

**ELLIOTT v HATTENS SOLICITORS**

COURT OF APPEAL (CIVIL DIVISION)

Newey, Asplin and Stuart-Smith LJJ: 18 May 2021

[2021] EWCA Civ 720; [2021] P.N.L.R. 25

<sup>Ⓒ</sup> Accrual of cause of action; Contingent liabilities; Damage; Guarantors; Insurance; Leases; Limitation periods; Loss; Professional negligence; Solicitors; Underleases

- H1 *Solicitor's negligence—flawed transaction—lease and underlease—failure to secure guarantee—failure to advise—damage—limitation—accrual of cause of action*
- H2 The respondent KE retained the appellant solicitors H to act for her in relation to a property transaction. KE's husband E was the freehold owner of premises. Under the transaction E was to grant KE a lease, and she in turn would grant an underlease to one JM. It was intended that JM's parents would guarantee his obligations under the underlease.
- H3 H prepared the lease and underlease. Pursuant to the lease KE as the tenant was required to insure the premises against fire, and the landlord was entitled to forfeit where the tenant did not comply with any tenant's obligation in the lease. The underlease in turn contained a landlord's obligation on KE to insure the premises. In accordance with the terms of the underlease JM was obliged to pay the rent and keep the premises in repair, subject to exceptions in relation to damage by "insured risks". The lease and underlease were executed on 24 February 2012. H failed to name JM's parents as parties to the underlease, and JM's parents did not execute the underlease nor otherwise become guarantors. H also failed to advise KE to obtain insurance, and KE did not do so.
- H4 The premises were effectively destroyed by fire on 6 November 2012. JM vacated the premises and did not undertake repairs. KE also lost rent. E had insurance on his own account, but E's insurer declined cover.
- H5 KE issued a claim in negligence against H on 10 April 2018, less than six years after the fire but more than six years after the lease and underlease were executed. H accepted that they had failed to exercise reasonable care and skill in drafting the documentation and advising KE but pleaded that the claim was statute-barred. A preliminary issue on limitation was ordered.
- H6 HHJ Bailey held that the claim was not statute-barred. Although the lease's assignment value was reduced at its inception owing to the lack of parental guarantees, since it was plain on the facts of the case that KE did not wish to assign the lease, the cause of action had, he said, arisen only once the contingencies had occurred.

- H7 H appealed, arguing that KE had suffered actionable damage on the execution of the lease and underlease, since at that time the rights she received had been objectively less valuable than if H had complied with its obligations. KE argued that this was irrelevant since it had not been the purpose of the transaction to produce assignable leases, and there had been no risk of E forfeiting KE's lease on the grounds of failure to insure.
- H8 **Held:** the claim was statute-barred and appeal should be allowed.
- H9 (1) Damage was an essential ingredient of the tort of negligence. A limitation defence could not be defeated by only claiming for the damage arising within the limitation period, if the same wrongful acts had also resulted in damage occurring outside the limitation period (*Khan v RM Falvey & Co* [2002] EWCA Civ 400; [2002] P.N.L.R. 28, noted) ([11]).
- H10 (2) Where a claimant alleged that but for a solicitor's negligence they would have entered into a flawless transaction, damage was sustained if and when the value of the transaction to the claimant became measurably less than that of the flawless transaction. Although the assumption of a contingent liability was not in itself immediate damage until the contingency arose, in this case KE had obtained less advantageous rights, and hence this was not a case about contingent liability (*Maharaj v Johnson* [2015] UKPC 28; [2015] P.N.L.R. 27; *Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 A.C. 543; [2006] P.N.L.R. 31; *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863; [2009] Bus. L.R. 42; [2008] P.N.L.R. 37, applied) ([12], [20]–[24]).
- H11 (3) H's failure to obtain the parental guarantees had caused KE damage at the time of entry into the lease and underlease, since objectively what she received then was significantly of less value than what she should have obtained. KE's subjective intentions were irrelevant in this respect (*Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863; [2009] Bus. L.R. 42; [2008] P.N.L.R. 37, noted) ([27]–[33]).
- H12 (4) The claim based on the failure to advise was also time-barred. This failure had placed KE in breach of her obligations in both the lease and underlease and at risk of forfeiture and the incurring of expense if an attempt was made to forfeit it. This risk could not be considered negligible in the absence of evidence as to KE's relationship with E, or as to the chances of E transferring the freehold. It followed that the value of KE's lease on the date of grant was lower than if she had complied with her insurance obligations ([36]–[38]).
- H13 **Cases referred to in the judgment**  
*DW Moore v Ferrier* [1988] 1 W.L.R. 267; (1988) 132 S.J. 227 CA (Civ Div)  
*Bell v Peter Browne & Co* [1990] 2 Q.B. 495; [1990] 3 W.L.R. 510; (1990) 140 N.L.J. 701 CA (Civ Div)  
*Knapp v Ecclesiastical Insurance Group Plc* [1998] Lloyd's Rep. I.R. 390; [1998] P.N.L.R. 172 CA (Civ Div)  
*Khan v RM Falvey & Co* [2002] EWCA Civ 400; [2002] Lloyd's Rep. P.N. 369; [2002] P.N.L.R. 28  
*Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 A.C. 543; [2006] P.N.L.R. 31  
*Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863; [2009] Bus. L.R. 42; [2008] P.N.L.R. 37

*AXA Insurance Ltd (formerly Winterthur Swiss Insurance Co) v Akther & Darby Solicitors* [2009] EWCA Civ 1166; [2010] 1 W.L.R. 1662; [2010] P.N.L.R. 10  
*Maharaj v Johnson* [2015] UKPC 28; [2015] P.N.L.R. 27

H14 **Appeal** from a decision of HHJ Bailey sitting in the County Court at Central London.

