

## LIMITATION PERIODS:- WHAT'S THE LIMIT?

### SEMINAR NOTES FOR HEALYS LLP, by Dov Ohrenstein, Radcliffe Chambers

1. This seminar considers the follow matters:
  - \* General Principles relating to the law of limitation of actions
  - \* Use of statutory provisions to extend time limits for claims in tort & contract
  - \* Using continuing duties to postpone the start of limitation periods
  - \* The date when economic loss is suffered
  - \* Time limits on claims for specific performance

### GENERAL PRINCIPLES

#### Aims of the Legislation

2. *“First, the aim of the statutes of limitation is to prevent citizens from being oppressed by stale claims, to protect settled interests from being disturbed, to bring certainty and finality to disputes and so on.”<sup>1</sup>*

These are laudable aims but they can conflict with the need to do justice in individual cases where an otherwise unmeritorious defendant can play the limitation *trump card* and escape liability.

3. The first general legislation on limitation periods was the Statute of Limitations of 1623 which introduced a 6 year time limit for all common law actions. This rule remained in force without substantial amendment for over 300 years. However, a flurry of legislation since 1939 has attempted to remove some of the harshness of the original legislation and, combined with developments in the law of negligence, has added complexity to the original relatively simple rules.

#### Tort & Contract

4. The basic rule is that a claim in tort<sup>2</sup> (other than for personal injury<sup>3</sup>) or in simple contract<sup>4</sup> shall not be brought<sup>5</sup> after the expiration of six years from the date on which the cause of action accrued.

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<sup>1</sup> **Natwest v Ashe** [2008] EWCA Civ 55

<sup>2</sup> Limitation Act 1980 s.2

<sup>3</sup> Limitation Act 1980 s.11 which covers *“damages for negligence, nuisance or breach of duty”* . In **A v Hoare** [2008] UKHL 6 the House of Lords decided that sexual assault and abuse fell within s.11 as claims for personal injury.

<sup>4</sup> Limitation Act 1980 s.5

<sup>5</sup> Proceedings are brought for Limitation purposes when the claim form was received in the court office - see CPR Pt 7 PD para 5.1

5. “Cause of Action” has been defined as “every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the Court”.<sup>6</sup>
6. The general rule in contract is that the cause of action accrues when the breach occurs, not when the damage is suffered.<sup>7</sup> In tort, the cause of action accrues when the damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the Claimant could have known about the damage<sup>8</sup>.
7. There have been expressions of judicial concern about the fact that, as the cause of action in tort, unlike in contract, does not arise until loss has occurred, there can be significant differences in the expiry date of the relevant limitation period:
 

*“In a case where, on any view, the natural cause of action is for breach of contract, the courts should not favour a much later date of accrual for the co-existing action in tort unless they are compelled to do so.”*<sup>9</sup>

*“... within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action. This is especially so if the law provides parallel causes of action in contract and in tort in respect of the same conduct. The disparity between the time when these parallel causes of action should be smaller, rather than greater.”*<sup>10</sup>
8. Despite such concerns, the law reports are filled with cases in which claimants have successfully argued that their tortious claims did not arise for many years until after their contract claims had accrued.

#### Indefinite liability for fraudulent trustees

9. No period of limitation applies to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party, or to recover from the trustee trust property (or the proceeds of trust property) in the possession of the trustee<sup>11</sup>.
10. It should be noted that there are conflicting recent authorities for the proposition that no limitation period applies where a claim is made on the basis of dishonest assistance to

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<sup>6</sup> **Read v Brown** (1888) 22 QBD 128 at 131. See also **Central Electricity Generating Board v Halifax Corpn** [1963] AC 785, at 800, 806

<sup>7</sup> **Gibbs v Guild** (1882) 9 QBD 59

<sup>8</sup> **Pirelli General Cable Works Ltd v Oscar Faber & Ptns** [1983] 2 AC 1, (nb other aspects of this decision have been subject to substantial criticism)

<sup>9</sup> **Axa Insurance v Akthar & Darby Solicitors** [2009] EWCA Civ 1166, per Lady Justice Arden at 83

<sup>10</sup> **Nykredit Plc v Edward Erdman Ltd** [1997] 1 WLR 1627 per Lord Nicholls at 1633D

<sup>11</sup> Limitation Act 1980 s.21(1)

a breach of trust<sup>12</sup>

11. Although there is no statutory time limit for such claims, undue delay coupled with sufficient prejudice will result in a laches defence succeeding.

#### Time Limits for breach of trust claims

12. A six year limitation period generally applies in respect of equitable claims other than those concerning a fraud or retention by a trustee of trust property<sup>13</sup>. Examples of claims falling in this category include where a trustee has innocently or negligently parted with trust property, invested on insufficient security, disobeyed a direction in the trust instrument to realise assets, or acted in breach of the “self dealing” rules by purchasing a beneficiary’s interest.<sup>14</sup>
13. Similarly, claims against directors for non fraudulent breaches of their duty cannot be commenced after a delay of over 6 years.
14. If the equitable claim concerns trust property which is land, the relevant period is 12 years not 6<sup>15</sup>. Longer periods apply in cases of Crown land and some Church land.
15. Time runs from the date on which the breach of trust accrued not from that on which a beneficiary suffered a loss.<sup>16</sup>

#### Actions to recover sums payable by virtue of a statutory provision

16. Section 9 of the Limitation Act provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after 6 years from the date of the cause of action.
17. Section 9 only refers to money claims. Most other statutory claims are treated as claims under a specialty (12 year limitation period)<sup>17</sup>. So, in the context of the Insolvency Act s.238-241 (transaction at an undervalue/ preferences) and s.423 (transactions intended to defraud creditors) the time limit for setting aside transactions is 12 years but where the substance of the claim is to recover a sum of money the period is 6 years.<sup>18</sup>

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<sup>12</sup> In **Statek Corporation v Alford** [2008] EWHC 32 (Ch), Evan-Lombe J expressed the view that no limitation period applied and that the contrary conclusion set out in **Cattley v Pollard** [2006] EWHC 3130 (Ch) was wrong. However, **Cattley v Pollard** was followed in **JD Wetherspoon v Van de Berg & Co Ltd** [2009] EWHC 639.

