

OUT OF TIME? RECENT DEVELOPMENTS IN LIMITATION

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

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.”*¹

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 culminating in the Limitation Act 1980 (as amended) 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.

The Issue of Proceedings

4. The Limitation Act 1980 provides that various types of claim *“shall not be brought”* after the expiration of the specified time limits. For the purposes of the Act a claim is *“brought”* when a claimant’s request for the issue of a claim form is delivered to the correct court office during its opening hours.² Accordingly, if the court staff fail to issue the claim promptly upon receipt of the claim form this will not result in the claim being time barred despite the fact that under the Civil Procedure Rules proceedings are not *“started”* until the Court issues the claim form.³
5. The Court of Appeal has also held that if a statutory limitation period expired on a day when the

¹ *Natwest v Ashe* [2008] EWCA Civ 55

² *St Helens Metropolitan BC v Barnes* [2006] EWCA Civ 1372, which is now reflected in CPR PD 7A para 5.1)

³ See CPR 7.2

court offices were closed it should be extended to the next day on which they were open.⁴

Tort & Contract

6. The basic rule is that a claim in tort⁵ (other than for personal injury⁶) or in simple contract⁷ shall not be brought after the expiration of six years from the date on which the cause of action accrued. The day on which the cause of action accrued is excluded from the computation of the 6 year period.
7. “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”.⁸
8. The general rule in contract is that the cause of action accrues when the breach occurs, not when the damage is suffered.⁹ 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 damage¹⁰.
9. 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 a 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.”*¹¹

“.... 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.”

⁴ **Pritam Kaur v S.Russell & Sons Ltd** [1973] QB 336

⁵ Limitation Act 1980 s.2. A tort claim probably includes claims under s2(1) of the Misrepresentation Act 1967, although the point remains undecided, see **Law v Society of Lloyds** [2003] EWCA 1887.

⁶ 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.

⁷ Limitation Act 1980 s.5

⁸ **Read v Brown** (1888) 22 QBD 128 at 131. See also **Central Electricity Generating Board v Halifax Corpn** [1963] AC 785, at 800, 806

⁹ **Gibbs v Guild** (1882) 9 QBD 59

¹⁰ **Pirelli General Cable Works Ltd v Oscar Faber & Ptns** [1983] 2 AC 1, (nb other aspects of this decision have has been subject to substantial criticism)

¹¹ **Axa Insurance v Akthar & Darby Solicitors** [2009] EWCA Civ 1166, per Lady Justice Arden at 83

10. 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

11. 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 trustee¹³.
12. There are conflicting recent authorities concerning the question of whether or not a limitation period applies where a claim is made on the basis of dishonest assistance to a breach of trust¹⁴ but the most recent decision of the Court of Appeal on the point has now held that no such time limit applies¹⁵, and that is binding pending any review of the relevant law by the Supreme Court.
13. 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

14. 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 property¹⁶. 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.¹⁷
15. Similarly, claims against directors for non fraudulent breaches of their duty cannot be commenced after a delay of over 6 years.
16. If the equitable claim concerns trust property which is land, the relevant period is 12 years not

¹² **Nykredit Plc v Edward Erdman Ltd** [1997] 1 WLR 1627 per Lord Nicholls at 1633D

¹³ Limitation Act 1980 s.21(1)

¹⁴ In **Statek Corporation v Alford** [2008] EWHC 32 (Ch), Evans-Lombe J expressed the view that no limitation period applied to claims against persons who were accessories to fraudulent breaches of trust 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 and a similar approach was taken by Lord Hoffman in the Hong Kong decision **Peconic Industrial Development Ltd v Lau Kwok Fai** [2009] 5 HKC 135.

¹⁵ **Williams v Central Bank of Nigeria** [2012] EWCA 415

¹⁶ Limitation Act 1980 s.21(3)

¹⁷ **Tito v Waddell (2)** [1977] Ch 107 per Megarry VC

6¹⁸. Longer periods apply in cases of Crown land and some Church land.

