For example, in the 2008 case of *Shore v Sedgwick Financial Services* the Court of Appeal confirmed that the defendant's negligent advice had caused a loss as soon as the claimant transferred his accrued pension benefits from one scheme to another, as the rights acquired under the new scheme were less advantageous to him than the ones he'd had under the previous scheme (even though that may not have been obvious at the time of the transfer).

Equally, in the 2009 case of *Axa Insurance Ltd v Akther & Darby Solicitors* the Court of Appeal confirmed that although the claimant's liabilities under the insurance policies in question were contingent upon claims being made under those policies, the defendants' negligent vetting of the initial claims prior to the policies being entered into meant that there was also a measurable devaluation in the value of the policies at their inception (as there was a greater risk of a claim being made, which in turn meant that the premiums charged were too low).

Both these cases involve claimants who acquired rights that, due to the defendant's negligence, were less valuable than they should have been. The damage was therefore suffered at the time of the transaction, even though the full extent of the loss may not have become apparent until a later stage.

The 2010 decisions

Two recent Court of Appeal cases have provided some further clarification in relation to calculating when the time period for bringing a claim will begin.

In *Pegasus Management Holdings v Ernst & Young* it was alleged that the defendant tax advisers had provided negligent advice in relation to the claimants' ability to avoid liability for corporation tax. After acting on the

defendants' advice, the claimants found that the transaction entered into did not satisfy the criteria for the relief sought.

Whilst the claimants' final tax position was still not clear when the case reached trial (as the degree of any financial losses suffered would be dependent on a number of other factors and contingencies), the Court of Appeal ruled that the claimants had suffered a loss as soon as they entered into the transaction because they immediately became more inhibited in terms of their options regarding the management of their tax liabilities going forward. The Court of Appeal reiterated that the claimants suffered a loss as soon as the defendants' alleged negligence caused a *"significant and potentially damaging loss of flexibility"* in the way the claimants could carry on their business (even though at that stage it was not clear whether or not they had suffered any actual financial losses).

Issues relating to knowledge, and deliberate concealment, were recently addressed in the case of *Williams v Lishman*. It is established law that where the relevant facts relating to a negligence claim are not known by a claimant at the time the damage is suffered, then the time period for bringing a claim is extended to 3 years from the date when the claimant knew (or ought reasonably to have known) those relevant facts.

This exception to the standard 6 year limitation period is further extended where the defendant has deliberately concealed facts from the claimant. In that scenario, the limitation period will not start under the claimant discovers (or ought reasonably to have discovered) the concealment.

In the case of *Williams v Lishman*, the claimants issued proceedings against their financial advisors in October 2006 for providing allegedly negligent advice in relation to the transfer of their pension funds in 1997. The claimants alleged that they had not known the relevant facts until October 2003, and so the claim had been issued in time. They also alleged that the time limit should be extended because the defendants had concealed an earlier loss relating to an "early surrender penalty", which only came to light during the Court proceedings.

The Court of Appeal disagreed on both counts. The Court confirmed that the losses had been suffered at the time of the transfers in 1997, but it agreed that in this case the claimants had not known the relevant facts at that time. However, based on the facts presented, the Court found that the claimants would have known (or should reasonably have known) the relevant facts by mid-2003 at the latest, and therefore by October 2006 the 3-year extended time period had expired. The Court of Appeal also clarified that where concealed losses occurred at the same time as unconcealed losses, the relevant time period would not be suspended/extended. In this case, all of the losses occurred at the time of the transfer, and therefore the concealment of the early surrender penalty could not be used to extend the limitation period any further.

Cautionary tales

The vast majority of reported cases relating to these issues are ones where the claimants have miscalculated when the time limits will start to run, and as a result, have missed the opportunity to pursue a claim in relation to what are often very significant losses. These cases reinforce the importance of seeking early legal advice as soon as there are any suspicions that negligent professional advice may have been provided, and of always erring on the side of caution when it comes to dealing with limitation periods.

The key message to remember when dealing with professional negligence claims is *"sooner rather than later"*. It is rare for a claimant to sue too early, but it is fatal to the claim to attempt to sue too late.

For further information on this or any other issue relating to professional negligence, please contact Michael Axe by emailing Michael or by calling him on 08450 990045, or speak to your usual contact in the Commercial Disputes Team.

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