RECENT LEGAL DECISIONS AFFECTING THE MAJOR PROFESSIONS

Two limitation cases in the House of Lords

1. Limitation law is "uneven, uncertain, unnecessarily complex, unfair, outdated and wasteful of costs" – to quote from a Law Commission report on the subject written in 1998. This would not come as a surprise to Charles Dickens, whose works have inspired the title of this conference. In *Bleak House* he wrote:

> "The one great business of English law is to make business for itself … Viewed in that light it becomes a coherent scheme, and not the monstrous maze that the laity are apt to think it."

2. In the last few months the House of Lords has given judgment in two professional negligence cases involving issues about limitation[1], and in particular issues about:

   - what amounts to **damage** sufficient to create a cause of action in tort and therefore to start time running (*Law Society v Sephton & Co* [2006] UKHL 22)

   - the construction and application of **section 14A** of the Limitation Act 1980 (*Haward v Fawcetts* [2006] UKHL 9).

3. Professionals and their insurers need to know whether they are exposed to claims concerning transactions that may have taken place many years in the past. Accordingly, it seemed to me that these House of Lords decisions might be of some interest to those attending this conference.

4. Let me start with some basic and familiar stuff.

[1] A third recent decision on a limitation point is *Horton v Sadler* [2006] 2 WLR 1346, in which the House of Lords overruled *Walkley v Precision Forgings* and held that the issue of abortive proceedings during the limitation period would not preclude the court from exercising its discretion under section 33 to disapply the limitation period in respect of further proceedings issued outside the limitation period.

(1) Outside certain specialised fields, the 'standard' limitation period is 6 years. No-one knows why. The use of a 6 year period dates back to 1623. Prior to that limitation periods were set by reference to a fixed date rather than a fixed period.[2] It is widely considered that a 6 year period is too long given that the rapidity of modern methods of communication. Its durability may reflect nothing more than lawyers' familiarity with it.

(2) The Limitation Act 1939 operated on the basis that a 6 year period applied to most claims, and that it began to run when the cause of action accrued.

(3) A cause of action in contract accrues when the breach of contract occurs. A cause of action in tort accrues when damage is occasioned by the tortious act. Where – as in almost all professional negligence cases – the defendant is liable both in contract and tort, the tortious limitation period may run from a date much later than the date from which the contractual period runs.

(4) In 1954 a shorter 3 year period was introduced for personal injury claims.

(5) *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 exposed a weakness in the regime created by the 1939 Act. The claimant suffered pneumoconiosis caused by inhaling dust at his place of work over a long period of time. The House of Lords held that his cause of action accrued (and so time started to run) as soon as the claimant suffered some injury which was not merely trivial, even though he was unaware of it at the time. This meant that a claimant could lose his right of action without knowing of its existence.

(6) The *Cartledge* problem was addressed in a series of Acts culminating in the Limitation Act 1975, which provided for a 3 year period from discoverability of the cause of action together with a judicial discretion to disapply the limitation period if the court found it equitable to do so.

[2] For example, writs of Mort d'auncestor could not refer to any time before "the last return of King John from Ireland into England".

(7) A consolidating Limitation Act was passed in 1980. The provisions creating a special regime for personal injury cases are to be found in sections 11, 14 and 33.

(8) A problem similar to that exposed by *Cartledge* but outside the field of personal injury arose in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1[3].The case concerned cracks in a chimney which occurred not later than 1970 but were not discoverable until 1972. The House of Lords held that the cause of action against the negligent engineer accrued when the cracks first occurred. The fact that damage was not at that time reasonably discoverable was irrelevant.

(9) This meant that outside the field of personal injuries a claimant could still lose his cause of action without knowing of its existence. The same principle – that time ran from the occurrence of damage and not its discoverability – operated in cases of non-physical, i.e. economic, loss: as in *Forster v Outred* [1982] 1 WLR 86.