<sup>13</sup> Limitation Act 1980 s.21(3)

<sup>14</sup> **Tito v Waddell (2)** [1977] Ch 107 per Megarry VC

<sup>15</sup> Limitation Act 1980 s.15(1) applied to trust land by s.18(1)

<sup>16</sup> **Want v Campain** (1893) 9 TLR 254, **Thorne v Heard** [1895] AC 495

<sup>17</sup> Limitation Act 1980 s.8. eg see **Collin v Duke of Westminster** [1985] QB 581 (a claim for leasehold enfranchisement under the Leasehold Reform Act 1967 s.4) and **Giles v Rhind** [2007] EWHC 687 Ch (a claim under s.423 of the Insolvency Act 1986 seeking to set aside transactions at an undervalue defrauding creditors).

<sup>18</sup> **Re Priory Garage (Walthamstow) Ltd** [2001] BPIR 144

18. Some classes of statutory remedy have no limitation period, for example, shareholder petitions alleging unfair prejudice.<sup>19</sup> However, laches may still bar relief in such cases.<sup>20</sup>

#### Time Limits for Contribution Claims

19. Claims under the Civil Liability (Contribution) Act 1978 can be made where the defendant to the contribution claim would have been liable, along with the party making the contribution claim, to the original Claimant
20. A claim for contribution between defendants is subject to a 2 year limitation period<sup>21</sup>. Time runs from the date on which the party claiming the contribution settled the claim of the original Claimant or was held liable to him in damages. Time does not start to run if there has merely been a judgment on, (or admission of), liability without a determination of quantum.<sup>22</sup>

#### Time Limits for enforcement of judgments

21. Section 24(1) of the Limitation Act provides that an “*action*” shall not be brought on any judgment more than 6 years after the date on which the judgment became enforceable. This section applies only to a judgment obtained in England or Wales, but the limitation period in relation to a foreign judgment is also 6 years on the basis that such an action is a simple contract debt.<sup>23</sup>
22. While the term *action* is defined as including any proceedings in a court of law<sup>24</sup>, it should be noted that s.24 is not concerned with procedures to enforce judgments already obtained but only with substantive rights to bring an action on a judgment.
23. It is not an abuse of process for a judgment creditor under an existing judgment to pursue a second action within six years based on that judgment in order to protect its position on the enforcement of its rights for the recovery of a debt. Judgment in the second action will start time running again.<sup>25</sup>
24. While there is no statutory time limit for enforcement of a judgment other than by action, writs of execution can only be issued with the court’s permission if more than 6 years have elapsed since judgment.<sup>26</sup> Permission will only be granted in exceptional cases<sup>27</sup>.

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<sup>19</sup> Companies Act 1985 s459, now duplicated in Companies Act 2006 s.994

<sup>20</sup> **DR Chemicals** [1989] BCLC 383

<sup>21</sup> Limitation Act 1980 s.10

<sup>22</sup> **Aer Lingus v Gildacroft** EWCA Civ 8

<sup>23</sup> **Williams v Jones** (1845) 13 M& W 628

<sup>24</sup> Limitation Act 1980 s.38(1)

<sup>25</sup> **Bennett v Bank of Scotland** [2004] EWCA Civ 988

<sup>26</sup> RSC Order 46 rule 2(1)

<sup>27</sup> **Patel v Singh** [2002] EWCA Civ 1938, **Society of Lloyds v Longtin** [2005] EWHC 2491 (Comm)

25. Winding up or bankruptcy proceedings based on proceedings more than six years are considered not to fall within the special meaning of “*an action upon a judgment*” even though a winding up or bankruptcy petition was a type of court proceeding and not merely a form of execution.<sup>28</sup>

#### Time limits imposed by statutes other than the Limitation Act

26. Section 39 of the Limitation Act stipulates that the Act shall not apply where an alternative limitation period is prescribed by any other statute. Various statutes prescribe different time limits for the bringing of claims. Some of these are significantly shorter than the time allowed under the 1980 Act. For example, a 3 month time limit (subject to exceptions) runs from the Effective Date of Termination for Unfair Dismissal claims<sup>29</sup> and 6 months from probate is the standard deadline for claims against estates for reasonable provision.<sup>30</sup>

### USE OF STATUTORY EXTENSIONS TO EXTEND TORT & CONTRACT TIME LIMITS

#### Tort Claims

27. There is a special time limit of 3 years from the date of knowledge for claims in tort where facts relevant to the cause of action are not known at the date of accrual of the cause of action.<sup>31</sup> This is subject to an overriding time limit of 15 years.<sup>32</sup>
28. Where different kinds of loss are caused by the same negligence time runs as soon as there is knowledge of any of those losses. In **Hamlin v Edwin Evans**<sup>33</sup> surveyors had inspected a property in 1986. In 1987 dry rot was discovered resulting in a modest ex gratia payment. Serious structural defects were discovered in 1992 and proceedings commenced in 1994. The Court of Appeal held the claim to be time barred on the basis that there was only one such cause of action, namely the negligent making of the report and it accrued when damage great or small was suffered for the first time and where two kinds of loss are discovered at different times, time runs from the discovery of the first.
29. In **John Hedley Haward & Ors v Fawcetts**,<sup>34</sup> a case concerning investments made in reliance upon the advice of defendant accountants, the House of Lords has recently considered the question of what knowledge is needed to trigger the start of the 3 year period. The date for the start of the 3 years was not when the claimant first knew that

