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# Newsflash

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## The contingent wants of an uncertain future<sup>1</sup>

The House of Lords' decision in *Sephton -v- The Law Society* [2006] 2 AC 543 continues to trouble the courts – most recently the Court of Appeal in *Axa Insurance Co and others -v- Akhter & Derby and others* [2009] EWCA Civ 1166. In *Axa*, the Court of Appeal distinguished *Sephton* holding that a large number of claims in the CLE or “TAG 2” litigation worth £20m are statute barred.

The basic problem in professional negligence claims arises from the seemingly well entrenched proposition that a professional defendant owes collateral duties in both contract and tort. The claimant's claim in contract arises at the date of breach whereas the cause of action in tort (negligence) only becomes complete and arises at the date on which the claimant suffers loss.

The question with which their lordships grappled in *Sephton* was whether a purely contingent loss is sufficient to trigger the primary six year limitation period. Subsequently, inferior courts have had to establish when the claimant's loss ceased to be purely contingent and became actual. It is an enquiry which increasingly threatens to take on some of the aspects of a finely honed theological or philosophical dispute.

*Sephton* was based on an unusual factual scenario. The question there was when The Law Society's compensation fund had suffered a loss resulting from its reliance upon an accountant's certification of a solicitor's client account which had in fact, and undetected by the accountants, suffered a series of defalcations by the solicitor. The compensation fund is established by statute and has no *obligation* to satisfy such shortfalls: the fund has simply to consider applications for grants by the clients of the solicitor who suffer loss arising from such defalcations and make *discretionary* grants. The question was whether such losses occurred at the time of the defalcations (as the accountants argued – and in which case the compensation fund's claims against them were statute barred) or when the clients made claims against the compensation fund (as the Law Society argued – and in which case the claims were not statute barred).

Reviewing a line of authority starting almost 30 years ago with *Forster -v- Outred* [1982] 1 WLR 86, the House of Lords concluded that The Law Society's loss remained purely contingent until the clients actually made claims on the compensation fund and so its claim against the accountants was not statute barred. In reaching this conclusion the House of Lords distinguished *Forster -v- Outred* where the claimant had mortgaged her home to provide security for her son's business overdraft. There, the Court of Appeal had concluded that the claimant had suffered actual loss by virtue of the diminution in value of the equity of redemption in her home when she executed

the mortgage over her home so that her loss was not purely contingent, but was an actual loss, at that point in time.

The difficulty which has confronted practitioners since *Sephton* lies in distinguishing whether a loss is purely contingent (as in *Sephton* itself) or actual (as in *Forster -v- Outred* – which remains good law). Put another way, is *Sephton* a decision based upon its own unique facts surrounding the structure of the compensation fund or does it lay down a general principle from which it is possible to determine whether a claim is purely contingent?

The difficulties are not made any easier by attempts to categorise them by relation to different types of transaction. In *Sephton*, Lord Hoffmann observed that it may be “relatively easy” to identify immediate loss where the claimant has entered a different transaction from that for which he bargained as a result of reliance on negligent advice (see *Knapp -v- Ecclesiastical Insurance* [1998] PNLR 172 where the claimant obtained only a voidable policy rather than a valid one because of his broker’s failure to disclose material facts to the insurer). By contrast, where the claimant would not have entered the transaction at all if the advice had not been negligent, the answer may be “more difficult”. Thus in *First National Commercial Bank -v- Humberts* [1995] 2 All ER 673, where the lender lent money in reliance on a negligent valuation, it was necessary to “wait and see” when the claimant suffered a loss (basically when the value of the lender’s security and the borrower’s covenant dropped below the outstanding loan).

In a chain of cases, of which *Axa* is the most recent, the courts have tended towards the first answer and have distinguished *Sephton*. In *Watkins -v- Jones Maidment Wilson* [2008] EGLR 149 it was held that the claimant clients of a solicitor suffered loss when they acted on advice to vary their rights under a building contract and not later when the builder delayed completion and their loss crystallised. Thus too, in *Shore -v- Sedgwick Financial Services* [2008] EWCA Civ 863 a financial adviser’s client suffered loss when he acted on advice to transfer his pension to a less favourable pension arrangement and not later when the new arrangement performed less well than the original scheme. So too in *Poole -v- HM Treasury* [2007] 1 Lloyd’s Rep IR 114 names at Lloyd’s suffered loss as Lloyd’s names by virtue of the defendant’s failure to implement a European directive at the date when they became names and not later when their losses actually accrued. So too in *Pegasus Management -v- Ernst & Young* [2009] PNLR 11 where the claimant client suffered loss arising from a failed scheme intended to provide roll over relief when he subscribed for shares in a company whose structure failed to satisfy the relevant requirements and not later.

In *Axa*, the claimants complain that some 78 firms of defendant solicitors negligently vetted “slip and trip”, industrial disease and housing disrepair claims for coverage under ATE policies issued by the claimants. The question here is whether the claimants suffered loss when they issued those ATE policies in respect of claims which it was assumed for these purposes failed to conform to the claimants’ criteria for claims suitable for ATE coverage or subsequently when those claims failed and the ATE insurers’ obligation to provide indemnity under the ATE policies arose.

The Court of Appeal held by a two to one majority (Arden and Longmore LJJ in the majority, Lloyd LJ dissenting) that loss arose at the date of issue of the policies so that claims arising from ATE policies issued more than six years before the issue of the claimants’ claim form were statute barred. However, the law remains in a developing state. In *Axa*, permission to appeal to the Supreme Court (formerly the House of Lords) has been granted and in *Pegasus* the decision of a differently constituted Court of Appeal is awaited. Ultimately, the Supreme Court will have to sort out this issue – as Arden LJ observed in *Axa*. In the meantime, we are all left to wonder why the outcome in *Forster -v- Outred* would have been different if Mrs Forster had simply

guaranteed her son's debt to his bank (a purely contingent loss) rather than charging her home as security (actual loss triggering the primary limitation period).

**Robin Simon acts for eight of the defendants in the CLE litigation and has been actively involved in the defence of the claimants' claims.**

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