H15 *Simon Goldstone* (instructed by Reynolds Porter Chamberlain LLP) for the appellants.

*Daniel Crowley* (instructed by Clarkson Wright & Jakes Ltd) for the respondent.

## JUDGMENT

### NEWHEY LJ:

- 1 The issue on this appeal is whether the claim is barred by the Limitation Act 1980. It turns on when damage was first sustained.
- 2 The appellants, Hattens, are a firm of solicitors. In 2011, they were retained by the respondent, Mrs Kelly Elliott, to act for her in connection with a transaction pursuant to which her husband was to grant her a lease and she would grant an underlease to a Mr Jamie Malster. The lease and underlease were to be of premises in Stanley Road, Grays, Essex of which Mr Elliot was the freehold owner. As was explained to Hattens by estate agents acting for Mrs Elliott, the intention was that Mr Malster’s parents should guarantee his obligations under the underlease.
- 3 In pursuance of their instructions, Hattens prepared a lease, underlease and rent deposit deed which were executed on 24 February 2012. The lease in Mrs Elliott’s favour was to last until 30 June 2014 and the underlease to Mr Malster was for a term expiring a little earlier in June 2014. The lease included covenants by Mrs Elliott as tenant to insure the premises against fire and to keep them in good repair and a provision entitling the landlord to forfeit whenever the tenant had not complied with any obligation in the lease. Covenants by Mrs Elliott to insure were also to be found in the underlease, while Mr Malster covenanted in the underlease to keep the property in repair as well as to pay the rent, subject to exceptions in respect of damage by “Insured Risks” unless payment of insurance money was withheld by reason of an act or default on Mr Malster’s part.
- 4 By mistake, Hattens failed to name Mr Malster’s parents as parties to the underlease, and Mr Malster’s parents neither executed the underlease nor otherwise became guarantors. Further, Hattens did not advise Mrs Elliott to obtain insurance. In the circumstances, Hattens accept that they failed to exercise reasonable skill and care in drafting the documentation and advising Mrs Elliott.
- 5 On 6 November 2012, there was a fire at the premises which effectively destroyed the buildings there. Mr Malster subsequently vacated the property without undertaking repairs. Mrs Elliott also lost rent.
- 6 Mrs Elliott had not taken out any insurance. Her husband had, on his own account, but the insurer declined cover. Hattens’ defence asserts that this was “as a result of a breach of warranty whereby the freeholder warranted that all waste would be swept up at the end of each working day, deposited in metal receptacles with metal lids and removed from the premises at intervals not exceeding one week” and that the breach of warranty was “as a result of the failure of Mr Malster

to implement a system of waste management that met the terms of the warranty (the terms of which he was aware and understood)”.

- 7 The present proceedings, seeking damages for negligence, were issued by Mrs Elliott on 10 April 2018, more than six years after the lease and underlease were executed but less than six years after the fire. Hattens are said to have been negligent in essentially two ways: failing to ensure that Mr Malster’s parents entered into a guarantee and failing to advise Mrs Elliott of her insurance obligations under the lease and underlease. A schedule of loss and damage includes items relating to both: (a) the costs of clearing the site and rebuilding; and (b) loss of rent.
- 8 Hattens pleaded in their defence that the claim was statute-barred. In the circumstances, an order was made for the trial of a preliminary issue, viz. “Whether the Claimant’s claim is barred by virtue of the Limitation Act 1980”? Directions were given for the preparation of an agreed statement of facts and exchange of witness statements in relation to facts which were not agreed. In the event, the parties agreed a statement of facts and neither side called any witnesses.
- 9 HHJ Bailey (the Judge) heard the trial of the preliminary issue on 17 May 2019 and answered the question in the negative. The core of his reasoning is to be found in [19] and [20] of the extempore judgment he gave:

“19. It is clear from *Maharaj* [i.e. *Maharaj v Johnson* [2015] UKPC 28, [2015] P.N.L.R. 27] that it is not enough for a Defendant to say that the plaintiff did not receive what it was that she should have obtained. It is necessary to look to see whether in fact there was some immediate measurable damage, and that must be done in each case. In the present case, indeed it was one of the points made by Mr. Goldstone [i.e. Hattens’ counsel], that the Claimant as soon as she received the package from the Defendant solicitors suffered loss because, although the sub-tenant was paying his rent and complying with his covenants up to the date of the fire she might have wanted to assign the lease. Had she sought to assign the lease it would have been worth less without the parental guarantees than it would have been worth with the parental guarantees. That is a more subsidiary matter; the fact that the Claimant was in breach of a covenant herself under the lease would have served to depress any premium she might have obtained on assignment. But on the facts of this case it is abundantly plain that the Claimant did not wish to assign the lease. The fact that she did not do so is some indication, but the nature of the transaction between herself and her husband would be, it seems to me, sufficient to demonstrate that she did not wish to assign the lease.