17. Time runs from the date on which the breach of trust accrued not from that on which a beneficiary suffered a loss.¹⁹

Actions to recover sums payable by virtue of a statutory provision

18. 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.
19. Section 9 only refers to money claims. Most other statutory claims are treated as claims under a specialty (12 year limitation period)²⁰. 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.²¹
20. Some classes of statutory remedy have no limitation period, for example, shareholder petitions alleging unfair prejudice.²² However, laches may still bar relief in such cases.²³
21. Note that the Court of Appeal has recently held that if the council obtains a liability order in the Magistrates Court in respect of Council Tax or non-domestic rates it can only obtain such an order in respect of sums that fell due in the previous 6 years. However, once a liability order has been obtained there is then no time limit for enforcing the order (eg by a winding up or bankruptcy petition, applying for a charging order etc).²⁴

Time Limits for Contribution Claims

22. 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
23. A claim for contribution between defendants is subject to a 2 year limitation period²⁵. Time

¹⁸ Limitation Act 1980 s.15(1) applied to trust land by s.18(1)

¹⁹ **Want v Campain** (1893) 9 TLR 254, **Thorne v Heard** [1895] AC 495

²⁰ 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).

²¹ **Re Priory Garage (Walthamstow) Ltd** [2001] BPIR 144

²² Companies Act 2006 s.994

²³ **DR Chemicals** [1989] BCLC 383

²⁴ **Bolsover DC v Ashfield Nominees** [2010] EWCA Civ 1129

²⁵ Limitation Act 1980 s.10

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.²⁶

Time Limits for enforcement of judgments

24. 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.²⁷
25. While the term *action* is defined as including any proceedings in a court of law²⁸, 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.
26. 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.²⁹
27. 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.³⁰ Permission will only be granted in exceptional cases³¹.
28. 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.³²

Time limits imposed by statutes other than the Limitation Act

29. 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

²⁶ **Aer Lingus v Gildacraft** EWCA Civ 8

²⁷ **Williams v Jones** (1845) 13 M& W 628

²⁸ Limitation Act 1980 s.38(1)

²⁹ **Bennett v Bank of Scotland** [2004] EWCA Civ 988, **Kuwait Oil Tanker Company SAK v Al Bader** [2008] EWHC 2432 (Comm)

³⁰ RSC Order 46 rule 2(1)

³¹ **Patel v Singh** [2002] EWCA Civ 1938, **Society of Lloyds v Longtin** [2005] EWHC 2491 (Comm)

³² **Ridgeway Motors v Alts Limited** [2005] EWCA 92, overruling **Re a Debtor No 50A/SD/95** [1997] 2 All ER 789

Effective Date of Termination for Unfair Dismissal claims³³ and 6 months from probate is the standard deadline for claims against estates for reasonable provision.³⁴

USE OF STATUTORY EXTENSIONS TO EXTEND TORT & CONTRACT TIME LIMITS

Tort Claims

30. 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.³⁵ This is subject to an overriding time limit of 15 years.³⁶
31. 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**³⁷ 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.
32. In **John Hedley Haward & Ors v Fawcetts**,³⁸ 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 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.

³³ Employment Rights Act 1996 s.111(2)

³⁴ Inheritance (Provision for Family and Dependents) Act 1975 s.4

³⁵ Limitation Act 1980 s.14A

³⁶ Limitation Act 1980 s. 14B

³⁷ (1996) 2 EGLR 106

³⁸ [2006] UKHL 9

Contract Claims

33. 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
 - * Insolvency
 - * Personal injury cases ^{39 40}
 - * Claims by persons under a disability at the commencement of the limitation period such as minors or persons of unsound mind ⁴¹
34. DELIBERATE CONCEALMENT:-
Deliberate concealment of a fact relevant to the Claimant's right of action⁴² 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 time⁴³. The defendant must know that he has acted in breach of duty before he can be accused of concealing the cause of action⁴⁴. The motive for the concealment is irrelevant.⁴⁵ Breach of duty for these purposes has a wide meaning and includes entering into a transaction which defrauds creditors falling within s.423 of the Insolvency Act.⁴⁶
35. 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.⁴⁷

WHEN IS ECONOMIC LOSS SUFFERED?