(10) Parliament attempted to deal with this problem by enacting the Latent Damage Act 1986. This Act inserted section 14A into the Limitation Act 1980. Section 14A created a secondary 3 year period running (broadly) from discoverability, very similar to the same period that already applied to personal injury claims.

5. This brief outline shows that the fact that limitation periods traditionally run from the accrual of a cause of action has led to problems which Parliament has attempted to resolve either by moving to a discoverability starting date (as in section 14A) or by relying on a judicial discretion to disapply the limitation period (as in the Defamation Act 1996) or by using both approaches (as in the regime for personal injury claims).

6. Professional negligence claimants whose claims are met with limitation defences tend to fight on two fronts. They argue either:

[3] The correctness of the reasoning in *Pirelli* has been doubted in various cases: eg. the Privy Council decision in *Invercargill City Council v Hamlin* [1996] AC 624.

(i) Damage did not occur until a date less than 6 years before the issue of proceedings. It follows that the primary limitation period applying to the claim in tort had not expired at the date of issue;

[**The date of damage issue**]

or

(ii) If that is wrong and the primary period had expired before issue, the claimant did not have actual or constructive knowledge of the relevant facts that are required to start running the secondary section 14A 3 year period until a date less than 3 years before the issue of proceedings. It follows that the secondary section 14A period had not expired at the date of issue.

[**The section 14A issue**]

7. Most limitation cases decided in the last 20 years have concerned one or both of these arguments.[4]

8. *Sephton* is a date of damage case. *Haward* is a section 14A case. It is logical to consider *Sephton* first.

<u>The date of damage issue; *Law Society v Sephton*</u>

Forster v Outred

9. The point of departure for any argument about what amounts to "damage" so as to bring a tortious cause of action into existence is (or at least was until the decision in *Sephton*) *Forster v Outred* [1982] 1 WLR 86. In 1973 Mrs Forster

[4] The other argument to which claimants sometimes resort – namely that the running of time has been postponed because a relevant fact has been deliberately concealed by the defendant – is of less practical importance since the decision of the House of Lords in *Cave v Robinson Jarvis & Rolfe* [2003] 1 AC 384.

executed a mortgage over her farm securing money being borrowed by her son to buy a hotel. In 1975 she was called upon by the bank to pay her son's debt, which she did. In 1980 she issued proceedings, more than 6 years after the execution of the mortgage but less than 6 years after the bank called upon her to pay. The Court of Appeal held that damage had been sustained when the mortgage was executed. It accepted a submission for the defendant as follows:

> "[Damage 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 claimant has no control**; things like loss of earning capacity, loss of chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases." [**emphasis added**]

10. This formulation has been approved by the appellate courts on many occasions.

11. It may be read as implying that damage is sustained and time starts to run where a claimant is <u>exposed</u> to the <u>possibility of future loss</u> as a result of the negligence of the defendant. The fact that the loss has not yet been sustained does not mean that there is no damage. The degree of probability of future loss is relevant to the quantification of damage but not to its existence. A claimant can say "I may suffer loss in the future as a result of your negligence but I want damages now, and damages can be assessed by reference to the probability of that loss occurring, a discount being applied to reflect the possibility that the loss might not occur". Claims are assessed on this basis every day in the personal injuries field in respect of loss of earning capacity.

12. Treating the <u>possibility of future loss</u> as amounting to <u>actionable damage</u> is consistent with Lord Diplock's well-known dictum in *Mallett v McGonagle* [1970] AC 177:

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or what would have happened in the past, the court must make an estimate as to what are the chances a particular thing will or

would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

An alternative reading

13. There is an alternative reading of *Forster v Outred*. The judges appear to have found that, quite apart from the risk of future loss, there was immediate loss in that the claimant prior to executing the mortgage owned an unencumbered asset and after the execution of the mortgage held an encumbered and therefore devalued asset[5]. On this analysis, the key to understanding *Forster v Outred* lies in these facts:

(i) the claimant possessed an asset prior to the defendant's negligent act

(ii) that asset was immediately devalued as a result of the defendant's negligence.