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<sup>28</sup> **Ridgeway Motors v Alts Limited** [2005] EWCA 92, overruling **Re a Debtor No 50A/SD/95** [1997] 2 All ER 789

<sup>29</sup> Employment Rights Act 1996 s.111(2)

<sup>30</sup> Inheritance (Provision for Family and Dependents) Act 1975 s.4

<sup>31</sup> Limitation Act 1980 s.14A

<sup>32</sup> Limitation Act 1980 s. 14B

<sup>33</sup> (1996) 2 EGLR 106

<sup>34</sup> [2006] UKHL 9

he might have a claim for damages but rather earlier. Key parts of the decision were:

- \* The relevant date was when the claimant first knew enough to justify setting about investigating the possibility that the Defendant's advice was defective.
- \* Knowledge of the facts constituting the essence of the complaint of negligence was sufficient for time to run.
- \* The claimant did not need to have a detailed knowledge of how and why the defendant had failed in their duty of care.
- \* Further, time started to run when the claimants knew that the investments had been intrinsically unsound rather than when they knew that the investments had been lost.

### Contract Claims

30. There is no general statutory provision for the extension of time in contract cases when the breach is not immediately discoverable. This is subject to only limited exceptions for cases of :

- \* Deliberate concealment
- \* Personal injury cases<sup>35 36</sup>
- \* Claims by persons under a disability at the commencement of the limitation period such as minors or persons of unsound mind<sup>37</sup>
- \* Insolvency

31. DELIBERATE CONCEALMENT:-  
Deliberate concealment of a fact relevant to the Claimant's right of action<sup>38</sup> postpones the start of the limitation period. This includes deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time<sup>39</sup>. The defendant must know that he has acted in breach of duty before he can be accused of concealing the cause of action<sup>40</sup>. The motive for the concealment is irrelevant.<sup>41</sup> Breach of duty for these purposes has a wide meaning and includes entering into a transaction which

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<sup>35</sup> Limitation Act 1980 s. 11 - 14

<sup>36</sup> Personal injuries would include depression caused by solicitors negligent handling of litigation - **Bennett v Greenland Houchen & Co** [1998] PNLR 458

<sup>37</sup> Limitation Act 1980 s.28 and s.38(2)

<sup>38</sup> Limitation Act 1980 s.32(1)(b))

<sup>39</sup> Limitation Act 1980 s.32(2).

<sup>40</sup> **Cave v Robins Jarvis & Rolf** [2003] 1 AC 384

<sup>41</sup> **Williams v Fanshaw Porter Hazelhurst** [2004] PNLR 29

defrauds creditors falling within s.423 of the Insolvency Act.<sup>42</sup>

32. **INSOLVENCY:-**  
For provable debts in both personal and corporate insolvency, time will cease to run for limitation purposes on the making of the relevant order, or in the case of a voluntary liquidation, on the passing of the resolution to wind up. It has been held that for a petitioning creditor only, time ceased to run from the date of the presentation of the petition but that time did not stop running against other creditors until the making of the winding up order.<sup>43</sup>

#### USING CONTINUING DUTIES TO POSTPONE THE START OF LIMITATION PERIODS

33. Where a professional does something contrary to the terms of his retainer time begins to run on the breach of contract claim on the date of that act. Where he omits to do something required of him under his retainer, ascertaining the date of accrual may be more difficult. This sometimes gives an opportunity to argue that the contractual duty continued thereby postponing the start date of the limitation period. For example, it was held in **Midland Bank v Hett Stubbs & Kemp**<sup>44</sup> that solicitors who failed to register an option were under a duty which continued to bind them until their duty was no longer effectively capable of performance by reason of the sale of the property.
34. However, the **Midland Bank** decision has been the subject of criticism and was distinguished by the Court of Appeal in **Bell v Peter Brown & Co**<sup>45</sup>. There, a solicitor's failure to register a caution or prepare a declaration of trust or a mortgage at the time a property was transferred from a husband to his wife constituted a breach of contract and failure to make good the breach thereafter did not constitute a further breach. Therefore, although the breach was potentially remediable in the eight years following the transfer and prior to sale by the wife, time for bringing a contractual claim had expired. It should be noted that in **Bell** (unlike in **Midland Bank**) the solicitor had no further contact or dealings with the client after the initial transaction.
35. In **Bell** the tortious claim was also time barred as at least a small loss had been suffered when the husband transferred the property to his wife without protecting his interest. This can be understood by the fact that if a claim for negligence had been made promptly the solicitors would have been liable for the Husband's costs of going to new solicitors to obtain a caution declaration or mortgage. The fact that a further (and much more substantial) loss occurred years later when the wife sold the property and did not pay her the husband his share was irrelevant to the timing of the accrual of the cause of action.
36. In **Morfoot v WF Smith & Co**<sup>46</sup> the court applied the reasoning of the Court of Appeal in **Bell** when deciding that a failure by solicitors to obtain a deed of release was not a

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<sup>42</sup> **Edwards John Giles v Caroline Rhind** [2008] EWCA Civ 118

<sup>43</sup> **Re Cases of Taffs Wells Ltd**[1992] Ch 179

<sup>44</sup> [1979] Ch 384

<sup>45</sup> [1990] 2 QB 495 at 500 (approved by the House of Lords in **Nykredit**).