36. It is important to determine when the cause of action accrued, and in tort cases this requires

³⁹ Limitation Act 1980 s. 11 - 14

⁴⁰ Personal injuries would include depression caused by solicitors negligent handling of litigation - **Bennett v Greenland Houchen & Co** [1998] PNLR 458

⁴¹ Limitation Act 1980 s.28 and s.38(2)

⁴² Limitation Act 1980 s.32(1)(b))

⁴³ Limitation Act 1980 s.32(2).

⁴⁴ **Cave v Robins Jarvis & Rolf** [2003] 1 AC 384

⁴⁵ **Williams v Fanshaw Porter Hazelhurst** [2004] PNLR 29

⁴⁶ **Edwards John Giles v Caroline Rhind** [2008] EWCA Civ 118

⁴⁷ **Re Cases of Taffs Wells Ltd**[1992] Ch 179

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.”*⁴⁸

*“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”.*⁴⁹

The “Package of Rights” Rule

37. 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.
38. In **D.W. Moore v Ferrier**⁵⁰, where a solicitor, instructed by an employer, failed to draft an employment agreement with an enforceable covenant against competition, loss is immediate. Bingham LJ held⁵¹:

“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.”
39. When in **McCarroll v Statham Gill Davis**⁵² 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.
40. In **Watkins v Jones Maidment Wilson**⁵³ 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

⁴⁸ **Abbott v Will Gannon & Smith** [2005] EWCA Civ 198, per Tuckey LJ at para 17

⁴⁹ **Law Society v Sephton & Co**, [2005] PNLR 21 per Neuberger LJ at para 58

⁵⁰ [1988] 1 WLR 267

⁵¹ *ibid* at 279

⁵² [2005] EWCA Civ 198

⁵³ [2008] EWCA Civ 134

contract because the net position was then beneficial to the Claimant and that loss only arose when that position changed.

41. In **Pegasus Management Holdings SCA v Ernst & Young**⁵⁴ 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.
42. In **Shore v Sedgwick Financial Services Ltd**⁵⁵ 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 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.
43. In **Axa Insurance v Akthar & Darby Solicitors**⁵⁶ 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

44. When, in the case of **New Islington & Hackney H.A.**⁵⁷, 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

⁵⁴ [2008] EWHC 2720 (Ch)

⁵⁵ [2008] EWCA Civ 863

⁵⁶ [2009] EWCA Civ 1166

⁵⁷ **New Islington & Hackney H.A. Ltd v Pollard Thomas and Edwards Ltd** [2001] BLR 74

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).

45. In **Forster v Outred**⁵⁸ 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.
46. 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 completion⁵⁹. However, it is not difficult to find examples of extraordinary cases.
47. In **Havenledge Ltd v Graeme John & Partners**⁶⁰ 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

48. A recurring difficulty is that:

⁵⁸ [1982] 1 WLR 86 (approved by the House of Lords in **Nykredit**)

⁵⁹ **Byrne v Hall Pain & Foster** [1999] 1 WLR 1849 CA

⁶⁰ [2001] PNLR 419 C.A

*“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.”*⁶¹

49. 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.

50. 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**⁶². 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:

*“[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.”*⁶³

51. 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.

52. The House of Lords revisited these issues in **Law Society v Sephton & Co**⁶⁴. 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

⁶¹ **Havenledge Ltd v Graeme John & Partners** [2001] PNLR 419 C.A, para 17 per Sir Anthony Evans

⁶² **Nykredit Plc v Edward Erdman Ltd** [1997] 1 WLR 1627 at 1633

⁶³ **Nykredit**, per Lord Hoffman at 1639

⁶⁴ [2006] UKHL 22

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.

53. In **Sephton**⁶⁵ Lord Hoffman held that **Nykredit** decides that:

“in a transaction in which there are benefits (covenant for repayment and security) as 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 that 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 Appeal⁶⁶.

54. 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”*

55. 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”.

56. 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

⁶⁵ at para [20]

⁶⁶ **Watkins v Jones Maidment Wilson** [2008] EWCA 134

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**⁶⁷ 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

57. 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.⁶⁸
- * “*The Package of Rights rule*”:
In cases⁶⁹ 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 cases⁷⁰ 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.⁷¹
- * The mere entry into the transaction under which “*Financial loss is possible, but not certain*” is not sufficient detriment⁷² to amount to immediate loss.