Accordingly, the claimant was from the date of the execution of the mortgage able to bring a claim for more than nominal damages against the defendant, the claim being founded on the immediate diminution in the value of the farm that occurred on the execution of the mortgage.

If the claimant had not charged real property but had merely given a personal guarantee in respect of her son's debt, there would have been no asset whose value had been diminished by the giving of the guarantee, and therefore (on this analysis) no immediate loss.

14. The distinction between a case in which a claimant grants a mortgage on real property in respect of her son's borrowings, and one in which she gives a guarantee in respect of those borrowings, is very narrow indeed. The narrowness of the distinction is evident when one considers how damages would be assessed where a mortgage has been granted. The claimant is able to claim damages in respect of the diminution in the value of the charged

[5] Cf. *Baker v Ollard & Bentley* Transcript 155 of 1982.

property. How does one assess that diminution? If the son is solvent and is prospering, then she is unlikely to suffer any real loss because the borrowings in question will ultimately be paid by him or out of his assets. Accordingly the diminution in value must be assessed by reference to the probability of the son defaulting. If the claimant were able to claim damages in respect of the possibility of future loss arising out of the giving of a personal guarantee, how would one assess those damages? In exactly the same way: by reference to the probability of the son defaulting.

15. Should the law of limitation have regard to this narrow distinction? In effect, this was the issue that arose in *The Law Society v Sephton & Co.*

Law Society v Sephton

16. Sephton & Co were a firm of accountants who had prepared reports on the books and accounts of a solicitor called Payne between 1988 and 1995. The reports certified that Mr Payne had complied with the Solicitors Accounts Rules, and were submitted to the Law Society. During this period Mr Payne had in fact misappropriated about £750,000 from client account. In 1996 the Law Society intervened in his practice. There would have been an earlier intervention if Sephton's reports had been prepared properly. Claims in respect of the stolen money were made on the Law Society's Compensation Fund by clients of Mr Payne. The first claim was made in July 1996. The first payment was made by the Fund in October 1996. The Law Society put Sephton on notice at that stage of its intention to make a claim in respect of the Fund's liabilities on the basis that the liabilities would not have been incurred if proper accountant's reports had been submitted. However, proceedings were not issued until May 2002.

17. Two unusual features of the case may be noted:

(i) The Law Society's liability (or contingent liability) to the defrauded clients of Mr Payne arose out of a statutory obligation imposed by the Solicitors Act. It was not enforceable in a private law action. It could have been enforced by a public law (i.e. judicial review) action by which the Law Society might have been compelled to exercise its discretion to award compensation rationally and in accordance with established principles.[6]

(ii) The Law Society did not <u>do</u> anything as a result of Sephton's negligence. Its claim against Sephton was founded on an <u>omission</u>, namely the omission to intervene in Mr Payne's practice and to put a stop to his frauds.

18. Sephton's argument was as follows:

- The moment that a misappropriation occurred, the Law Society came under a contingent liability in that it was probable that the client who had been defrauded would in due course make a valid claim on the Fund.

- This contingent liability fell within the formulation of 'damage' that has been established by *Forster v Outred* and approved in many subsequent cases.

- Accordingly, the cause(s) of action accrued when the misappropriations occurred, not when claims were later made on the Fund or when payments were made from the Fund, with the result that the action was statute-barred prior to issue of proceedings in May 2002.

