LIMITATION AND PROFESSIONAL NEGLIGENCE: WHERE ARE WE NOW?

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I would like to begin by thanking the Lady Chief Justice and Dame Sara Cockerill for inviting me to give a talk to the Commercial Court seminar, this is a great honour and I am delighted to be here.

I am going to talk about the limitation regime for cases in tort for negligent professional advice leading to financial loss. This area is bedevilled by the fact that the statutes that govern it - the Limitation Act 1980, amended by the Latent Damage Act 1986 - were both enacted, on the model of the equivalent regime for personal injury, without the slightest thought given to this sort of claim. The past is a foreign country, and it is hard to recollect that in the early 1980s the tortious preoccupation was defectively constructed buildings. But within a few years, tort claims for defective buildings were no longer permitted (*D&F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398), while the House of Lords in *Henderson v Merrett Syndicates* [1995] 2 AC 145 opened the door, indeed the floodgates, to concurrent claims in tort under *Hedley Byrne & Co v Heller & Partners* [1964] AC 465 by clients against advisers with whom they had a contract. This latter development, ironically, was entirely driven by the more claimant-favourable limitation regime in tort. 20 years ago, I wrote an article about inaptness of the limitation regime for professional negligence claims for financial loss, which concluded with the hope that the Law Commission's proposed reforms from 2001 would be implemented. They weren't. No surprises there for private lawyers. So today I want to revisit, very briefly, how the courts over the past two decades have managed this mismatch between cause of action and statutory limitation rules.

Before turning to the tort regime, I want to mention one knotty issue in contract that has never quite gone away. In *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384 the defendant solicitors failed to register a son's option to purchase the father's farm, and as all good law students know (or used to know), some years later the father defeated the

option by conveying the farm to his wife. At the time, Green's only claim against his solicitors was in contract (though Oliver J made an influential and prescient case for concurrent liability in tort). If the failure to register was a once and for all breach, the claim was out of time. But Oliver J held the defendants were in *continuing* breach (bearing in mind this was a case of non-feasance) until the option was defeated, noting that they were consulted over the years about the possibility of registering the option but never checked to see if it had been registered.

Authorities since *Midland Bank* have almost invariably distinguished or criticised this reasoning, taking the view that even in cases of non-feasance there is one moment of breach. In 2015 a majority of the Court of Appeal in *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2015] EWCA Civ 1310 held that the various attempts to distinguish *Midland Bank* had cited irrelevant factual differences, rather than principled grounds of distinction, and that *Midland Bank* should be regarded as wrongly decided. Is that the end of the 'continuing duty' reasoning? I had assumed so, but it seems not. It has some formidable supporters.

Gloster LJ dissented on the point in *Capita*, but her dissent focused on the particular facts - the contract there was for wide-ranging consultancy and advisory services for a pension scheme on an ongoing basis - a very different type of contract from the solicitors' retainers for one transaction in the cases distinguishing and criticising *Midland Bank*.

In the same year, Lord Clarke offered a more general defence of Oliver J's reasoning, in a Privy Council case from Trinidad and Tobago, *Maharaj v Johnson* [2015] UKPC 28. A solicitor acted for the purchaser of land from a personal representative, who gave power of attorney to someone else to execute the conveyance. 22 years later the claimant tried to sell the land; it transpired that the power had only authorised the attorney to act for the donor in her personal capacity and the sale fell through. The main issue was when the claimant suffered damage for the purpose of the tort limitation period, but contractual accrual was also in issue.

Commonsense certainly favours the majority view, expressed by Lord Wilson, that the solicitor did not owe a continuing contractual duty for 22 years, when there had been no

contact with the claimant, the fees had long since been paid and the file closed. This was an error in checking the power of attorney, not a case of non-feasance as in *Midland Bank*.

On the other hand, Lord Clarke's dissent on the point is strangely compelling, because it invokes basic general contractual principles:

> *Where a solicitor accepts a retainer upon the terms alleged by the claimants to perform a certain task … then: (a) his failure to perform it cannot discharge him from the obligation; (b) that is so even if his obligation is cast as an obligation to perform it within a reasonable time; (c) the failure to perform timeously may or may not give rise to a repudiatory breach of the contract of retainer, but that is writ in water unless and until it is accepted by the client as bringing the contractual obligation to an end. Thus, for example, if the client discovers the failure one or two years later, the client is contractually entitled to insist on performance. The solicitor cannot say that (without more) he is now discharged.*

He also points out that an express term that obligations expire after a reasonable time would be unusual, and there are no grounds to imply such a term - it is certainly not needed to give the retainer business efficacy nor is it so obvious as to go without saying.