THE FAILED LITIGATION CASES

⁶⁷ [2009] EWCA Civ 1166 at para 27

⁶⁸ **Nykredit Plc v Edward Erdman Ltd** per Lord Nicholls at 1631

⁶⁹ such as **Bell v Peter Browne & Co**, and **McCarroll v Statham Gill Davis**

⁷⁰ such as **Forster v Outred**, and **Axa v Akther**

⁷¹ as in **NyKredit**

⁷² **Nykredit Plc v Edward Erdman Ltd** per Lord Nicholls at 1631

58. 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**⁷³ 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**⁷⁴ 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 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.
59. 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 struck 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.
60. 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**⁷⁵ and in **Khan**⁷⁶ 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.

USING CONTINUING DUTIES TO POSTPONE THE START OF LIMITATION PERIODS

61. Subject to the arguments raised above it is relatively simple to identify the moment at which time begins to run for the purposes of the Limitation Act in cases where a party takes an active step and breaches a term of the relevant contract in doing so. A more difficult question arises when the potential defendant to a claim has committed a sin of omission as opposed to a sin of commission.
62. Where a potential defendant fails to perform a contractual obligation/duty for which there will

⁷³ [1995] PIQR 43

⁷⁴ [2002] LI Rep PN 369

⁷⁵ at 347 per Nourse LJ

⁷⁶ at para 32 per Stuart Smith LJ

be a liability in tort a question may arise as to what the earliest (or latest) time for performance of the obligation in question was.

63. The scope for questioning when a duty ought to be performed can provide an opportunity to argue that the contractual obligation to perform the act continued thereby postponing the start date of the limitation period.
64. The majority of the case law in this area tends to revolve around the duties of professionals subject to a retainer of some sort. It should be emphasised at the outset that there appears to be judicial reticence to the idea of duties continuing indefinitely, particularly in a commercial context:

“The notion that a professional person owes a continuing duty to review the quality of the performance of his retainer or engagement is not a straightforward one unless it is intended simply as a transparent mechanism for delaying artificially the commencement of some period of limitation. In the ordinary conduct of human affairs a task which is considered to have been completed satisfactorily is put behind one as the next task is embraced. To expect someone in real life continuously to review what he or she is doing is to expect them to be paralysed into substantial inactivity by anxious traversing of old ground until eternity.”⁷⁷

65. In **Shepherd Construction Ltd v Pinsent Masons LLP**⁷⁸ Akenhead J felt no qualms about striking out a claim against Pinsent Masons for alleged professional negligence of various previous predecessor firms in relation to advice concerning the standard forms of contract used by the Claimant:

There is something commercially and professionally worrying if professional people are to be held responsible for reviewing all previous advice or indeed services provided. There is a difference to be drawn between a specific retainer or commission which imposes a continuing duty on a professional to keep earlier advice or services under review and some sort of obligation which requires the professional to review and revise previous advice given or services provided on commissions or retainers which are complete. Thus, in the field of architects or engineers, their retainers may require them to keep under review designs which they had produced during the course of those retainers; if during the defects liability period an architect either ascertains or should ascertain that the design put into effect is defective, possibly in the light of new practice, it may well be that his or her retainer requires him or her at least to raise this with the client. However, the fact that the architect or engineer has a number of commissions with the particular client would not mean that as such they must review the designs on completed commissions. Again, by one route or another, different considerations may apply if the professional actually knows or becomes aware that his or her earlier work is or has become in some way deficient; even that may be subject to time constraints and may not be an indefinite responsibility. Another consideration of course is the financial one: if such a reviewing function continues indefinitely or at least for a long time into the future, is the professional entitled to be paid for what may be extensive time reviewing and advising on the need for revision of earlier advice or drafting done by him or her?

⁷⁷ **Tesco Stores Ltd v Costain Construction Ltd** [2003] EWHC 1487 (TCC) at [270] per HHJ Richard Seymour QC

⁷⁸ [2012] EWHC 43 (TCC); [2012] BLR 213

...

