To have & have not

Shantanu Majumdar argues that the loss which is unknown is no loss at all

IN BRIEF

- *Axa Insurance Ltd v Akther*: limitation and professional negligence.
- The latest inconclusive word on accrual and the difference between actual and contingent damage.

Professional negligence litigation comes in fashions. One of the latest arises from the vogue for after the event (ATE) legal expenses insurance obtained, usually by claimants on conditional fee agreements, as protection against any eventual liability to pay the defendants' costs.

Axa

In *Axa Insurance Ltd (formerly Winterthur Swiss Insurance Co) v Akther & Darby Solicitors* [2009] EWCA Civ 1166, [2010] PNLR 10, [2009] All ER (D) 151 (Nov) the claimant insurer was the assignee of ATE policies issued under a scheme operated by a claims management company whereby a panel of solicitors took on personal injury claims from members of the public. Conditions of acceptance under the scheme were that each claim had to have at least a 51% chance of success and a likely quantum of more than £1,000 (in order to take it outside the restrictive costs rules of the small claims régime) and on acceptance of a qualifying claim an ATE policy was issued.

The claimant made severe losses from its involvement in the scheme and claimed as to a number of such claims that the defendant solicitor had negligently:

- assessed claims at the outset as having the requisite chances of success; ("the vetting claims");
- conducted the litigation of claims;
- failed to notify the claimant when a claim's prospects of success fell below 51% ("the conduct claims").

Limitation was tried as a preliminary issue and the question arose whether the claimant had suffered actual damage in respect of the negligent vetting and conduct of claims only when a claim came to be made on the relevant ATE policy or, as the defendant solicitor argued, at an earlier stage. In respect of the assessment of prospects of success this was alleged to be the inception of the policy and in relation to the failure to notify when the solicitor should have (but did not) notify the insurer.

The insurer relied on the decision of the House of Lords in *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 3 All ER 401, arguing that until a claim was made on the policy loss was a mere possibility and thus purely contingent. An understanding of this argument requires us to revisit *Sephton* and two other cases.

> "Each misappropriation created only the possibility that the society might receive a claim"

Forster v Outred

The first is *Forster v Outred & Co* [1982] 2 All ER 753 where in 1973 the claimant had executed a mortgage over her property in favour of a finance company as security for a loan made to her son. The defendant solicitors acted for the claimant and her son, but allegedly failed to advise her to seek independent legal advice. In 1975 the lender demanded payment of the loan from the claimant and she duly paid. Proceedings were brought in 1980 and were in time if loss had been suffered on payment but not if it had been suffered on execution. The Court of Appeal adopted the submission that "actual damage" (upon the occurrence of which the cause of action in tort would accrue) means "any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases…"

Applying this definition it was held that the plaintiff had suffered loss on her execution of the mortgage because "as soon as she executed the mortgage the plaintiff not only became liable under its express terms but also – and more importantly – the value of the equity of redemption of her property was reduced. Before she executed the mortgage deed she owned the property free from incumbrances; thereafter she became the owner of a property subject to a mortgage". This was a quantifiable loss and from that date her cause of action against the solicitor was held to be complete.

This analysis was applied in numerous subsequent cases but in *Wardley Australia Ltd v State of Western Australia* ((1992) 175 CLR 514, 109 ALR 247) the idea that relevant loss could include "liabilities which may arise on a contingency" was considered by the High Court of Australia. There the putative damage arose from possible future liability on a purely personal covenant (an unsecured guarantee) and the question was whether loss was suffered on execution of the guarantee or only when (and if) demand was later made on it.

The High Court could not accept that the English decisions cited to them held that loss is sustained on entry into an agreement even if the (only) loss to which the claimant is exposed by the agreement is a loss upon a contingency. Instead, it reasoned that those cases involving (apparently) contingent loss were decisions which turned on the claimant sustaining measurable loss at an earlier time, quite

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apart from the contingent loss which may or may not occur at a later date.