I find this fascinating because it is hard to disagree with Lord Clarke's statement of basic contractual principles, yet they generate such a counter-intuitive conclusion. It's marvellous that Oliver J's first instance decision from the 1970s still provokes such fundamental debate.

Anyway, I will turn now to the primary limitation period for negligence claims in tort for pure financial loss, six years from the date of damage. A series of cases in the 1980s and 1990s defined the date of damage rather earlier than lay claimants might intuitively understand - beginning with *Forster v Outred & Co* [1982] 1 WLR 86. Here damage was suffered the moment the claimant mortgaged her home to secure her son's present and future indebtedness (when her solicitor should have advised and documented merely a temporary bridging loan), and not the later moment when the mortgagee demanded payment and she paid out. Executing the mortgage caused her actual, measurable detriment.

Then in 2006 the House of Lords in *Law Society v Sephton* [2006] UKHL 22 set the outer limit of this approach. Here accountants negligently certified that a solicitor had complied with Solicitors Accounts Rules, when he had actually misappropriated clients' money. The solicitor was eventually struck off, and the Law Society paid out to his clients from the Solicitors Compensation Fund. The HL held that the Law Society did not suffer damage until it received a claim on the Fund. Until then, it had not suffered actual damage, the accountants' negligent certification gave rise to a purely contingent liability. As Lord Hoffmann put it, "*the possibility of an obligation to pay money in the future is not in itself damage*".

Since then, it fair to say that *Sephton* is always relied on by professional negligence claimants facing a limitation defence and almost always distinguished, invariably with the slightly unhelpful caveat that the point is 'intensely fact sensitive' or as the CA said in *Berney v Saul* [2013] EWCA Civ 640 'critically dependent on the circumstances arising in any particular case'. So in the *Makaraj* PC case, damage was suffered on completion of the sale to the claimant - it was not a pure contingency but an immediate 'flawed transaction' - not when the claimant's attempted sale fell through 22 years later. And in *Shore v Sedgwick Financial Services* [2008] EWCA Civ 863 the defendants negligently advised the claimant to transfer his occupational pension into a personal pension fund withdrawal scheme. The CA held he suffered damage the moment he transferred to the new scheme, when he '*obtained a bundle of rights which, from the outset, were less advantageous to him than the benefits that he enjoyed under the [occupational] scheme*.' Because the new scheme was riskier, it didn't matter that the risk might not eventuate - some judicial contortion was needed to explain why this was different from a purely contingent liability a la *Sephton*.

One particularly difficult issue is how to pinpoint the moment of 'damage' in the cases on negligent conduct of litigation. Is it the moment the chose in action constituting the rights in the litigation loses value (once there is a risk that the claim will be struck out), or is it only once it will inevitably be struck out, or actually is struck out, or (as in *Berney*) the claimant settles on disadvantageous terms? It is hard to guess in advance. *Holt v Holley and Steer* [2020] EWCA Civ 851is a classic example where the application of the legal test produces a moment of damage accrual that lay clients would find mystifying. Solicitors acting for the claimant in her divorce did not seek their own valuation of assets or challenge the other

side's inflated valuation. An unfavourable financial order was made accordingly. McCombe LJ held that *'her loss was sufficiently well measurable, if not precisely quantifiable, when she lost the ability to adduce the evidence that she avers that she should have been able to produce before [the] District Judge in the financial remedies proceedings. That date may, in reality, have been shortly after the financial dispute resolution hearing'.* The test forces this conclusion, but it is not transparent to a lawyer, let alone a lay client.

I would like to make two general points about this knotty corner of the law. The first is perhaps a trite observation about cases that attain the status of 'leading authority'. Often (though by no means always) they have unusual fact patterns, some distance from the run of the mill, easily settleable dispute. That is why they go up to the apex court, but it is also why they generate so much subsequent litigation, which can in time ignore what made the authority unusual in the first place. My favourite examples in this category are *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 and *West Bromwich Building Society v Investors Compensation Scheme Ltd* [1998] 1 WLR 896, but it occurs to me that *Law Society v Sephton* fits that pattern too - a very unusual fact pattern, skewing subsequent application of it as an authority. For a start, it's tortious only, there's no concurrent contract. But more relevantly, the basis of the Law Society's obligation to meet claims on the Fund is unusual, as Lord Mance noted: '*In deciding whether or not to make a grant out of the Fund, the Society has under section 36 [of the Solicitors Act 1974] a discretion, though one which is susceptible to judicial review'*. This public law discretion makes the Law Society's position materially different from the position of someone who has, eg, made a risky investment or encumbered their property unnecessarily. There is, of course, discretion in the conduct of litigation, including the decision to strike out a claim, though that is not the claimant's but the courts.