19. This apparently formidable argument was rejected. Lord Hoffmann said that *Forster v Outred* should not be read as holding that damage would necessarily be sustained where a claimant became exposed to a possible future liability that might arise on a contingency. He treated it as deciding merely that damage was sustained by Mrs Forster when she executed the mortgage because the

---

[6] This feature, however, was not a matter on which the House of Lords founded its decision.

value of an existing asset, the farm, was immediately diminished as a result of the encumbrance. It appears from paragraph 14 of his judgment that if Mrs Forster had merely provided a guarantee of her son's debts that was not secured on real property, the risk of future loss resulting from the guarantee would not in itself have amounted to 'damage'. Lords Walker and Mance came to similar conclusions. An Australian authority, *Wardley Australia Limited v State of Western Australia* (1992) 175 CLR 514 was cited with approval. The ratio of the case was expressed in Lord Hoffmann's speech as follows:

> "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*, 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 damages in the circumstances). But, standing alone as in this case, the contingency is not damage."

20. Only one previous case, *Gordon v JB Wheatley & Co* [2000] Ll Rep PN 605 was treated as having been wrongly decided. The claim in *Gordon* was very similar to that in *Sephton*. The claimant was a financial adviser whose solicitor had negligently failed to advise him to register under the Financial Services Act 1986. The non-registration exposed the claimant to a potential liability to underwrite losses incurred by his clients as a result of entering into a certain mortgage scheme. The Court of Appeal held that time ran from the dates on which customers entered into the scheme, since from that moment onwards the claimant was exposed to a potential liability.

21. In order to understand the implications of the decision in *Sephton* it is necessary to consider the standing of various other reported cases in this field.

(1) Cases where the value of an existing asset is immediately reduced or extinguished as a result of the negligence of the defendant: *time runs from the date on which the value is first reduced*

22. Examples of cases falling within this category are:

- *Forster v Outred* itself, as explained above.

- *Bell v Peter Browne & Co* [1990] 2 QB 495, where a client's one-sixth interest in the matrimonial home should have been protected by the execution of a deed and by registration: time ran from the date on which the deed should have been executed or the date on which the interest should have been registered (and not from the much later date on which the wife sold the property and dissipated the proceeds).

- Cases where an existing cause of action becomes liable to being struck out for delay as a result of a solicitor's negligence: *Hatton v Chafes* [2003] PNLR 24[7].

(2) Cases where the claimant enters into a transaction with a third party as a result of the negligence of his adviser

23. These need careful handling. Lord Hoffmann has in the past observed that the distinction between so-called "successful transaction cases" and "no-transaction cases" is unprincipled and should be abandoned. Some unprincipled practitioners think that the distinction retains practical utility. In paragraph 21 of his speech in *Sephton* Lord Hoffmann appears to invoke the distinction, though he manages to avoid using the terminology. He refers to cases in which the claimant "did not get what he should have got"; and to cases in which the damage suffered by the claimant consists in the difference between his actual position and what his position would have been if he had not entered into the transaction in question.

(2A) Successful transaction cases

24. In a successful transaction case a claimant says: "I entered into an unsatisfactory transaction – if you, my professional adviser, had done your job properly I would have entered into a similar but improved transaction:

[7] Though it should be noted that the court left open the question whether time started to run when the action became vulnerable to being struck out; or when it became probable that it would be struck out; or when it became inevitable that it would be struck out.

damages are to be assessed so as to put me in the position in which I would have been if I had entered into the improved transaction". In such a case, time will run from the date on which the claimant entered into the transaction, since from that date onwards he will be entitled to some compensation. The compensation will be recoverable in respect of the difference between his actual position and the improved position which would have been achieved if his adviser had done the job properly.

Examples:

- *DW Moore & Co v Ferrier* [1988] 1 WLR 267, where a solicitor failed to ensure that the claimant obtained a covenant that effectively prevented an employee from resigning and setting up a competing business. Non-negligent advice would have led to the employee accepting an effective covenant. Time ran from the date on which the covenant was entered into, not the much later date on which the employee set up a competing business. To deprive the claimant of an effective restrictive covenant was to cause him measurable loss.

- *Knapp v Ecclesiastical Insurance Group PLC* [1998] PNLR 172[8], where the claimant took out a fire insurance policy that was voidable as a result of a non-disclosure for which his broker was responsible. Proper disclosure would have led to the making of a policy binding on the insurer. Time ran from the date of the making of the policy, not from the date of the fire. To deprive the claimant of an effective insurance policy was to cause him measurable loss.

