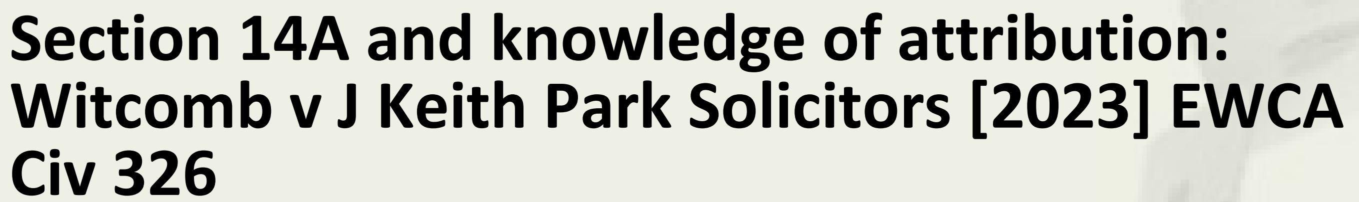

Section 14A and knowledge of attribution: Witcomb v J Keith Park Solicitors [2023] EWCA Civ 326

Alice Nash

30 March

A personal injury claim is settled. Later, the claimant's condition dramatically worsens in ways not anticipated in the settlement. At what point must the Claimant decide to sue his legal advisers for under-settling his claim? The Court of Appeal grappled with this issue in *Witcomb v J Keith Park Solicitors*. The discussion focussed on the claimant's knowledge that his loss was attributable to his solicitors' alleged mistake, and illustrates importance of identifying with particular clarity what it is that the claimant complains of.

The claim

Mr Witcomb was badly injured in a road traffic collision in 2002. Liability was admitted and the claim settled in December 2009 for a lump sum payment of £150,000. He was warned more than once during the proceedings that any settlement would be final and that there was a risk of under-settlement if his condition later deteriorated. He was not advised of the possibility of seeking provisional damages.

Deterioration began sooner than had been anticipated by the expert instructed on Mr Witcomb's behalf in the personal injury claim. In January 2017 he was advised that he needed a below-knee amputation, and contacted his former solicitors to enquire whether there was any way of re-opening the claim against the original defendant. He was told there was not, but was not told to seek independent legal advice. That suggestion came from one of his doctors.

The claimant duly took such advice, and professional negligence proceedings were issued in December 2019. He alleged that his solicitors had been negligent in failing to follow a recommendation to obtain a plastic surgeon's report, and that as a result they negligently failed to advise that he had a provisional damages claim.

The defendants raised a limitation defence, which was tried as a preliminary issue and determined in favour of the claimant. The Court of Appeal upheld the decision. Its reason, in short, was that it was not until some time after January 2017 (and hence well within 3 years of the issue of the claim: the claimant was not required to prove the exact date) that the claimant learned that provisional damages had been a possibility. Accordingly he did not until then have the requisite knowledge to bring a claim. An argument that his knowledge of the risk of undersettlement was sufficient was rejected.

Looking at those facts, the average layperson might well consider that fair enough. How can a person complain about the outcome of litigation (or anything else where they were provided with a professional service) unless they know of the possibility that things could have been different?

The average layperson, however, has not had the dubious pleasure of considering in detail the considerable body of caselaw surrounding what it was once hoped[1] would be the "common sense" interpretation of the provisions of s.14A of the Limitation Act 1980. They might be dimly aware that the claimant in *Boycott v Perrins Guy Williams* [2011] EWHC 2011 ended up in a legal battle over a house he bought with his girlfriend, but are unlikely to know or care why his claim against his former solicitors failed.

[1] by Sir Thomas Bingham MR in *Spencer-Ward v Humberts* [1995] EGLR 123, among others.

The reasoning in the Court of Appeal

As every professional negligence lawyer knows, s.14A provides a special time limit in negligence cases where the claimant lacks "knowledge required for bringing an action for damages" at the date of accrual of the cause of action, giving the claimant time to discover those relevant facts. The appeal in *Witcomb* concerned the claimant's knowledge i) of the material facts about the damage in respect of which damages were claimed (s.14A(6)(a) and (7), termed "material facts knowledge"); and ii) that the damage was attributable in whole or in part to the act or omission which was alleged to constitute negligence (s.14A(6)(b) and (8), termed "knowledge of attribution").