Different considerations may apply where the relationship between a client and solicitor is that of being the family solicitor. Thus, a solicitor may draft a will for a long-standing private client and later handle his divorce; knowing that an impending re-marriage would invalidate the earlier will, it may be incumbent upon the solicitor at least to advise his client of this consequence. However, that may be because there is on analysis a general retainer by which the solicitor is required from time to time to give advice to his client for reward.

If the existence of a long-standing relationship and the award of numerous specific commissions to a solicitor gave rise by implication to an implied general retainer pursuant to which the solicitor had to keep under review all previous advice and drafting, this would have very wide ramifications for the solicitors' profession and indeed to their clients who might be expected to have to pay."

66. However, the notion of continuing duties is a long-standing one which has been considered in a number of cases. In **Shaw v Shaw**⁷⁹ the "wife" of a bigamist brought a claim for breach of promise of marriage. The plaintiff met the defendant in 1937 and was told by him that he was a widower. The plaintiff believed that she legally married the defendant in 1938. In fact the original wife of the defendant did not die until 1950 and it was only upon the defendant's intestate death in 1952 that the plaintiff discovered that the defendant had been previously married. She brought a claim against the estate of the man she had believed to be her husband and the estate pleaded limitation.
67. The Court of Appeal held that the widow would have had a statutory ground for extending limitation under section 26(b) of the Limitation Act 1939. However, the majority of the Court of Appeal (Denning LJ and Singleton LJ) also stated that there was a continuing warranty running with the promise of marriage that the defendant was in a position to marry.
68. Denning LJ held:
"The same result can be reached, however, by considering this as being a claim for breach of promise of marriage. Clearly Shaw did promise to marry the plaintiff, and after his own wife had died in 1950, he was in a position to marry her and could have implemented his promise, but he did not do so. It would not lie in his mouth to say that a reasonable time had expired, because it was all due to him that the marriage had not taken place before. He ought to have married her in 1950 when he was free to do so, and there was a breach of the promise at that time for which like damages could be recovered. Although it is true that damages in an action for breach of promise, after the death of the man, are limited to special damages, I regard the damages which I have mentioned as being special damages within that rule.
The Limitation Act, 1939, is, in my judgment, no answer to the breach of warranty, because the breach took place on his death in 1952. It is also no answer to the breach of promise to marry⁸⁰, because that breach took place in 1950."
69. A good example of the court accepting the existence of continuing duties is **Midland Bank**

⁷⁹ **Shaw v Shaw** [1954] 2 QB 429

⁸⁰ This analysis rests on the notion that a promise of marriage by a person already married is unenforceable on the grounds that it is contrary to public policy and morals – see Phillimore J in **Spiers v Hunt** [1908] 1 KB 720 at 724

Trust Co Ltd v Hett Stubbs and Kemp⁸¹. The case concerned the professional negligence of solicitors acting on retainer.

70. The case involved the failure to register an option agreement granted by a father in favour of his son which would permit the son to purchase a 300 acre farm at £75 per acre. The option was expressed on its face to remain effective for 10 years. The defendant firm failed to register the option as an estate contract under the Land Charges Act 1925 following the grant. The son continued to seek the advice of the defendant firm in relation to whether he should exercise the option. However, at no stage was the option agreement registered and eventually, six and a half years into the life of the option, the plaintiff's father conveyed the farm to his wife, as opposed to honouring the plaintiff's unregistered option agreement. It was held that the breach of contract occurred upon the date of the sale of the farm by the father to his wife. Oliver J held that up until that date the obligation was capable of effective, albeit late performance.
71. **Midland Bank Trust Co** was something of a high water mark in this area. The Court of Appeal in **Bell v Peter Browne & Co**⁸² came to a different decision in a very similar factual matrix without expressly overruling **Midland Bank Trust Co**.
72. In **Bell** a husband agreed in the process of his divorce that his matrimonial home would be transferred into the sole name of his wife and that he would receive one-sixth of the gross proceeds of sale whenever that occurred. The defendant solicitors transferred the property without taking any steps (such as a declaration of trust or the registration of a caution at the Land Registry) to protect the husband's interest. The settlement happened in 1978 and the disappointed husband brought his action against the solicitors in 1987 following the sale of the property by his ex-wife in 1986. It seems that Nicholls LJ felt able to distinguish the decision in **Midland Bank Trust Co** on the basis that the solicitors in this case had not had any further involvement with their client, however the other two Lords Justice did not feel such a distinction was necessary.
73. In **Bell** the claim based in tort was also time-barred because 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.
74. Subsequent decisions on the issue of date at which loss for the purposes of a tortious claim occurs have seemingly favoured the approach set out in **Bell** over that set out in **Midland Bank Trust Co**. However, the failure by the Court of Appeal in **Bell** to fully grapple with the contractual aspect head-on resulted in the law being left in a lamentably confused state, leaving no clear guidance as to when a contractual duty will be considered to be a continuing one.