Secondly, it's worth noting that if the Law Commission's reform had been implemented, the primary limitation period for the tort of negligence would have been three years from the date of the claimant's knowledge, actual or constructive, of various matters, including that 'the injury, loss or damage… are significant'. That would have rendered the debate about whether to apply or, more commonly, distinguish *Sephton* almost entirely otiose.

This leads us nicely to the secondary regime in tort which under s14A(5) is three years from the 'starting date', namely (s14A(6)) the date of knowledge both of the 'material facts' and 'other relevant facts'.

Under s14A(7) *'Material facts' = 'such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings against a defendant who did not dispute liability and was able to satisfy a judgment'*

Under s14A(8) *Other relevant facts include 'the identity of the defendant'* and importantly *'that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence'.*

As I have said, there are lots of problems with s14A when applied to cases of negligent professional advice, because such claims were not considered when the legislation was drafted. But with limited time, I will concentrate on the most fundamental - the interaction in solicitors' negligence cases between these required 'factual knowledge' elements, and s14A(9) which provides:

'Knowledge that any acts or omissions did not, as a matter of law, involve negligence is irrelevant' to the knowledge required to start the three year period running.

This separation of knowledge of 'facts' and of 'law' was taken from the equivalent language covering personal injury cases, but has proved especially problematic where the claim involves negligent legal advice. Concepts such as 'damage' and 'attributable' cannot be understood other than as legal concepts suggestive of fault. Paying money to HMRC is only 'damage' if it wasn't payable or could have been minimised by careful professional advice. Mortgaging your house to secure a relative's business debts is only 'attributable' to the defendant solicitor if that solicitor had a duty to advise you not to do it. The House of Lords in *Haward v Fawcetts* [2006] UKHL 9 explained that the factual knowledge elements do not have to be entirely stripped of connotations of fault - a claimant must know they had received 'flawed' or 'defective' advice; must know the 'essence' of their complaint (though not the detail of what went wrong). But as the judge said in *Ross v Attanta Ltd* [2021] EWHC 503 (Comm) pointed out, with perfect understatement, *'On some sets of facts, however, that is easier said than done*.'

So despite these appellate formulations, judges are still regularly forced into sophistry to hold the line between the factual knowledge requirements and s14A(9). In *Schumann v Veale Wasbrough* [2015] EWCA civ 441 the claimant alleged (unsuccessfully in the end) that legal advice from solicitors and a barrister that she should discontinue a wrongful birth claim. In considering the relevant date of attribution knowledge, Jackson LJ identified two propositions: (i) that the advice which the defendants gave was wrong; and (ii) that the error made by the defendants was negligent, concluding that C needed to know (i) but not (ii) for time to start to run. A fine distinction indeed. (The case also threw up the fascinating question of statutory construction about *whose* acts and omissions are referred to in s14A(9), when dealing with negligent failure to progress a claim against an earlier negligent party. The majority held that s14A(9) referred only to the acts and omissions of the particular defendant in the case before them. This meant the subsection did not render irrelevant knowledge of whether the acts and omissions of the lawyers who advised her to discontinue her wrongful birth claim amounted as a matter of law to negligence (she was nonetheless saddled with constructive knowledge of their alleged negligence). But Roth LJ read s14A(9) very broadly as not confined to the acts and omissions of the present defendant but extending to anyone's, including the acts and omissions of the medical lawyers who initially advised the claimant. Roth LJ expressed alarm at this conclusion, but felt compelled to reach it by the unfortunate statutory wording.

I will now touch on just two themes that have emerged recently:

The first concerns omissions and duty. Twenty years ago, there was a series of cases where (typically) a wife who had guaranteed her husband's business debts sued the solicitors acting for his business, on the basis that they had certified to the bank that they had advised the wife, but had not done so. These claims threw up the s14A(9) problem - what if she knew she had received no advice, but did not know the significance of that fact because she did not know she was owed a duty? Could she know the loss of her home was 'attributable' to someone whom she did not know owed her a duty? Several cases said that was irrelevant under s14A(9). Fortunately, this litigation has dried up thanks to reform of the substantive law on constructive notice of undue influence, but an equivalent problem has surfaced, in the guise of the whether knowledge of the 'scope of the duty' is needed.