20. What then is the measurable loss that she suffered on receipt of this flawed package from her solicitors? The loss, as contended for, is the lower value of the unsupported covenant of the sub-tenant, unsupported that is by the parental guarantee. The loss is the fact that, under any sub-tenant or any tenant under a lease may not pay the rent and if he does not pay the rent the landlord is clearly in a better position if he can recover from the guarantors. I ask myself whether, in the light of the observations of their Lordships in *Sephton* [i.e. *Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 A.C. 543], that can properly be considered as loss sufficient to make good the tort of negligence. It seems to me that it comes within the ‘financial loss is possible but not certain’ category which I am told by Lord Nicholls and Lord Mance, is not sufficient detriment to make good a claim for tort. I can well see that in holding

and reaching that view it might appear that I am reaching a view which runs contrary to the series of cases quoted above and which can be found in the text books when dealing with the question of economic loss for the purposes of making good the tort of negligence. But I am persuaded by Mr. Crowley [i.e. Mrs Elliott’s counsel] that, in the light of the *Sephton* and *Maharaj* decisions it is important to look at each case upon its own facts and it seems to me that in this particular case it cannot be said that the tort was made good by loss on receipt by the Claimant of her package of lease documents from the solicitors. Rather, it seems to me, that the better analysis is that it is only when the various contingencies occurred which Mr. Crowley contends that the cause of action arose for the Claimant. I can well see, in the light of the authorities as to guarantees, that a lively argument might ensue as to when the various contingent possibilities eventuated. Fortunately, it is not necessary to go into any consideration of such matters because all of them were after 10th April 2012, the relevant date for present purposes.”

- 10 In the circumstances, the judge held that Mrs Elliott’s claim was not statute-barred. Hattens, however, now challenge that conclusion in this court, the judge having granted permission to appeal.

### Legal principles

- 11 A claim in tort will normally become time-barred six years after the cause of action accrued. With the tort of negligence, damage is an essential ingredient of the cause of action. The availability of a limitation defence will thus depend on when the negligence first caused actionable damage. “[O]nce real damage—as distinct from purely minimal damage—is sustained the cause of action arises, even though greater loss may later eventuate from the negligence” (per Sir Murray Stuart-Smith in *Khan v RM Falvey* [2002] EWCA Civ 400; [2002] P.N.L.R. 28, at [11]), and “A claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period, if he has suffered actual damage from the same wrongful acts outside that period” (per Sir Murray Stuart-Smith in *Khan v RM Falvey*, at [23]).
- 12 Negligence claims against solicitors often relate to transactions, on which the solicitors were instructed, which have turned out badly. In that context, a claimant may allege either that, but for the solicitors’ negligence, he would not have entered into the transaction at all (a “no transaction” case) or that, had it not been for the negligence, the transaction would have been a better one (a “flawed transaction” case). The Privy Council referred to the distinction between the two situations in *Maharaj v Johnson* [2015] UKPC 28; [2015] P.N.L.R. 27 (*Maharaj*). Lord Wilson (with whom Lady Hale, Lord Carnwath and Lord Hodge agreed) said in [19]:

“[T]he central concept behind the ‘no transaction’ and the ‘flawed transaction’ cases is different. For in the latter the claimant *does enter* into a ‘flawed transaction’ in circumstances in which, in the absence of the defendant’s breach of duty, he would have entered into an analogous, but flawless, transaction. In the former, however, the claimant also enters into a transaction but in circumstances in which, in the absence of the defendant’s breach of duty, he *would have entered* into ‘no transaction’ at all. The difference in concept dictates a difference in the inquiry as to whether, and if so when, the

claimant suffered actual or measurable damage. In the ‘flawed transaction’ case the inquiry is whether the value to the claimant of the flawed transaction was measurably less than what would have been the value to him of the flawless transaction. In the ‘no transaction’ case the inquiry is whether, and if so at what point, the transaction into which the claimant entered caused his financial position to be measurably worse than if he had not entered into it: see [*Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)*] [1997] 1 W.L.R. 1627], at p.1631 (Lord Nicholls). The *Nykredit* case was a classic example of a ‘no transaction’ case in that the claimants, who had lent money on the security of a property which the defendant valuers had negligently overvalued for them, would have declined to make the loan if the valuation had not been deficient.”