(2B) No-transaction cases

25. In a no-transaction case a claimant says: "I entered into an unsatisfactory transaction – if you, my professional adviser had done your job correctly I would not have entered into <u>any</u> transaction – accordingly if you had done

[8] Cf. *Iron Trade Mutual Insurance v JF Buckenham Ltd* [1990] 1 All ER 808.

your job correctly my position would have been 'neutral': damages are to be assessed by reference to the loss occasioned to me by my entry into the transaction.

26. As Lord Hoffmann observes in *Sephton* at paragraph 21 the analysis of the limitation position in such a case "may be more difficult". Despite the breach of duty, the transaction may originally have been advantageous to the claimant and some evidence may be necessary to show when he first sustained loss.

Example:

- *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1977] 1 WLR 1627, where a surveyor's negligent valuation led to the claimant obtaining security for his loan that was worth less than he supposed. If a proper valuation had been carried out, the claimant would have made no loan. On making the loan the claimant obtained a 'package' of rights in return for his money: in particular, the borrower's covenant to repay and the mortgage on the property in question. Time ran from the date on which the amount that he was owed exceeded the value of such rights (borrower's covenant plus security).

A counter-example:

- Suppose that in *Nykredit* the claimant had run a successful-transaction case on the basis that, if properly informed about the value of the proposed security, he would still have made the loan, having obtained further security (a charge on a different property or a guarantee from a solvent person associated with the borrower, say). If that case were made good on the evidence, then it would appear that time would run from the date on which the loan was made, since from that moment onwards the claimant would be entitled to measurable compensation in respect of the difference between the package of rights that he in fact obtained and the package of rights that he should have obtained.

Another counter-example:

- Suppose that in *Forster* the claimant had been given an expensive car by her son by way of a thank-you present for granting the charge on her property. If she had been properly advised, she would have granted no charge and would have received no car. Presumably time would then run from the date on which the risk of her ultimately being liable to pay off her son's debts was to be assessed as exceeding the value of the car.

27. Neuberger LJ exposed the deeply unsatisfactory nature of the reasoning of the majority in the Court of Appeal and of the House of Lords by positing a case that is the converse of *Knapp*.

Suppose that, due to the negligent non-disclosure of certain relevant information by its agent, an insurer insures against fire risks it would not have been prepared to cover if properly advised. The insurer's position is a mirror image of the claimant's position in *Knapp*. One might expect time to start running against the claimant (insurer or insured) in each case from the same date, or at least from a date arrived at by reference to the same principles. Yet the insurer is subject to a "mere" contingent liability to pay out in the event of fire. Presumably, if *Sephton* is correctly decided, time runs from the date on which the fire occurs

28. There is a *Jarndyce v Jarndyce* flavour to these distinctions. One wonders whether *Sephton* was correctly decided in the Lords. A rule whereby one treats a risk of future loss as present damage for limitation purposes has much to recommend in terms of simplicity and ease of application. As Neuberger LJ said in *Sephton* in the Court of Appeal:

> "The law relating to the date on which a cause of action accrues in negligence is, I think, generally accepted as being somewhat arbitrary and unpredictable, and, in some cases, capable of leading to unsatisfactory results. Unless clearly satisfied that the reasoning in previous cases is distinguishable on an intellectually and practically satisfactory basis, I consider that it would be wrong in principle, and would merely

add to the uncertainty and arbitrariness which already exists in this field, if we were to depart from them."

Closing observations

29. There is no reason why time should run from the date on which a cause of action accrues. The Law Commission has been considering an alternative regime, whereby time runs in all cases from the date of discoverability, with an overriding long-stop limitation period of, say, 20 years from the date of the defendant's breach/negligence. Such a regime would remove the need to conduct difficult and expensive investigations in an attempt to identify the date on which 'damage' was sustained.