<sup>46</sup> [2001] Lloyds Rep PN 658

continuing breach of contract. **Midland Bank** should be now seen as a decision which turns on its particular facts. In most cases it will be hard to establish any continuing contractual duty to revisit matters dealt with (or which ought to have been dealt with) years before.

37. Allegations of continuing contractual duty have often arisen in cases such as those concerning architects. An architect engaged to design and supervise the construction of a building is likely to be under a duty to keep his designs under review during the period of construction. However, it has in the past been held that architects owe a duty beyond the date of practical completion<sup>47</sup> and that a similar continuing obligation is owed by engineers<sup>48</sup>. However in the light of recent decisions that is now doubtful unless special circumstances apply<sup>49</sup>.
38. By analogy, in the field of financial services, if someone provides investment advice, the extent to which that advice needs to be revisited when market conditions change is something which depends upon the relationship between the parties, the existence or nature of any retainer etc.

#### **WHEN IS ECONOMIC LOSS SUFFERED?**

39. It is important to determine when the cause of action accrued, and in tort cases this requires determination of the date when loss was suffered. The date of loss is often hard to determine.

*“So what is the present state of the law of England? With three House of Lords’ cases to guide us it ought to be possible to give a clear answer to this question, but I regret that I feel unable to do so with any confidence.”*<sup>50</sup>

*“the law relating to the date on which a cause of action accrues in negligence is ... generally accepted as being somewhat arbitrary and .... capable of leading to unsatisfactory results”.*<sup>51</sup>

#### **The “Package of Rights” Rule**

40. In cases of economic loss where a client acquires less valuable rights than intended, actionable damage normally occurs at the time of the acquisition of those rights rather than at the moment when those rights are exercised.

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<sup>47</sup> **University of Glasgow v William Whitfield** [1988] 42 BLR 66

<sup>48</sup> **Chelmsford DC v TJ Evers** (1983) 25 Build LR 99

<sup>49</sup> **New Islington & Hackney H.A. Ltd v Pollard Thomas and Edwards Ltd** [2001] BLR 74 where Dyson J. considered that an architect would not be under continuing a duty to review the design of foundations unless there was some particular reason for him to do so. See also **Tesco v Costain** [2003] EWHC 1487 T&C

<sup>50</sup> **Abbott v Will Gannon & Smith** [2005] EWCA Civ 198, per Tuckey LJ at para 17

<sup>51</sup> **Law Society v Sephton & Co.**, [2005] PNLR 21 per Neuberger LJ at para 58



41. In **D.W. Moore v Ferrier**<sup>52</sup>, where a solicitor failed to draft an agreement for a prospective employee with an enforceable covenant against competition, loss is immediate. Bingham LJ held<sup>53</sup>:

*“On the plaintiffs’ case ... the covenants against competition were intended, and said by the defendants, to be effective but were in truth wholly ineffective. It seems to me clear beyond argument that from the moment of executing each agreement the plaintiffs suffered damage because instead of receiving a potentially valuable chose in action they received one that was valueless.”*

42. When in **McCarroll v Statham Gill Davis**<sup>54</sup> the former drummer in the band Oasis was allegedly inadequately advised on the drafting of the terms of his contract the cause of action arose upon execution of the contract rather than when he was expelled from the band without compensation. At the time the contract was signed the band member had less rights than he would have had if properly advised so that damage occurred then. The fact that financial loss depended upon a contingency being fulfilled did not postpone the cause of action.
43. In **Watkins v Jones Maidment Wilson**<sup>55</sup> solicitors’ allegedly negligent advice resulted in the Claimant entering into a building contract which included unfavourable terms. The loss arose immediately upon the Claimant entering that contract as the Claimant’s *“package of rights”* arising out of the contract was of lesser value than they were led to believe that it would be. The Court of Appeal rejected the claimant’s contentions that there was no loss on entry into the contract because the net position was then beneficial to the Claimant and that loss only arose when that position changed.
44. In **Pegasus Management Holdings SCA v Ernst & Young**<sup>56</sup> the claimant had subscribed for shares in a company in the belief (based allegedly on advice he was given) that this would provide him with roll-over relief. In the event, relief could not be obtained because the company structure did not satisfy the relevant requirements. On the question of when time began to run for limitation purposes, Lewison J held that the claimant suffered loss as soon as he acquired the shares because his advisers did not ensure that he subscribed for shares in a company which would enable him to preserve his entitlement to roll-over relief.
45. In **Shore v Sedgwick Financial Services Ltd**<sup>57</sup> a claimant who alleged that he had been negligently advised to transfer assets from an occupational pension to a personal pension fund withdrawal (“PFW”) scheme was found by the Court of Appeal to have suffered detriment immediately upon that transfer because he acquired a high risk investment not

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<sup>52</sup> [1988] 1 WLR 267

<sup>53</sup> *ibid* at 279

<sup>54</sup> [2005] EWCA Civ 198

<sup>55</sup> [2008] EWCA Civ 134

<sup>56</sup> [2008] EWHC 2720 (Ch)

<sup>57</sup> [2008] EWCA Civ 863

a safe one. The PFW scheme was therefore immediately less advantageous to the Claimant and loss did not have to await a fall in the value of the PFW scheme. This was a case where the claimant was considered (if he could prove negligence) to not have acquired the rights that he ought to have had if properly advised.