- 13 *Maharaj* was itself a “flawed transaction” case. The claimants had contracted to buy some land and a conveyance in their favour had subsequently been executed on the vendor’s behalf by someone with a power of attorney on 6 February 1986. More than two decades later, the claimants’ title was queried on the basis that the conveyance had not been within the scope of the power of attorney. A deed of rectification was obtained from the vendor, but the claimants nonetheless brought proceedings against solicitors who had acted for them in the original purchase. The claim was struck out as statute-barred.
- 14 In [22], Lord Wilson identified the relevant issue as “was the value of a full equitable interest in the land on 6 February 1986 measurably less than the value then of a full legal and equitable interest in it”? He answered the question in the affirmative, explaining as follows in [27] and [28]:

“27. In respectful agreement with the brief judgment of the Court of Appeal in the present case, the Board concludes that the claimants suffered actual damage upon their execution of the Deed on 6 February 1986. An inference to this effect is properly to be drawn from the following.

- (a) The claimants’ failure to obtain a legal interest in the land on that date subjected them to significant risks which were present from then onwards.
- (b) Just as in 2008 the claimants discovered that their lack of a legal interest obstructed their attempts both to borrow on the security of the land and to sell it, they would be likely to have met similar obstruction in the event that at any earlier time after 6 February 1986 they had attempted either to borrow on the security of it or to sell it. Their equitable interest was therefore significantly less valuable to them than a legal interest would have been.
- (c) It was not even in the power of the claimants or of the defendants to remedy the flaw by themselves. For it was necessary to procure the participation of Mrs Lambert [i.e. the vendor]. In 2008 it so happened that she was quickly located and that she cooperated in a swift execution of the Deed of Rectification. Even in those circumstances costs, for which in the first instance the claimants were liable, must have been incurred in procuring its execution and in registering it. But from 6 February 1986 onwards there were risks that Mrs Lambert would not be able to be located or would be found to have died: were either risk to have eventuated, there would have been significant extra complications—and extra costs. There was also a

risk that, if located, Mrs Lambert would not willingly execute the Deed: were that risk to have eventuated, it would have been necessary to take costly legal steps in order to oblige her to do so.

28. The risks to which the Board has referred were such as to generate an immediate and (no doubt with difficulty) a quantifiable reduction from the value of the asset which the claimants should have received on 6 February 1986 to the value of the asset which they did receive. The risks were not such as to render their loss purely contingent.”

- 15 In *Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 A.C. 543 (Sephton), Lord Hoffmann commented at [21] that, in cases where plaintiffs had entered into bilateral transactions as a result of defendants’ negligence and “liability is for the difference between what the plaintiff got and what he would have got if the defendant had done what he was supposed to have done, it may be relatively easy, as Bingham LJ pointed out in *DW Moore & Co Ltd v Ferrier* [1988] 1 W.L.R. 267, to infer that the plaintiff has suffered some immediate damage, simply because he did not get what he should have got”. “Thus,” Lord Hoffmann continued, “in *Knapp v Ecclesiastical Insurance Group plc* [1998] P.N.L.R. 172, where the plaintiff paid a premium for a voidable fire insurance policy because his insurance broker had failed to disclose material facts, the Court of Appeal held that he had suffered immediate damage because he ‘did not get what he should have got’, namely a policy binding on the insurers”. In the next paragraph, Lord Hoffmann said:

“Thus cases like *Bell v Peter Browne & Co* [1990] 2 Q.B. 495 and *Knapp v Ecclesiastical Insurance Group plc* [1998] P.N.L.R. 172 are readily explicable as cases in which the damage was the difference between the plaintiff’s position as it was and as it would have been if the defendant had performed his duty and in which it was possible to infer that the plaintiff’s failure to get what he should have got from a bilateral transaction was quantifiable damage, even though further damage which might result from the flaw in the transaction was still contingent. The plaintiff had paid money, transferred property, incurred liabilities or suffered diminution in the value of an asset and in return obtained less than he should have got. But these authorities have no relevance to a case in which a purely contingent obligation has been incurred.”

- 16 On the other hand, Lord Wilson noted in *Maharaj* at [26]: “The fact that the transaction was flawed does not by itself mean that the claimant suffered actual damage on entry into it.” There is, Lord Wilson said: “no substitute for attending to the particular facts and deciding whether ... an inference [that there was immediate damage] is properly to be drawn from them”.
- 17 *Maharaj* was a case in which the problem which had emerged was capable of remedy. Issues as to the significance of remediability also featured in *Bell v Peter Browne & Co* [1990] 2 Q.B. 495 (Bell) and *Knapp v Ecclesiastical Insurance Group Plc* [1998] P.N.L.R. 172 (Knapp). In *Bell*, the plaintiff agreed with his wife following the breakdown of their marriage that he would transfer the matrimonial home to her on the footing that he would receive a sixth of the proceeds of sale when it was sold. The transfer was effected, but the plaintiff’s solicitors, who were the defendants, failed to ensure that his interest was protected either by a declaration of trust or mortgage or by the lodging of a caution at the Land Registry. The wife having sold the house and spent the proceeds, the plaintiff sued the defendants,