⁸¹ [1979] Ch 384

⁸² [1990] 2 QB 495 at 500 (approved by the House of Lords in *Nykredit*).

75. In **Morfoot v WF Smith & Co**⁸³ 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 continuing breach of contract. Part of the reason for this assessment that the breach was a once and for all breach was the wording of the instructions given to the solicitors in question. The instructions had been to obtain the deed of release “*as soon as possible*”, accordingly the Judge Havelock-Allan QC held that the breach had occurred at the moment at which it became possible to obtain the deed of release and the solicitors had thereupon failed to obtain it. This case emphasises the significance of the wording of the obligations/duties upon the solicitor in such cases. Would the result have been different if the instructions had simply been to obtain the deed of release, with no stipulation as to time?
76. **Bell** was also applied in the recent decision **Amir Nouri v Ali Marvi**⁸⁴ where it was held that the cause of action in negligence of a property owner against solicitors who had acted for a fraudster who pretended to own and then sold the property accrued when the fraudulent transfer was completed. It was held that there were no special facts to suggest that the solicitors assumed a continuing duty to the claimant which survived completion of the transaction. It was also held that this was not a case in which the defendant solicitors were under any contractual duty to take specific steps in relation to the claimant’s property or title as was the case in **Midland Bank Trust Co.**⁸⁵
77. Even if there had been a continuing duty in **Nouri** the Court of Appeal held that loss would have been sustained at the moment of completion in the form of a blot on the title that would have reduced the market value of the property, notwithstanding the fact that the fraudulent transfer was not yet registered. As a consequence of the harm caused by the blot on the title the Court of Appeal held that cause of action in tort was perfected at completion and not upon registration. Recently in **Edehomo v Edehomo**⁸⁶ Roth J adopted the **Nouri/Bell** analysis of when loss was suffered causing a tortious cause of action to accrue.
78. The Bell approach was again endorsed in **Integral Memory Plc v Haines Watts**⁸⁷. The Claimant appealed an order for summary judgment in favour of the Defendant where the tax advice in question had been correct at the time it was given but had been altered in 2003 by a change in the law meaning that the claimant had underpaid NIC contributions. In 2009 the Claimant had settled its outstanding liability with HMRC. In 2011 the Claimant sought damages from the Defendant in relation to the advice, relying in part on a continuing duty alleged to have arisen in 2003 when the law changed. Richard Sheldon QC sitting as a Deputy Judge of the High Court that the relevant duty was breached in 2003 and that “*thereafter there was a failure to remedy the existing breach, not the commission of a further breach*”. This case is particularly significant because it seems to be accepted at paragraph 23 of the judgment that there was a continuing relationship in this case, whereas there had been no such continuation in **Bell**.

⁸³ [2001] Lloyds Rep PN 658

⁸⁴ [2011] PNLR 7

⁸⁵ See [2011] PNLR 7 para 38 per Patten J

⁸⁶ [2011] 1 WLR 2217

⁸⁷ [2012] EWHC 342 (Ch)