On this basis, *Forster v Outred* was explicable by the immediate diminution in value caused by the effect of the charge given over the plaintiff's property whereas in *Wardley* the damage caused by an unsecured guarantee was held not to have been suffered until (and thus only if) demand was made upon it. The existence of security was therefore crucial to the explanation (or, perhaps, rationalisation) of *Forster* as a case of immediate actual loss.

In *Wardley* the High Court had also identified transactions in which there are benefits and burdens in which case it may be that actionable damage only occurs when (and if) an "adverse balance" is struck ie there is a net loss. This adverse balance approach was taken up by the House of Lords in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 where, by reason of a surveyor's negligent valuation, the plaintiff lender had acquired what proved to be inadequate security for its loan. It was held that damage did not occur immediately but instead when the amount owed to the lender exceeded the value of its rights under the transaction, ie the value of the borrower's covenant plus security.

Law Society v Sephton & Co

In *Law Society v Sephton & Co (A Firm)* the question of actual or purely contingent damage arose in respect of the defendant accountants' negligent approval of the accounts of a solicitor who was in fact misappropriating large amounts of money from client accounts. As a result of those misappropriations various clients subsequently made claims on the Solicitors' Compensation Fund which the Law Society administers and which then sought damages in respect of the compensation payments which it had made. When did the society suffer damage? Was it:

- when each appropriation occurred;
- when each claim for compensation was made; or
- (even) when it resolved to meet a particular claim—since relief under the scheme is discretionary?

The House of Lords, following *Wardley* as a correct statement of existing English law, held that the mere possibility of an obligation to pay money in the future is not itself damage. Each misappropriation created only the possibility that the society might receive a claim and, in the absence of any transaction changing the claimant's legal position or any diminution in the value of any asset, it was held that the society's loss was therefore purely contingent until a claim was made.

This then was the legal landscape in which *Axa* came to be decided. The majority of the Court of Appeal (comprising Arden and Longmore LJJ) characterised *Axa* as comprising a flawed bilateral transaction rather than a merely contingent liability. A number of considerations influenced this conclusion:

- Although the insurer's liability on the policies was contingent upon a subsequent claim, there was also measurable loss at the inception of the policies in that they were worth less than they would have been had there been proper vetting of the merits of the claims by the defendant;
- The premiums received in respect of the insurance policies were not just trading receipts but sums for reserve and investment against future claims the amount of which had been calculated to reflect a particular risk. In this sense the premiums had been harmed and undermined by the negligence of the solicitors.
- From the inception of the policies, there was a greater risk of a claim than there should have been and the premiums were correspondingly less than they would have been (assuming, of course, that the policies would have been written at all had the true facts been known).

This was a case in which a transaction had been concluded in reliance upon the defendant's advice and under which the claimant had received "a less valuable bundle of rights" by reason of the negligence. This is the principle which informs the judgments of the majority even though their detailed reasons are not quite the same. It followed that the cause of action in respect of the "vetting claims" had accrued at the time of the issue of the ATE policies and in respect of the "conduct claims", which alleged a failure to notify, at the time when notification should have taken place.

Difficulty in distinction

It is plain from the length and complexity of the analysis in the judgments that the Court of Appeal did not find *Sephton* easy to apply. Moreover, Arden LJ noted the difference (said in both *Wardley* and *Sephton* to explain the result in *Forster*) in the limitation treatment between a claimant who gives security for what would otherwise be a contingent liability and a claimant who does not. There may, in other respects be a distinction between the two cases, but why should one claimant have more *time* than the other to bring a claim in respect of the same breach? It was this absence of anything analogous to a security which seems to have led Lloyd LJ (dissenting in *Axa*) to conclude that, as in *Sephton*, actionable damage was contingent until the claimant first came under an actual liability to make a payment under the relevant policy.

There is policy at work here. As Longmore LJ said (at para 83 in *Axa*): "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."

This must be right and could be said to be a necessary *quid pro quo* for the recognition in *Henderson v Merrett* of a parallel duty in tort in the first place; but it must be evenly applied and the limitation distinction which the law currently makes between secured and unsecured cases appears to lack principled justification. An explanation from the Supreme Court would be welcome. NLJ

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