but the claim was held to be statute-barred. Nicholls LJ distinguished at 502 between “(a) the solicitors’ failure to see that the parties’ agreement was recorded formally in a suitable declaration of trust or other instrument and (b) their failure to protect the plaintiff’s interest in the house or the proceeds of sale by lodging a caution”. As to failure (a), Nicholls LJ said that “the damage, such as it may have been, was sustained when the transfer was executed and handed over” when “the plaintiff parted with title to the house, and he became subject to the practical inconveniences which might flow from his not having his wife’s signature on a formal document”. While the extent of the prejudice depended on the attitude adopted by his wife, “the uncertainty surrounding her future intentions goes only to the quantum of the loss the plaintiff sustained when the transfer was executed without him having the same degree of protection as would be provided by a formal document”, Nicholls LJ said at 502. Turning to failure (b), Nicholls LJ observed at 503 that this “stands on a different footing from failure (a) in that it was within the plaintiff’s own power to remedy failure (b) so long as the house continued to belong to his former wife”. Nicholls LJ was, however, “unable to accept that remediability puts failure (b) on the other side of the line from failure (a)”. He explained at 503:

“The solicitors’ breach of duty in 1978 was remediable by the plaintiff, but that was only possible after he became aware that there had been a breach of duty. Apart from any other consideration, to treat the plaintiff’s ability to remedy the breach himself without the concurrence of his former wife as a ground of distinction between this case and cases such as *Baker v. Ollard & Bentley*, Court of Appeal (Civil Division) Transcript No. 155 of 1982 would be to disregard the unlikelihood in practice of the plaintiff ever being in a position to remedy the breach. Once the solicitors closed their file, it was unlikely that failure (b) would come to the notice of the plaintiff or the defendants, until the house was sold and it was too late. That, on the pleaded facts, is exactly what happened. The first the plaintiff knew that his one-sixth share was not properly protected was after it had gone beyond recall. So his ability to remedy the breach before the house was sold was a matter of more theoretical interest than practical importance.

In considering whether damage was suffered in 1978 one can test the matter by considering what would have happened if in, say, 1980 the plaintiff had learned of his solicitors’ default and brought an action for damages. Of course, he would have taken steps to remedy the default. But he would have been entitled at least to recover from the defendants the cost incurred in going to other solicitors for advice on what should be done and for their assistance in lodging the appropriate caution. The cost would have been modest, but not negligible.”

- 18 *Bell* was the subject of extensive discussion in *Knapp*. In the latter case, the plaintiffs had arranged insurance cover through the second defendant insurance broker, but when they invoked it following a fire the insurers elected to avoid the policy for non-disclosure. A claim against the insurance broker was held to be statute-barred on the basis that his alleged negligence had first become actionable when the cover was effected, and that although Hobhouse LJ said at 179 that he was prepared to assume that, had the non-disclosure been realised, the second defendant “would, on the instructions of the plaintiffs, have been able, within a very short period of time—a matter of hours not days, to have arranged for the



plaintiffs to be held covered either by the insurance company or some other insurer, maybe at an increased premium”. Noting that the ability to remedy the failure to lodge the caution had not been treated as making any difference in *Bell*, Hobhouse LJ discerned three elements in Nicholls LJ’s reasoning in relation to “failure (b)” as to which Hobhouse LJ said this at 185–186:

“First [Nicholls LJ] points out that the failure creates a risk and indeed it is this risk which forms the subject matter of the action. Secondly he points out that it is unreal to fail to take into account the fact that the plaintiff is unaware of the failure to lodge the caution. It only becomes possible for the plaintiff to remedy the breach ‘after he became aware that there had been a breach of duty’. It is not right to make the assumption that the plaintiff knows of the breach. His ignorance of it is indeed one aspect of the failure of the defendant to perform his professional duty.

In the present case the second defendant was under a duty, *inter alia*, to advise the plaintiffs. The second defendant failed to advise the plaintiffs that the renewal was not binding upon the insurance company and implicitly he advised that he had effected a binding renewal of the cover. It is a consequence of the second defendant’s breach of duty that the plaintiffs were unaware of the true position and that they were therefore deprived of the opportunity to remedy the nondisclosure ...

The third strand of the reasoning of Nicholls L.J. is that he considered that, on the facts of *Bell v. Peter Browne*, remedying the failure to lodge the caution would, although easily accomplished, have still involved the plaintiff in some modest ‘but not negligible’ cost. For the reasons which I have given earlier in this judgment I consider that it would not be right in the absence of evidence to make any assumption one way or the other about whether the remedying of the non-disclosure would have been likely in the present case to involve the plaintiffs in any additional expense. Therefore, in my judgment, in so far as Nicholls L.J. has founded himself upon this third consideration, it does not avail the second defendant in the present case.”

19 Hobhouse LJ concluded at 186:

“The plaintiffs suffered loss as soon as they received an insurance contract which was not binding upon the insurers. The subsequent events, the question whether or not the insurers would thereafter avoid the policy and with what consequences, went only to the quantification of loss not to the identification of the first moment at which a plaintiff suffered loss and the tort became actionable.”

Had it been necessary, Hobhouse LJ said at 187, the court could and should have put a monetary value on the loss at the time of the receipt of the purported cover. It “would exclude the possibility at that time of remedying the deficiency because the plaintiffs were in fact unaware of it and their state of knowledge arose from the breach of duty of the second defendant”. As, however, Lord Wilson pointed out in *Maharaj* at [24], Hobhouse LJ said at 185 that it was “possible to visualise a situation where the relevant fault can be so easily remedied that no more than nominal damages will be recoverable in an action in contract, and ... any cause of action in tort fail”.