79. Allegations of continuing contractual duty (which in effect amount to allegations of continuing breach) have often arisen in cases 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 completion⁸⁸ and that a similar continuing obligation is owed by engineers⁸⁹. However in the light of recent decisions that is now doubtful unless special circumstances apply.⁹⁰
80. 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.
81. The **Midland Bank Trust Co** approach may still have some life in it. In May 2012 Peter Smith J gave a Claimant permission to re-amend his Particulars of Claim to plead continuing duty. In **Quayle v Rothman Pantall & Co**⁹¹ the re-amended pleading sought to overcome a limitation point by pleading that on every occasion that the Defendant accountants advised the Claimant's company in relation to matters which affected the Claimant's shareholding the Defendant was under a duty to have regards to the implications of its then current advice on the original and/or subsequent advice provided to the Claimant regarding the availability of Business Asset Taper Relief ("BATR"). It was alleged that the Defendant accountants had acted both for the Claimant's company and the Claimant (to whom they provided tax planning and financial advice). In permitting the amendment Peter Smith J stated:
- "13. In essence this is a plea in effect that the Defendant was under a continuing duty to review its advice first given in 2002 through to the termination of their retainer on 29th November 2007 after the letter of claim sent on 31st October 2007.*
- 14. This is not a novel plea see Midland Bank v Het Stubbs and Kemp [1979] Ch 384 (cp Bell v Peter Browne [1990] 2 QB 495 and Jackson & Powell "Professional Liability" paragraph 5-030).*
- 15. The plea given the continued retainer of the Defendant between 2002 and 2007 is in my view plainly one that has a real prospect of success."*
82. However, it is important to remember that the threshold to establish a real prospect of success is considerably lower than the balance of probabilities. In the circumstances, given the weight of support for **Bell**, whilst the position remains in doubt pending an authoritative decision on the point the **Midland Bank Trust Co** approach seems to be in serious decline.

⁸⁸ **University of Glasgow v William Whitfield** [1988] 42 BLR 66

⁸⁹ **Chelmsford DC v TJ Evers** (1983) 25 Build LR 99

⁹⁰ **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 TCC

⁹¹ [2012] EWHC 1474 (Ch)

83. In conclusion, in establishing when a breach of contract occurs in situations where continuing duties may be properly asserted it is key to consider the precise nature of the obligation. If the obligation must be performed at a certain time then it is clear that the cause of action accrues when the time comes and the obligation remains unperformed. In cases where there is an extended period to comply with the obligation determining the precise limits of that period may be a difficult exercise requiring a judgment to be made in each case as to whether there is a continuing quality in relation to the obligation or whether in fact it is in effect a “once and for all” breach.⁹²

TIME LIMITS FOR EQUITABLE REMEDIES

84. Section 36 of the Limitation Act disapplies the various time limits set out in the Limitation Act 1980 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 1st July 1940.*”
85. Section 36 does not affect 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”*⁹³

*“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.”*⁹⁴

Where the equitable claim mirrors a legal claim

86. In cases where the facts giving rise to a claim are sufficient to found an action at law and 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.
87. 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

⁹² See comments of Newman J in **Vai Industries (UK) Ltd v Bostock & Bramley and Ors** [2003] EWCA Civ 1069; [2003] B.L.R. 359 where he comments that certain classes of relationship, such as husband and wife and landlord and tenant “have a continuing quality and character giving rise to an “exceptional” obligations”

⁹³ **Milward v Earl Thanet** (1801) 5 Ves 720n, cited in **P&O Nedlloyd v Arab Metals** [2006] EWCA Civ 1717 at para 50.

⁹⁴ **Eads v Williams** (1854) 4 De G.M.&G 674, cited in **P&O Nedlloyd v Arab Metals** at para 50.

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”.

Specific Performance claims are distinct

88. The Court of Appeal in **P&O Nedlloyd v Arab Metals**⁹⁵ has recently reviewed the authorities concerning the inter action of limitation periods, laches and claims for specific performance.
89. 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.
90. 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”⁹⁶

...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 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.”

Laches in the context of injunctions

91. Interim relief should always be sought promptly to give an application for an interim injunction the best chance of succeeding. The South Australian courts have stated that “*mere delay, a want*

⁹⁵ [2005] 1 WLR 3733

⁹⁶ **Nedlloyd** at para 43

*of vigilance in pressing his remedy is fatal to the application”.*⁹⁷

92. The very nature of interim relief is such that the applicant is seeking an interim remedy which may well cause harm to the respondent before the court has had an opportunity to assess the merits of the ultimate claim. Often one of the grounds for seeking an interim injunction is that irreparable harm will be occasioned to the applicant if he is forced to wait until trial. It is self-evident that delay without a reasonable explanation will render the applicant’s case less persuasive.
93. However, generally a defendant wishing to establish laches must establish both unreasonable delay and that it would be unjust to grant the interim injunction owing to that unreasonable delay.
94. In the case of perpetual injunctions the question is again one of fact and degree. However, the comments at paragraph 84 and 85 above apply in relation to limitation applying where the equitable claim has a mirroring legal claim. There are also a number of other considerations which should be borne in mind, space precludes a full examination of them in these notes.⁹⁸