The section 14 A issue: *Haward v Fawcetts*

30. Mr Haward, an experienced businessman, purchased a controlling shareholding in a company called Kings Stag Engineering Limited in December 1994. Before doing so he obtained a report on the financial position of the company from his accountants, Fawcetts. The report was favourable. In the following four years he invested substantial sums in this company: £431K in 1995, £102K in 1996, £509K in 1997 and £208K in 1998. This proved to be money down the drain. In December 2001, seven years after the acquisition of the company, he brought an action against Fawcetts. A limitation point was taken in connection with the investments made prior to December 1995, i.e. more than six years before the issue of proceedings. Mr Haward relied on section 14A of the Limitation Act 1980. The judge, HHJ Playford QC, held this part of the claim to be statute-barred. The Court of Appeal allowed an appeal against this decision. The House of Lords restored the judge's decision.

31. *Haward* is the first case that squarely raises a section 14A issue to reach the House of Lords. All five Law Lords delivered reasoned speeches. The case is, therefore, certain to be much cited in future cases on section 14A. It is, though,

not a very satisfactory vehicle in which to conduct a tour of section 14A. This is for two reasons.

32. First, the defendant omitted to argue that Mr Haward had sufficient constructive knowledge to start time running. The constructive knowledge argument in section 14A cases goes like this:

- You, the claimant, knew that you had obtained a 'bad result' (lost a lot of money at Lloyd's[9]; suffered from permanent foot drop after an operation on the knee[10]; etc).

- You may not have had actual knowledge of the "act or omission alleged to constitute negligence", because technical expertise was required to ascertain what that act/omission was (exposing the Lloyd's name to pollution and asbestos claims in *Hallam-Eames*; severing a nerve in the course of the operation in *Broadley*).

- However, once you realised that things had gone very badly, it is reasonable to expect you to have made appropriate enquiries, if necessary involving suitable experts, and pursuant to section 14A(10) you are fixed with knowledge of the matters that those enquiries would have yielded.

33. It is clear from the speeches in the House of Lords that if Fawcetts had run a constructive knowledge argument, they would have succeeded on the limitation point without much difficulty[11]. Mr Haward knew that things were going very badly at the company soon after his initial investment, and could have been expected to make appropriate enquiries.

34. It would be a mistake, then, to suppose that the facts of *Haward* necessarily raised a genuinely difficult section 14A point that could only be sorted out by 5

[9] *Hallam-Eames v Merrett Syndicates Limited* [2001] Lloyd's Rep PN 178.
[10] *Broadley v Guy Clapham & Co* [1993] 4 Med LR 328.
[11] Eg. per Lord Mance at paragraph 138.

Law Lords and 138 paragraphs of intricate reasoning. The point was only difficult because the analysis was restricted for forensic reasons to the issue of <u>actual</u> knowledge.

35. The second reason why *Haward* needs careful handling is that the evidence adduced by Mr Haward on the section 14A issue at trial addressed the wrong point. Mr Haward sought to say that he had not realised that he "had a claim" against Fawcetts until late in the day. One thing that is clear in the murky waters of section 14A jurisprudence is that it is <u>not</u> necessary for a claimant to know that he has a cause of action for time to run: section 14A(9) says so in terms.

36. For this reason two out of the five Law Lords (Lords Nicholls and Mance) allowed the appeal on the narrow basis that Mr Haward had failed to discharge the burden of proof.

37. Time runs under section 14A when the claimant has knowledge (normally actual or constructive, in *Haward* actual only) of the following things:

(1) That he has suffered **damage** that is sufficiently serious to justify issuing proceedings against a defendant who admitted liability and would be good for the money.

[This is the section 14A(6)/(7) requirement]

(2) That the damage is **attributable** (i.e. capable of being attributed to)

(3) The **act or omission which is alleged to constitute negligence**.

[Section 14A(8)(a)]

(4) The **identity** of the defendant.