- 20 In *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863; [2009] Bus. L.R. 42 (Shore), Dyson LJ, with whom Buxton and Keene LJJ agreed, said at [42] that the “essence of the reasoning” in cases such as *Bell* was that “the fact that the risk to which the claimant was exposed by the defendant’s negligence might not eventuate did not mean that the claimant did not suffer loss as a result of being exposed to that risk”. “It is the possibility of actual financial harm that constitutes the loss”, Dyson LJ said in [42].
- 21 It is also relevant to refer to an aspect of *Shore* on which Mr Daniel Crowley, who appeared for Mrs Elliott, placed reliance. In *Shore*, the claimant had been advised by the defendant financial advisers to transfer his pension from a final salary scheme (the Avesta scheme) to an income withdrawal scheme (the PFW scheme). The pension having fallen in value, the claimant alleged that the defendants ought to have advised him to remain in the Avesta scheme. The claim was held, however, to be statute-barred on the basis that the claimant had first suffered loss when he invested in the PFW scheme; the fact that the price paid for the investment might not have exceeded its then current market price did not matter. Dyson LJ, with whom Buxton and Keene LJJ agreed, said on the subject:

“37. ... It is Mr Shore’s [i.e. the claimant’s] case (assumed for present purposes to be established) that the PFW scheme was inferior to the Avesta scheme because it was riskier. It was inferior because Mr Shore wanted a secure scheme: he did not want to take risks. In other words, *from Mr Shore’s point of view*, it was less advantageous and caused him detriment. If he had wanted a more insecure income than that provided by the Avesta scheme, then he would have got what he wanted and would have suffered no detriment. In the event, however, he made a risky investment with an uncertain income stream instead of a safe investment with a fixed and certain income stream which is what he wanted.

38. The analogy with the investor who is negligently advised to buy shares rather than Government bonds does not assist [the claimant’s counsel]. In my judgment, an investor who wishes to place £100 in a secure risk-free investment and, in reliance on negligent advice, purchases shares does suffer financial detriment on the acquisition of the shares despite the fact that he pays the market price for the shares. It is no answer to this investor’s complaint that he has been induced to buy a risky investment when he wanted a safe one to say that the risky investment was worth what he paid for it in the market. His complaint is that he did not want a risky investment. A claim for damages immediately upon the acquisition of the shares would succeed. The investor would at least be entitled to the difference between the cost of buying the Government bonds and the cost of buying and selling the shares.

39. In any event, the analogy with the share purchase transaction breaks down on the facts of the present case. Mr Egerton produced an expert’s report dated 29 March 2007 on behalf of Mr Shore. At para 4.1.25, he said that the benefits of deferring taking the Avesta benefits until the age of 60 were so large ‘that they exceeded any reasonable estimate of benefits that could have been provided by a pension fund withdrawal arrangement’:

‘The reason for this is that the financial benefits of deferring taking the Avesta benefits were so large ... that they exceeded any reasonable estimate of benefits that could have been provided by a pension fund

withdrawal arrangement. Although there were substantial early retirement penalties with the Avesta scheme, the rate at which these penalties reduced was such that the effective investment return until age 60 could not realistically be matched by any other appropriate investment. Even if the claimant's other income ceased or diminished prior to age 60 or November 1999 (so that he would have been compelled to start drawing pension benefits), any deferral would have resulted in an improvement in the Avesta pension payable such that no other appropriate investment could have realistically have expected to have matched it. Had the defendant undertaken a transfer value analysis as required by IMRO rules, this would have been clearly shown.'

40. The same sentiment was expressed by Mr Waddingham (SFS's [i.e. the defendant's] expert). He said in relation to the figures produced by SFS in January 1997 that the PFW figures would only match the benefits under the Avesta scheme (on the footing that Mr Shore deferred taking his benefits until the age of 60) if there was a growth in the fund of 14.5% pa. He described this as a 'racy objective' and 'something for the adventurous'.

41. In these circumstances, in my view it is not possible to say that Mr Shore did not suffer financial loss on 28 April 1997 when he invested in the PFW scheme."

- 22 Cases such as *Bell, Knapp, Shore* and *Maharaj v Johnson* need to be distinguished from those in which the claimant merely assumed a contingent liability. In *Sephton*, the House of Lords held that "the possibility of an obligation to pay money in the future is not in itself damage", to quote Lord Hoffmann at [31]. In the previous paragraph, Lord Hoffmann had said:

"A contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of other property, as in *Forster v Outred & Co* [1982] 1 WLR 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage."

Accordingly, "merely incurring a possible future liability (for example, by giving a guarantee or indemnity unsecured upon any property)" would not count as immediate damage (see [14] of *Sephton*).

