

UPDATE

Law Society v. Sephton [2006] UKHL 22

The House of Lords has delivered the opinions in this appeal which considers the difficult question of the date of damage in tort for the purposes of the Limitation Act. This is the second important decision on the 1980 Act within 6 months¹.

In this case the Law Society sued a firm of accountants, one of whose partners, Mr Mascord, had provided Solicitors Accounts Rules Certificates for a solicitor sole practitioner, Mr Payne, for many years up to March 1996. Mr Payne had apparently misappropriated over £750,000 of client funds over those years. Mr Mascord had been negligent in providing the certificates. The Law Society discovered the deficiency on 17th May 1996 and intervened in the practice. Mr Payne was subsequently struck off and imprisoned. Mr Mascord committed suicide.

In July 1996 the Law Society received its first claim against the Compensation Fund from a former client of Mr Payne and over the following 7 years has paid out over £1.2m. A Claim was intimated against Sephton & Co in October 1996 but no Claim Form was issued until 16th May 2002. The Defendants pleaded limitation. The trial Judge found for the defendants but the majority of the Court of Appeal reversed this ruling. The House of Lords has unanimously dismissed the appeal, rejecting both parties' principal contentions as to the date upon which the Law Society suffered damage.

As has become commonplace there are substantial speeches from three members of the panel, which do contain certain differences. Nevertheless all of their lordships express agreement with each other.

As Lord Hoffmann reflects, the issue of when damage occurs has been recognised as a “troublesome one” for many years. He adopts, at least in part, the approach of the High Court of Australia in *Wardley Australia v. State of Western Australia*² and concludes that the conflict between the Australian approach and the broadest interpretation of *Forster v. Outred*³ referring to exposure to purely contingent liability was not resolved by the House in *Nykredit v. Edward Erdman*⁴. Lord Hoffmann concludes that the Australian court's rejection of the very broadest interpretation of *Forster* is correct. He emphasises the importance of evidence of the existence of damage in some “transaction” cases and suggests that *Gordon v. Wheatley*⁵ may have been wrongly decided. The question of when damage has been suffered cannot be resolved simply by determining whether a set of accounts would make

¹ See *Haward v Fawcetts* [2006] UKHL 9.

² (1992) 175 CLR 514.

³ [1982] 1 WLR 86.

⁴ [1997] 1 WLR 1627.

⁵ [2000] Lloyd's Rep PN 605.

provision for the loss but as a matter of legal principle. A contingent liability is not damage until that contingency occurs, albeit that, in cases such as *Forster* where the contingency is secured against property, the contingency may depress the value of the property and amount to loss. In many “transaction” cases damage will still be demonstrable as there will be an asset which is diminished in value as a result of the negligence.

Lord Walker of Gestingthorpe emphasises that the precise quantification of damage is not a necessary feature. Nevertheless there will be cases where the prospect or risk of economic loss, however great, will not amount to actionable damage. He states that the words “detriment” or “worse off” in many of the earlier cases including *Nykredit* are imprecise and unhelpful. Lord Walker reviews a number of well known cases to demonstrate that they each involve an asset which has suffered diminution in value, possibly not yet quantifiable, so as to amount to damage. He also accepts the *Wardley* comment that the earlier English decisions do not extend to finding damage in cases of personal and wholly contingent liabilities. Thus Mrs Forster would have suffered no loss on giving a purely personal guarantee if it had not been secured upon her property. He states that *Gordon* was close to the borderline.

Lord Mance refers to cases demonstrating that merely to enter into a transaction which would not otherwise have been entered into, but for negligent advice does not inevitably cause damage⁶. He concludes that the result reached in *Wardley* would also have been reached in England. He concludes that no change in the Law Society’s legal position occurred until after a claim was received. Even if some contemporaneous statistical assessment of the likelihood of claims emerging could have been made at the date of the misappropriations Lord Mance would not consider contingent loss on so remote a basis to be sufficiently measurable. He criticises part only of the Court of Appeal’s reasoning in *Gordon*.

COMMENT

The great majority of the strict English cases on date of damage remain unaffected by the decision of the House, although the continuing status of *Gordon* is unclear. However, the use of the word “detriment” and “worse off” in cases including *Nykredit* should not detract from a careful analysis of the nature of the damage suffered and, once again, it may be necessary to consider carefully whether evidence will be required in cases near the borderline. It is submitted that Lord Mance’s references to loss being “measurable” should not be viewed as casting any doubt on cases which make it clear that ascertainable loss may not yet be finally determinable with certainty.

Michael Pooles QC and Derek Holwill appeared for Sephton & Co.

⁶ See e.g. *UBAF Ltd v. European American Banking Corporation* [1984] QB 713.