In *Boycott v Perrins Guy Williams* [2011] EWHC 2969 (Ch), Geoffrey Boycott bought a house for an older friend, as joint tenants. She severed the joint tenancy just before she died, something his solicitor hadn't mentioned as a possibility. He nonetheless knew all he needed to know for time to run. Because of s14A(9) '*there was no need in law for Mr Boycott to know that the solicitor owed a legal duty to advise him that the joint tenancy was unilaterally severable…'* In contrast, in *Jago v Mortgage4You Ltd* [2019] EWHC 533 (QB) the claimant knew from the outset that brokers hadn't advised her about the wisdom of remortgaging, but didn't realise until less than three years before the claim that they had had a duty to consider whether it was advisable for her to take out any further mortgage. The judge allowed the claim to proceed to trial, noting *'This case involves a decision as to which side of a very fine line Ms Jago's ignorance falls: whether it is more accurately to be characterised as an unawareness that M4Y's omission to advise involved negligence, which is statutorily irrelevant under ss.(9), or ignorance of a fundamental fact concerning M4Y's obligation to advise, going to attributability under ss.(8)*.'

This language actually picks up one of my broader concerns about the elision of 'duty' and 'breach' in negligence cases, possibly driven by the prominence given to the concept of the 'scope of the duty', which sees the duty phrased very narrowly in terms that exactly reflect the allegation of breach ('a duty to avoid doing X' where 'X' is the precise, detailed allegation of breach). Time does not permit me to elaborate here, so I will perhaps leave that for the questions!

A second recent development is that courts are less likely to find claimants saddled with knowledge that they had received 'flawed' legal advice where the matter was especially legally esoteric. So very recently in *Witcomb v Keith Park Solicitors* [2023] EWCA Civ 326, solicitors acting in a personal injury claim overlooked the possibility of pleading obscure 'provisional damages'. Eight years later the claimant's condition had deteriorated and his leg had to be amputated. He asked about going back to court and was told this was not permitted. CA held he did not have the requisite knowledge under s14A(8) that his loss was 'attributable' to flawed advice at this point: '*There was nothing intrinsic to his situation to alert him to the fact that he had received flawed advice. He might, as the judge observed, have thought there were problems with the legal system which did not, as he had been told,*

allow for a further application for damages, but it did not follow that there might be problems with the advice he had been given.'

We see the same protective approach, this time in the context of knowledge of 'material facts', in *Blakemores LDP v Scott* [2015] EWCA Civ 999. Here the claimants instructed solicitors to apply to the Land Registry to close off a manorial registered title. The solicitors missed the deadline to file the relevant objection to the title, and eventually the adjudicator exercised the resulting discretion and declined to close to the title. The claimants sued the solicitors. They knew from the outset that the solicitors had failed to file the objection, but the Court of Appeal held that the *essence* of their claim was the *effect* of this failure to file. This the claimants did not know, because they were *'not experts in land registration or manorial law. They cannot be taken to have known the obscure consequences of a failure to file an objection in time without being told what they were*.'

This concern is welcome, but it proves too much! Lay clients seek legal advice because they don't know the law - to them, everything is esoteric, be it divorce litigation, drafting of suitable contractual protections, or the scope of a power of attorney. On one view, it undermines s14A(9) entirely.

The Law Commission's proposed reform would have solved almost entirely the problem of the interaction between the factual knowledge requirements and s14A(9). Its equivalent of s14A(9) would have been qualified so that it would … '*not apply to a cause of action in respect of breach of duty where the breach of duty concerned is a failure to give correct advice as to the law, and the fact that correct advice had not (or may not) have been given shall be treated as one of the facts giving rise to the cause of action.'*

For now, the courts could at least interpret s14A(9) narrowly and naturally, as referring just to negligence with a small 'n', namely breach or fault, for example whether the defendant's conduct fell below the *Bolam* test - but not the rest of the elements of the negligence cause of action: is there a duty, is there a relevant causal connection, is there damage in the obscure legal sense of the word?

To conclude, I think this area of law remains a mess, not really meeting the policy rationales of a functioning limitation regime for either claimants or defendants. If only we had a Law Commission to look at this….