- 23 For his part, Lord Walker, having referred to, among other cases, *Bell* and *Knapp*, said at [48]:

"In all these cases the claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages. Your Lordships have not, I think, been shown any case in which the imposition on a claimant of a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets, has been treated as actual loss. That would have been the position if the claimant in the

*Forster* case [1982] 1 WLR 86 had given a personal covenant guaranteeing her son's debts (which she seems not to have done—she paid them simply to prevent enforcement of the security on her farm) and if she had not given any security over any of her own assets.”

- 24 The Court of Appeal considered the implications of *Sephton* in *Axa Insurance Ltd v Akther & Darby* [2009] EWCA Civ 1166; [2010] 1 W.L.R. 1662 (Axa). Longmore LJ observed in [70] that “a contingent liability does not ‘of itself’ constitute ‘damage’”, “[t]here must be something more”. In a similar vein, Arden LJ, the other member of the majority of the court, observed at [33] that “the central idea in the *Sephton* case is that there has to be loss additional to that resulting from the incurring of a purely contingent liability”. The speeches in *Sephton*, Arden LJ said in [27], “draw a distinction between contingent liabilities which affect particular assets of the person subject to the liability as well as his legal position, and contingent liabilities which have little or no effect on his legal position or assets”. Thus, “if a claimant gave a personal guarantee, unsecured on any property of his, time would not begin to run for the purposes of any claim against his solicitor for negligent advice at the time he entered into the transaction until a call was made on him as guarantor” (to quote Arden LJ at [17]; see too [22], [25], [27] and [28]).

### The parties' cases in outline

- 25 Mr Simon Goldstone, who appeared for Hattens, argued that Mrs Elliott suffered damage as soon as the lease and underlease were executed. She was immediately in a measurably less advantageous position than she should have been. Hattens' negligence served to deprive her of certain of the benefits which she should have obtained from the transaction (in particular, the right to a guaranteed rental stream and a property that was insured) and so they were at once vulnerable to a tortious claim. Mrs Elliott's loss was not purely contingent and the judge was mistaken in attaching importance to whether she wished to assign. The package of rights which Mrs Elliott received was objectively less valuable and the cause of action therefore accrued regardless of her intentions as to assignment.
- 26 In contrast, Mr Crowley supported the judge's decision. There was, he submitted, no measurable loss before the fire. Every case has to be determined on its own facts and, here, Mrs Elliott did not suffer any actual loss or damage as a result of the absence of a guarantee until after Mr Malster had defaulted on his obligations and did not suffer any actual loss or damage as a result of Hattens' failure to advise on insurance until after the fire. It had not been part of the purpose or object of the transactions to produce assignable leases, and there was no risk of Mrs Elliott's husband forfeiting her lease on the strength of her failure to insure. Just as it can be seen from *Shore* that a claimant's intentions can be relevant to whether actionable damage was suffered, so they can mean that there was no such damage. Alternatively, it was open to the judge to find that loss was purely contingent up to the fire.

### Discussion

- 27 This is a “flawed transaction” case. Mrs Elliott would still have taken a lease of the Stanley Road premises and granted an underlease to Mr Malster if there had been no negligence. Had, however, Hattens not been negligent, Mr Malster's parents

would have guaranteed his obligations and, it is to be assumed, Mrs Elliott would have been warned of the need to insure and would have done so.

- 28 The question then arises whether “the value to [Mrs Elliott] of the flawed transaction was measurably less than what would have been the value to [her] of the flawless transaction” (to adapt slightly words of Lord Wilson in *Maharaj*). On the face of it, the answer is obvious: apart from anything else, Mrs Elliott’s lease must have been less valuable because there was no guarantor in respect of the underlease she had granted and, for good measure, it was not within her power to remedy the deficiency without the cooperation of Mr Malster’s parents. While it would not have been possible to say how far, if at all, Mrs Elliott might have wished to call on a guarantee, there can be no doubt that, looking at matters objectively, what she received from the transaction was significantly inferior to what she should have received. The reversion to an underlease with the benefit of Mr Malster’s parents as guarantors would plainly have been of measurably greater value than that to the unguaranteed underlease which Hattens’ negligence led Mrs Elliott to grant. An expert could doubtless have put a figure on the difference.
- 29 The present case does not resemble *Sephton*. As Longmore LJ noted in *Axa*, *Sephton* shows that “a contingent liability does not ‘of itself’ constitute ‘damage’”: there must be “something more”. Here, Hattens’ negligence did not cause Mrs Elliott to assume any *liability*: the position is rather that she obtained less advantageous rights. More importantly, perhaps, there was “something more”. The fact that the underlease had no guarantor affected property of Mrs Elliott, viz. her lease. Mrs Elliott was “disappointed (as against what [she] was entitled to expect) in an asset which [she acquired]” and “received less than [she] should have done” as “a party to a bilateral transaction” (to use words of Lords Walker and Hoffmann in *Sephton*).
- 30 The judge, however, drew attention to the fact that Mrs Elliott had not wished to assign her lease, and Mr Crowley argued that that fact was highly relevant. In this respect, he relied particularly on *Shore*. That decision, he argued, shows that what matters is value *from the claimant’s point of view*. In *Shore*, damage was held to have accrued because, regardless of whether the investment in the PFW scheme was objectively worth what was paid for it, it was inferior from Mr Shore’s point of view as what he wanted was a secure scheme. In *Shore*, focusing on the claimant’s intentions meant that damage was held to accrue earlier than might otherwise have been the case, but the same principle, Mr Crowley contended, can delay the accrual of a claim. In the present case, Mr Crowley submitted, Mrs Elliott did not wish to assign her lease and so the mere fact that the absence of a guarantee might have reduced its assignable value is unimportant. It was not, Mr Crowley said, part of the purpose or object of the transaction to produce an assignable lease.
- 31 I cannot accept this argument. In the first place, the simple fact is that Mrs Elliott did not obtain the package of rights that she subjectively desired. As Mr Crowley accepted in submissions, she wanted to have the benefit of a guarantee from Mr Malster’s parents from the outset, but that was not provided. True it may be that she did not envisage assigning her lease, but it does not follow that she did not want the lease to be assignable or that it was not part of the purpose or object of the transaction to produce an assignable lease, let alone that she did not wish the underlease to be supported by a guarantee from Mr Malster’s parents.
- 32 Secondly, *Shore* indicates that a claimant can potentially suffer relevant damage as soon as a flawed transaction is entered into even though the value of that