Laches in rectification claims

95. To establish laches there needs to have been unreasonable delay on the part of the claimant rendering the relief sought unjust. The delay has to be considered in all the circumstances and the time from which delay will be regarded as relevant is usually the time from which the claimant had sufficient knowledge that the facts and circumstances gave rise to a claim for equitable relief:

“It is well established that the doctrine does not come into play before the person against whom it is raised as a defence has discovered the material facts, in this case the mistake. It must be shown that the subsequent delay in pursuing the claim renders it “practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were otherwise to be asserted”. See Lindsay Petroleum Company v Hurd (1873) 5 App. Cas. 221 at 239 (per Lord Selborne). As Lord Selborne went on (at 240) to observe:

*“Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.”*⁹⁹

Laches within the limitation period

⁹⁷ **White v Taylor** (1874) 8 SALR 1 at page 35

⁹⁸ For further information on the use of statutes of limitation in relation to perpetual injunctions see Spry Equitable Remedies, 8th Ed, 2010 at 416-430.

⁹⁹ See **KPMG LLP v Network Rail Infrastructure Ltd** [2006] 2 P & CR 7 at 197 per Blackburne J in which rectification of a tenant’s break clause in a lease from 1974 was ordered. The claimant had the relevant knowledge of the mistake in 1999 but did not issue proceedings until 2005.

96. 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.”*¹⁰⁰

97. 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.

98. 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.

CONCLUSIONS

99. 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 couple of years:

- * The Courts have had to grapple with Human rights implications of “squatters rights” and acquiring title by a sufficiently period adverse possession,¹⁰¹

¹⁰⁰ **Nedlloyd** at para 61

¹⁰¹ **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

- * 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;¹⁰²
- * Mortgagees and other lenders would be relieved by the Court of Appeal's decision¹⁰³ that where a part payment of a debt was accompanied by a denial of liability the effect of the part payment was still to start time to run again under s.29(5) of the Limitation Act;
- * 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;¹⁰⁴
- * Previously established case law relating to the time limit for claiming damages for intentional assaults has been overturned;¹⁰⁵
- * 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 parties¹⁰⁶, and dispensing with service of the claim form;¹⁰⁷
- * Following legislation¹⁰⁸ which imposed a 3 year limitation period in place of the previous 6 year period for reclaiming tax, the House of Lords held¹⁰⁹ 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;
- * The Court of Appeal have confirmed that the Crown could, if necessary, rely on the

¹⁰² **Natwest v Ashe** [2008] EWCA Civ 55,

¹⁰³ **Ashcroft v Bradford & Bingley PLC** [2010] EWCA Civ 223

¹⁰⁴ **Yorkshire Bank Finance Ltd v Mulhall** [2008] EWCA Civ 1156

¹⁰⁵ **A v Hoare** [2008] UKHL 6

¹⁰⁶ Civil Procedure Rule 17.4 and 19.5 and **Adelson v Associated Newspapers Limited** [2007] EWCA Civ 701

¹⁰⁷ see Civil Procedure Rule 6.9 and **John Olafson v Hannes Holmsteinn Gissurarson** [2008] EWCA 152

¹⁰⁸ Value Added Tax Regulations 1995 reg.29

¹⁰⁹ **Michael Fleming (t/a Bodycraft) v Customs & Excise** [2008] UKHL 2

Limitation Act to obtain adverse possession of the Severn Estuary;¹¹⁰

- * 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.¹¹¹

100. 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 reforms¹¹², 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 Supreme Court to continue to need to revisit this area of the law on a regular basis.

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¹¹⁰ **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 13th Century.

¹¹¹ **Edwards John Giles v Caroline Rhind** [2008] EWCA Civ 118

¹¹² **Law Com No 270**, [2001]