The position in 2009

The defendant's primary submission was that s.14A did not apply at all. This was because, it argued, at the time of the settlement in 2009, Mr Witcomb knew that he had been left with no provision for the risk of future deterioration. Perhaps unsurprisingly, neither the judge nor the Court of Appeal was persuaded by the submission that he ought, immediately upon entering into the settlement in 2009, to have appreciated that his lawyers had advised him wrongly about it and ought to have sued them.

Interestingly, the judge at first instance stated that the obtaining of a settlement that did not provide for a risk of future deterioration was the "damage" and that the claimant had been aware of it. However, the Court of Appeal said, "this was not, as is plain from the judgment, a finding that the claimant had knowledge of the material facts about the damage within the meaning of Subsection (7), not least because the claimant did not know that there was an alternative to "the damage" (para [33]).

The trial judge appears to have based his decision on the question of attribution – he said that in 2009 the claimant had no reason to suspect that any perceived shortcomings in the settlement were attributable to anything his legal advisers had done or not done – but the Court of Appeal went further, adding that "at that time the claimant did not know that he had in fact settled at an undervalue (because his claim for provisional damages was not taken into account)" (para [37]).[2]

Once the damage of which the claimant complained was clearly identified in those terms, it could not be said that he "knew of some of the damage as at December 2009" (see at [30]).

The position in 2016-2017

The claimant accepted that he had "material facts knowledge" more than 3 years prior to the issue of the claim. The key issue therefore was "knowledge of attribution". As the court noted, this has been a battleground in many cases since s.14A was introduced.

In *Haward v Fawcetts* [2006] 1 WLR 682 (HL), the leading case on s.14A, Lord Nicholls said at [19]: "As already noted, in addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ('attributable to') the acts or omissions alleged to constitute negligence. The conduct alleged to constitute negligence in the present case was not the mere giving of advice. The conduct alleged to constitute negligence was the giving of flawed advice." He rejected the argument that this involved an impermissible consideration of whether the conduct had been negligent, which of course is deemed irrelevant by s.14A(9) (see at [13]-[14]).

[2] The same reasoning would surely apply if the damage that in fact arose was an actual undersettlement because of the failure to include a particular head of loss.

Which side of the line?

Why, given that it was accepted that Mr Witcomb had "material facts knowledge" more than 3 years before the issue of the claim, was he entitled to pursue his claim?

The answer cannot simply be that all he knew was that the settlement did not properly compensate him for the dramatically worse outcome that had eventuated, and that the solicitors had not advised him to do anything else. The same was true in the case of *Boycott,* which was distinguished. What was needed was awareness that something else was possible.

The Court of Appeal (at [55] and [56]) endorsed the following statements of principle identified by Bourne J at first instance:

- "where the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under section 14A until a claimant has some reason to consider that the advice may have been wrong", and
- "where the essence of the allegation is an omission to give necessary advice, time will not start to run under section 14A until the claimant has some reason to consider that the omitted advice should have been given."

Note that this is not the same as saying that the solicitors had been under a duty to advise about provisional damages, or that they had breached their duty by failing to give that advice – those points go to the question of whether the omission was negligent, which remains to be decided if the case proceeds. But on the facts of *Witcomb*, knowledge that something else could have been done was necessary in order to identify "the act or omission said to constitute negligence". That act or omission was not merely the advice to enter the settlement agreement, but specifically the failure to advise about the particular alternative of seeking provisional damages.

By contrast, in *Boycott*, the essence of the complaint was, in terms, that the defendants had not advised, when he and his girlfriend bought their house, that a joint tenancy was severable, and that was what the claimant discovered in May 2007 when she duly severed it, more than 3 years before the proceedings were issued. Although it was not specifically argued, the decision is perhaps also explicable by reference to the probability, that a person who knew what Mr Boycott knew in 2007 must also have known that it would have been possible to structure the purchase differently; that is, that "something had gone wrong".

Conclusion

What can we learn from *Whitcomb* about the court's approach to these cases? It is tempting to suggest that there has been a trend towards an increasingly claimant-friendly interpretation of these provisions, but if so, *Boycott* is an outlier. What is clear is that practitioners representing claimants should be mindful of how their client's complaint is characterised, and, if limitation is likely to be an issue, take time to consider how it can be shown that the claimant did not know the facts at its essence until the relevant time. As ever, the best advice is not to take a chance on limitation if you can possibly avoid it.

Alice Nash
Hailsham Chambers
30 March 2023

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.