46. In **Axa Insurance v Akthar & Darby Solicitors**<sup>58</sup> the Court decided as a preliminary issue that if the Defendant solicitors breached their duty to insurers by accepting and thereafter conducting cases where there was a less than 51% prospect of success, loss to the Claimant After The Event insurers arose at the time of the inception of the insurance policies. The decision, upheld by a majority of the Court of Appeal, can be explained on the basis that this was a “*flawed transaction*” or “*package of rights*” case in which the insurers acquired policies which they would not otherwise have done (because they would generate claims in excess of premium income because the prospects of success were less than 51%) rather than a case in which the insurers were exposed to contingent liabilities. Had the insurers, immediately upon entering into the insurance policies, tried to sell those policies then they would have received less than if the solicitors’ vetting breach had not occurred. Accordingly, a measurable loss occurred upon the inception of the insurance policies even though the insurers were not immediately financially worse off because they received the premiums up front.

The “*Damaged Asset*” Rule

47. When, in the case of **New Islington & Hackney H.A.**<sup>59</sup>, an architect introduced a defective design into a building as a result of which there was insufficient sound insulation it was held that his liability in tort and contract accrued at the date of practical completion at the latest. This decision can be understood by the fact that economic loss amounting to the cost of putting right the defect arose immediately. Any injustice caused by the fact that the damage might not be immediately apparent is mitigated by the alternative limitation period of 3 years from date of knowledge (subject to 15 year long stop).
48. In **Forster v Outred**<sup>60</sup> the plaintiff, on allegedly negligent advice, mortgaged her previously unencumbered property to pay for her son’s debts and the mortgage was enforced some two years later. The Court of Appeal held that she had suffered a loss as soon as she signed the mortgage, as she had detrimentally affected the value of her property at that point. The loss was immediate and it did not matter that if her son paid his debts the mortgage might never be enforced.
49. In an ordinary case where a purchaser buys a property in reliance upon a survey which fails to identify material defects the loss arises when the Claimant has irrevocably committed himself to buying the property - in a residential property context this would be the date of exchange not completion<sup>61</sup>. However, it is not difficult to find examples

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<sup>58</sup> [2009] EWCA Civ 1166

<sup>59</sup> **New Islington & Hackney H.A. Ltd v Pollard Thomas and Edwards Ltd** [2001] BLR 74

<sup>60</sup> [1982] 1 WLR 86 (approved by the House of Lords in **Nykredit**)

<sup>61</sup> **Byrne v Hall Pain & Foster** [1999] 1 WLR 1849 CA

of extraordinary cases.

50. In **Havenledge Ltd v Graeme John & Partners**<sup>62</sup> solicitors were alleged to have been negligent in failing to advise their client to obtain a mining survey report but the property at the time of purchase was worth what the client paid. Substantial refurbishment took place for the purpose of developing the property. Cracks caused by mining subsidence then appeared. British Coal in accordance with its statutory liability paid for repairs but there was disruption to the clients' business. The difficulties of this area of the law are illustrated by the fact that the three members of the Court of Appeal each gave conflicting decisions:

- \* Buxton LJ held that the cause of action arose when the client bought the property and it was unsuitable for the intended purpose because of the risk of damage from mining subsidence.
- \* Sir Anthony Evans held that the cause of action arose when cracks first appeared in the building as prior to that time there was only a risk of loss being incurred.
- \* Pill LJ held that neither did the cause of action have to await until the cracks appeared nor was it complete upon purchase. Instead he decided that relevant loss first occurred when the client had taken action to its detriment by the expenditure of money on the redevelopment and conversion of the property. Relevant loss had occurred even though, it was not until much later that it could have been quantified on the basis of an assessment of the risk of subsidence.

#### The problem of contingent losses

51. A recurring difficulty is that:

*“There is a fine distinction, therefore, between a situation where no actual loss is suffered, notwithstanding a risk of potential loss, and one where there is an actual loss which can only be measured by assessing the present value of future risks.”*<sup>63</sup>

52. In the case of a negligent valuer a mortgagee usually suffers loss when it agrees to lend money against the inadequate security. This would be an example of the application of “*package of rights rule*”- the mortgagee obtaining less valuable rights than had been intended.

53. Different considerations apply though in marginal cases where the value of the security, although lower than stated in the negligent valuation, equals or exceeds the sum loaned. The House of Lords considered this in **Nykredit Plc v Edward Erdman Ltd**<sup>64</sup>. The Lender contended that loss would occur upon the loan being advanced against inadequate security. The Valuer's contention was that loss arose only when the property was sold. Lord Hoffman held:

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<sup>62</sup> [2001] PNL R 419 C.A

<sup>63</sup> **Havenledge Ltd v Graeme John & Partners** [2001] PNL R 419 C.A, para 17 per Sir Anthony Evans

<sup>64</sup> **Nykredit Plc v Edward Erdman Ltd** [1997] 1 WLR 1627 at 1633

*“[L]oss will be suffered when the lender can show that he is worse off than he would have been if the security had been worth the sum advised by the valuer... There may be cases in which it is possible to demonstrate that such loss is suffered immediately upon the loan being made. The lender may be able to show that the rights which he has acquired as lender are worth less in the open market than they would have been if the security had not been overvalued. But I think that this would be difficult to prove in a case in which the lender's personal covenant still appears good and interest payments are being duly made. On the other hand, loss will easily be demonstrable if the borrower has defaulted, so that the lender's recovery has become dependent upon the realisation of his security and that security is inadequate. On the other hand, I do not accept [the] submission that no loss can be shown until the security has actually been realised. Relevant loss is suffered when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been.”*<sup>65</sup>