transaction is not objectively lower than that of the intended transaction. Where, on the other hand, a flawed transaction is objectively less valuable from the start, it seems to me that the cause of action accrues at the outset. If negligence on the part of a solicitor served to reduce the market value of an asset, the claimant cannot, in my view, defer the expiry of the limitation period by pointing out that he was not intending to sell it. It is one thing to say that someone suffered damage because he did not get what he wanted regardless of whether what he got was objectively as valuable; it is another to say that someone who, looking at matters objectively, has sustained a financial loss has not yet suffered relevant damage and so could not bring a claim. In *Sephton*, Lord Walker thought the formulation “financially worse off” preferable to either “worse off” or “detriment” because “worse off” and “detriment” were “imprecise”: see [43]. Where a claimant can be seen to be “financially worse off”, because an asset has a lower market value, relevant damage will, I think, have been suffered whatever the claimant was intending to do with the asset.

- 33 In the circumstances, I am in no doubt that Hattens’ failure to ensure that Mr Malster’s parents were guarantors caused Mrs Elliott damage as soon as the lease and underlease were entered into and, hence, that her cause of action accrued at that point and is now statute-barred.
- 34 I have considered whether the position is different as regards Hattens’ failure to advise Mrs Elliott to insure the premises. An argument to this effect would proceed on the basis that, until the fire, the deficiency could have been remedied easily. While Mrs Elliott’s failure to insure might theoretically have rendered her lease vulnerable to forfeiture, there was no real possibility of the landlord, her husband, seeking to take that course, nor any reason to believe that insurance would have cost more than that it would have done if taken out when the lease and underlease were first executed.
- 35 However, Mr Crowley did not present his case on this basis. He did not suggest in his skeleton argument for the appeal that any distinction could be drawn between the absence of insurance advice and the want of guarantors. Nor, so far as I can see, did he put matters that way before the judge and, although that hearing involved the trial of a preliminary issue rather than merely an application to strike out or for summary judgment, no evidence was adduced as to the unlikelihood of the right to forfeit being exercised or Mrs Elliott’s ability to solve the problem without incurring additional expense.
- 36 In any event, what Mrs Elliott plainly wanted Hattens to achieve for her was a package comprising a lease and underlease which were fully effective. On Mrs Elliott’s case, however, Hattens’ failure to advise her of the need to insure put her in breach of her obligations under both the underlease and lease and provided a ground for forfeiting the latter. Mrs Elliott was thus exposed to a risk which, there being no evidence as to, for example, her relationship with her husband or the chances of his transferring the freehold, cannot be dismissed as negligible, the more so since Mrs Elliott stood to remain in ignorance of the relevant provisions of the lease and underlease. Further, it was foreseeable that, were an attempt to be made to forfeit the lease, Mrs Elliott would have to incur expense in connection with it even if she ultimately retained the lease.
- 37 As Dyson LJ noted in *Shore*, cases such as *Bell* proceeded on the basis that “the possibility of actual financial harm ... constitutes the loss”. In *Knapp*, Hobhouse LJ held that the plaintiffs “suffered loss as soon as they received an insurance

contract which was not binding upon the insurers”, going on to observe that the Court could if necessary have put a monetary value on the loss “exclud[ing] the possibility at that time of remedying the deficiency because the plaintiffs were in fact unaware of it and their state of knowledge arose from the breach of duty”. In a similar way, a valuer asked to value Mrs Elliott’s lease as at the date of its grant on the footing that she would not be complying with her insurance obligations could be expected to arrive at a lower figure on that account.

38 The upshot is that I do not think that the failure to give advice as to the need to insure falls to be treated any differently from the failure to ensure that Mr Malster’s parents became guarantors. I respectfully differ from the judge and would hold Mrs Elliott’s claim to be statute-barred in its entirety.

39 I would allow the appeal.

**ASPLIN LJ:**

40 I agree.

**STUART-SMITH LJ:**

41 I also agree.