54. Following Lord Hoffman’s approach it may be thought necessary to examine how high the risk of future prejudice needs to be before there can be a determination that a loss has occurred. The courts have not given clear guidelines on the level of the threshold. It may be necessary to investigate the commercial value of the “loan book” to determine whether or not a loss had occurred. Some commentators have expressed surprise at this because the loan book valuation will fluctuate depending upon market conditions so a cause of action could arise and then disappear. However, that is not unique to this type of situation.
55. The House of Lords recently revisited these issues in **Law Society v Sephton & Co**<sup>66</sup>. The Defendant accountants had failed to identify that a solicitor had misappropriated client funds, when certifying that solicitor’s accounts for the period 1989 to 1995. The Law Society acted upon complaints from clients and investigated the accounts from 20 May 1996 onwards. Thereafter the Law Society made payments to clients of the fraudulent solicitor. Professional negligence proceedings were issued against the defendant accountants in May 2002. The Court of Appeal and now the House of Lords have concluded that the cause of action did not accrue until the clients actually made claims for compensation out of the Law Society Fund. The solicitor's misappropriations had given rise to the possibility of a liability to pay compensation out of the fund, contingent on the misappropriation not being otherwise made good and a claim in proper form being made. It was held that until such a claim was actually made, no loss or damage had been sustained by the fund. Accordingly the proceedings had been issued within the limitation period. The possibility of an obligation to pay money in the future is not itself damage. There was no reason to accelerate the accrual of a cause of action where there had been no transaction changing the claimant's legal position and no diminution in value of any particular asset.
56. In **Sephton**<sup>67</sup> Lord Hoffman held that **Nykredit** decides that:

*“in a transaction in which there are benefits (covenant for repayment and security) as*

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<sup>65</sup> **Nykredit**, per Lord Hoffman at 1639

<sup>66</sup> [2006] UKHL 22

<sup>67</sup> at para [20]

*well as burdens (payment of the loan) and the measure of damages is the extent to which the lender is worse off than he would have been if he had not entered the transaction, the lender suffers loss and damage only when it is possible to say the he is on balance worse off.”*

In that passage Lord Hoffman uses the words “worse off” though on another occasion he uses the words “*financially worse off*”. Lord Walker in **Sephton** expressed the view that the latter expression was to be preferred, an approach since followed by the Court of Appeal <sup>68</sup>.

57. Lord Hoffman summarised his conclusion in **Sephton** in this way:

*“30. In my opinion, therefore, the question must be decided on principle. 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**, 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 damage in the circumstances). But standing alone as in this case, the contingency is not damage. .... the possibility of an obligation to pay money in the future is not in itself damage”*

58. Lord Walker in **Sephton** referred to cases such as **Moore, Forster, and Bell** and concluded:

*“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”.*

59. According to the light of the Lords’ decision in **Sephton** subtle distinctions need to be made. Mrs Forster in **Forster v Outred** had suffered an immediate loss when she encumbered her property with a mortgage to secure her son’s debts as this immediately depressed the value of the property (in effect it became a “*damaged asset*”) even though the lender might not seek to enforce. Lord Hoffman and Lord Walker both said in **Sephton** that if there was an unsecured personal guarantee (rather than one secured by a charge against her home) time would not start to run until a claim on the guarantee was intimated or made. However, it is hard to see why the date of accrual of a cause of action of a person who, as a result of negligent advice, executes an unsecured personal guarantee should be different from that of a person who executes a secured guarantee. Lady Justice Arden expressed the view in **Axa Insurance v Akthar & Darby Solicitors** <sup>69</sup> that “*such distinctions are hard to rationalise. In my judgment this aspect of **Sephton** makes it desirable that at the appropriate time it should be revisited by the Supreme Court.*”

Summary of when causes of action for recovery of economic loss accrue

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<sup>68</sup> **Watkins v Jones Maidment Wilson** [2008] EWCA 134

<sup>69</sup> [2009] EWCA Civ 1166 at para 27

60. The relevant principles when determining the date when economic loss occurred can be summarised as follows:
- \* The mere fact of entering into a contract as a result of negligent advice does not amount to a loss.<sup>70</sup>
  - \* “*The Package of Rights rule*”:  
In cases<sup>71</sup> where breach of duty causes a party to acquire less rights than it had hoped for then that amounts to a detriment and is an immediate loss whether the value of the loss is immediately quantifiable or not.
  - \* “*The Damaged Asset Rule*”:  
In cases<sup>72</sup> where the breach of duty results in a reduction in the value of an existing asset then that is an immediate loss whether the value of the loss is immediately quantifiable or not.
  - \* The negligent creation of a risk of future harm does not give rise to an immediate loss.<sup>73</sup>
  - \* The mere entry into the transaction under which “*Financial loss is possible, but not certain*” is not sufficient detriment<sup>74</sup> to amount to immediate loss.

#### **THE FAILED LITIGATION CASES**

61. Where solicitors have been negligent in their conduct of litigation questions have arisen as to when their client’s cause of action in tort arose. The courts have adopted a variety of approaches:
- \* In **Hopkins v Mackenzie**<sup>75</sup> the Court of Appeal endorsed the view that such a cause of action arose only when the original claim was struck out.
  - \* In **Khan v Falvey**<sup>76</sup> the Court of Appeal came to a different conclusion and held that the cause of action arose on and limitation period runs from the time when the original litigation becomes significantly vulnerable to striking out.
  - \* In **Axa Insurance v Akthar & Darby Solicitors** the Court of Appeal held that where the defendant solicitor had failed to notify the insurer or had failed to progress a case as it should have done, the damage to litigation insurers had

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<sup>70</sup> **Nykredit Plc v Edward Erdman Ltd** per Lord Nicholls at 1631

<sup>71</sup> such as **Bell v Peter Browne & Co**, and **McCarroll v Statham Gill Davis**

<sup>72</sup> such as **Forster v Outred**, and **Axa v Akther**

<sup>73</sup> as in **NyKredit**

<sup>74</sup> **Nykredit Plc v Edward Erdman Ltd** per Lord Nicholls at 1631

<sup>75</sup> [1995] PIQR 43

<sup>76</sup> [2002] LI Rep PN 369

occurred when the breach of duty took place if at the time of breach the insurers were exposed to larger liabilities than they otherwise would have faced.

62. The logic of the **Khan v Falvey** approach is that a claim is worth a reduced amount (eg were it to be assigned) if it is vulnerable to a strike out even if such a strike out has not occurred. Assessing the commercial value of the claim is consistent with the approach of Lord Hoffman in **Nykredit**. However, it does create problems for practitioners as in many cases it will be difficult to determine with any degree of confidence the precise time when the vulnerability to a successful strike out arose.
63. The courts' approach in those cases where incompetent handling of litigation has resulted in the need for a claim to be compromised at a discount to the claim's original value is inconsistent. There were suggestions in **Hopkins**<sup>77</sup> and in **Khan**<sup>78</sup> that the cause of action does not accrue until settlement but that would not be consistent with **Nykredit** or the general reasoning in **Khan**. If time runs in strike out cases as soon as the Claim is vulnerable, the fact that the claim is later compromised ought not to postpone the start of the limitation period.

#### TIME LIMITS FOR SPECIFIC PERFORMANCE CLAIMS

64. Section 36 of the Limitation Act disapplies the various time limits set out in the Act including s.2 (tort claims), s.5 (contract claims), s.8 (specialty claims), s.9 (claims for sums due under an enactment) to claims for equitable relief such as for specific performance or injunctions "*except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1<sup>st</sup> July 1940.*"
65. Section 36 does not effect the scope of any laches defence. The general principle that the doctrine of laches applies to claims for equitable relief such as for specific performance is well established:

*"... a party cannot call upon a Court of Equity for specific performance, unless he has shewn himself ready, desirous, prompt, and eager"*<sup>79</sup>

*"Specific performance is relief which [the] court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit."*<sup>80</sup>

#### Where the equitable claim mirrors a legal claim

66. In cases where the facts giving rise to a claim are sufficient to found an action at law and

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<sup>77</sup> at 347 per Nourse LJ

<sup>78</sup> at para 32 per Stuart Smith LJ

<sup>79</sup> **Milward v Earl Thanet** (1801) 5 Ves 720n, cited in **P&O Nedlloyd v Arab Metals** [2006] EWCA Civ 1717 at para 50.

<sup>80</sup> **Eads v Williams** (1854) 4 De G.M.&G 674, cited in **P&O Nedlloyd v Arab Metals** at para 50.

an action in equity and in which substantially identical relief is available in each case, equity takes the view (as it did prior to 1940) that the limitation period applicable to a claim at law should apply by analogy to a claim in equity.

67. Accordingly, the time limit for the taking of an equitable account will be identical to that where there is a contractual duty to account. Similarly, where an allegation of breach of fiduciary duty was based on the same facts as a common law claim of fraud:

*“One could scarcely imagine a more correspondent set of remedies as damages for fraudulent breach of contract and equitable compensation for breach of fiduciary duty in relation to the same factual situation, namely, the deliberate withholding of money due by a manager to his artist. It would have been a blot on our jurisprudence if those selfsame facts gave rise to a time bar in the common law courts but none in a court of equity.”*<sup>81</sup>

#### Specific Performance claims are distinct

68. The Court of Appeal in **P&O Nedlloyd v Arab Metals** has recently reviewed the authorities concerning the inter action of limitation periods, laches and claims for specific performance.
69. The facts in **P&O Nedlloyd** concerned a contract for the delivery of a cargo which turned out to be radioactive. The shipper was trying to compel the buyer to accept delivery. A damages claim had also been made. Here, although the claim for specific performance was clearly a form of remedy for the buyer’s breach it was held not to be time barred.
70. A key part of the Court of Appeal decision was the conclusion that a claim for specific performance of a contract is sufficiently different to a claim for damages that the 6 year limitation period set out in Section 5 of the Limitation Act should not apply:

*“It is not surprising that equity should apply by analogy the limitation periods applicable to claims at law for an account and for damages for breach of duty, whether in contract or tort, to claims for an account and for equitable compensation. In each case the same facts give rise to a claim, whether at law or in equity, and the same kind of relief is obtainable. A claim for specific performance raises different considerations, however, both because relief comparable to that available from the courts of equity was not available from the common law courts and because the facts needed to support a claim for specific performance are not in all respects the same as those necessary to support a claim for breach of contract.”*<sup>82</sup>

*.... No doubt it is true that most claims for specific performance are made in response to an existing breach of contract, but as **Hashim v Zenab** shows, an accrued right of action for breach of contract is not a necessary precondition to obtaining relief of that kind. It is therefore wrong in principle to treat specific performance as merely an*

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<sup>81</sup> **Coulthard v Disco Mix Club Ltd** [2000] 1WLR707

<sup>82</sup> **Nedlloyd** at para 43



*equitable remedy for an existing breach of contract. Moreover, since a claim for specific performance may be made as soon as the contract has been entered into, it would be necessary to regard the cause of action as accruing at that moment with the unfortunate result that the claim could become time barred before any need for relief had arisen. This lends further support to the conclusion that the application of the limitation period by analogy is not appropriate in relation to claims for specific performance.”*<sup>83</sup>

#### Laches within the limitation period

71. If a limitation period applies, laches can still operate as a defence so long as the laches defence is based on more than mere delay, i.e. some element of prejudice is proven. The Court of Appeal in **P&O Nedlloyd** expressly left undecided the question of whether mere delay could ever be sufficient to give rise to a laches defence but made clear that mere delay would certainly be an insufficient basis for a defence within the limitation period.

*“However, if and to the extent that a limitation period is applicable to the claim, it is difficult to see why mere delay should defeat the claim until the limitation period has expired....*

*Equally, however, I can see no reason in principle why, in a case where a limitation period does apply, unjustified delay coupled with an adverse effect of some kind on the defendant or a third party should not be capable of providing a defence in the form of laches even before the expiration of the limitation period. The question for the court in each case is simply whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks.”*<sup>84</sup>

72. Particularly if there has been a change of position by a Defendant, a defence of laches could arise long before any limitation period would have expired.

73. The current state of the law on time limits relating to equitable claims can therefore be summarised as follows:

- \* Where a claim in equity mirrors a legal claim, the legal limitation period applies by analogy.
- \* A specific performance claim does not amount to a mirror of a legal claim, accordingly no limitation period applies even by analogy.
- \* In cases where specific performance is claimed (and in other cases where there is no limitation period) and there has been undue delay in bringing the claim then a Defendant needs to rely on the laches rules.
- \* Where there is a limitation period laches can still be a defence to equitable claims (including specific performance) before the expiry of any limitation period but only if prejudice is shown.

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<sup>83</sup> **Nedlloyd** at para 47

<sup>84</sup> **Nedlloyd** at para 61

## CONCLUSIONS

74. These seminar notes highlight only a few of the difficult limitation period problems. The Courts regularly give decisions creating new law relating to limitation. Within the last year alone:
- \* The Courts have had to grapple with Human rights implications of “*squatters rights*” and acquiring title by a sufficiently period adverse possession;<sup>85</sup>
  - \* Many mortgagees will have recently been concerned to find limitation loopholes in their standard procedures because where the mortgagor had been in possession of the mortgaged property for 12 years without any payment or acknowledgement of the mortgage debt, the mortgagee’s right to possession of the land was held barred under s.15 and its title to the mortgaged property was also extinguished by section 17;<sup>86</sup>
  - \* In contrast to the position of mortgagees, judgment creditors with charging orders will have been relieved to find that section 20(1) of the Limitation Act has been held to have no application to charging orders so a creditor who obtains a charging order can rely on that charge more than 12 years later;<sup>87</sup>
  - \* Previously established case law relating to the time limit for claiming damages for intentional assaults has been overturned;<sup>88</sup>
  - \* The interaction between limitation periods and the Civil Procedure Rules have been examined by the Court of Appeal in cases concerning out of time amendments to statements of case and the adding or substitution of parties<sup>89</sup>, and dispensing with service of the claim form;<sup>90</sup>
  - \* Following legislation<sup>91</sup> which imposed a 3 year limitation period in place of the previous 6 year period for reclaiming tax, the House of Lords held<sup>92</sup> that such legislation was defective because it lacked the transitional arrangements necessary under European law. A court could, in a suitable case, reach its own decision as to a reasonable period for the disapplication of the limitation period;

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<sup>85</sup> **JA Pye (Oxford) Ltd v Graham** (2002) UKHL 30, (2003) 1 AC 419 and **JA Pye (Oxford) Ltd v United Kingdom** (44302/02) 23 BHRC 405, applied most recently by the Court of Appeal in **Ofulue v Bossert** [2008] EWCA Civ 7

<sup>86</sup> **Natwest v Ashe** [2008] EWCA Civ 55,

<sup>87</sup> **Yorkshire Bank Finance Ltd v Mulhall** [2008] EWCA Civ 1156

<sup>88</sup> **A v Hoare** [2008] UKHL 6

<sup>89</sup> Civil Procedure Rule 17.4 and 19.5 and **Adelson v Associated Newspapers Limited** [2007] EWCA Civ 701

<sup>90</sup> see Civil Procedure Rule 6.9 and **John Olafson v Hannes Holmsteinn Gissurarson** [2008] EWCA 152

<sup>91</sup> Value Added Tax Regulations 1995 reg.29

<sup>92</sup> **Michael Fleming (t/a Bodycraft) v Customs & Excise** [2008] UKHL 2

- \* The Court of Appeal have confirmed that the Crown could, if necessary, rely on the Limitation Act to obtain adverse possession of the Severn Estuary;<sup>93</sup>
- \* The Court of Appeal have determined that “*breach of duty*” for the purposes of deliberate concealment and s.32(2) of the Limitation Act includes entering transactions at an undervalue.<sup>94</sup>

75. Despite the fact that the basic principles behind the Limitation Act have been on the statute books for over 300 years the cases show that even on those limitation questions that are not meant to be matters of discretion, judges continue to struggle to apply the law in a consistent or entirely rational manner. The Law Commission has proposed reforms<sup>95</sup>, and while the government has expressed approval in principle, there is little political appetite to introduce legislative changes. Practitioners can expect the Court of Appeal and the House of Lords to continue to need to revisit this area of the law on a regular basis.

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<sup>93</sup> **Mark Andrew Roberts v Crown Estate Commissioners** [2008] EWCA Civ 98, where the Claimant sued as sued as “*Lord Marcher of Magor*”, a title he acquired in 1997 but which dates back to the 13<sup>th</sup> Century.

<sup>94</sup> **Edwards John Giles v Caroline Rhind** [2008] EWCA Civ 118

<sup>95</sup> **Law Com No 270**, [2001]