(5) The **identity** of any other person whose act or omission causes the defendant to be liable.

[Section 14A(8)(b)/(c)]

38. It is very unusual for items (4) and (5) to be contentious. They play no part in *Haward*.

39. Three of the Law Lords (Lords Scott, Walker and Brown) all came to much the same conclusion on the issue of actual knowledge of items (1)-(3). Their reasoning ran as follows:

- <u>Damage</u>

  It was clear that long before December 1998 (i.e. three years before issue of proceedings) Mr Haward knew that he had suffered substantial losses as a result of his investment decision(s).

- <u>Attributability</u>

  If he had knowledge of the act or omission alleged to constitute negligence, then it would have been clear to him that the loss was capable of being attributed to that act or omission (because he knew very well that he had invested on the strength of Hawards' favourable report).

- <u>Act or omission alleged to constitute negligence</u>

  The critical question was whether he had by that date acquired actual knowledge of **the act or omission alleged to constitute negligence ("the AOCN")**.

- Identifying the AOCN involves identifying "the essential thrust of the case"[12]; or "looking at the way the claimant puts his case, distilling what he is complaining about and asking whether he had in broad terms knowledge of the facts on which that complaint is based"[13].

- The AOCN in *Haward* was relatively straightforward: it amounted to the provision of a report that presented a favourable picture of the financial state of the company.

- Mr Haward had knowledge of that matter from the outset[14].

- He did not know until much later that he had a legal claim against Fawcetts, but section 14A(9) makes it plain that knowledge of that matter is not required to start time running.

- Equally, he did not have detailed knowledge of the shortcomings in Fawcetts' performance, but section 14A is concerned with broad knowledge[15], not with the sort of detailed analysis that would be required in order to plead the case. Once the claimant has sufficient broad knowledge of the AOCN, the damage, and the link between the two, then time runs and he has three years in which to assemble his detailed case.

40. There is nothing particularly surprising, or indeed illuminating, about this conclusion. It is consistent with the broad thrust of the many section 14A cases decided at Court of Appeal level over the last 20 years.

41. The most interesting aspect of the case lies not in the *ratio*, but in observations made by a number of the judges about cases that fall into a category different

[12] *Dobbie v Medway Health Authority* [1994] 1 WLR 1234, Bingham MR..
[13] *Broadley* [1993] 4 Med LR 328, 332, Hoffmann LJ.
[14] Per Lord Scott, paragraph 53; per Lord Brown, paragraph 90.
[15] *Wilkinson v Ancliff* [1986] 1 WLR 1352, 1365, per Slade LJ; *Halford v Brookes* [1991] 1 WLR 428,443, Bingham MR.

to that in which they placed *Haward*. The distinction can be expressed as follows:

Category (1)

- In the first type of case, of which Haward is an example, the claimant needs no particular expertise to identify the damage and the AOCN. An experienced businessman needs no assistance in order to recognise (i) a loss-making investment and (ii) a favourable report which has persuaded him to make that investment.

Category (2)

- In the second type of case, the transaction generating the complaint is of such a complex nature that a claimant might well know the basic facts without appreciating what, to an expert, they add up to[16]. In this type of case, the claimant may well not have actual knowledge of items (1) to (3) until he has obtained expert advice, though he may well have constructive knowledge if he has failed to take reasonable steps to obtain such advice.

Category (2) cases

42. *Hallam-Eames v Merrett Investments* [2001] Lloyds Rep PN 178.

This case was rescued from the limbo of unreported cases in 2001. It is extensively cited in *Haward*. The claimants knew that they had suffered substantial losses at Lloyd's as a result of the decision of managing agents to enter into run-off and reinsurance-to-close policies. They did not know at the relevant time, however, that for various reasons these policies would expose

[16] "It is no coincidence .. that both *HF Pension Trustees* and *Hallam-Eames* were cases of pure economic loss occurring in areas (occupational pensions and reinsurance at Lloyd's) which call for specialized technical expertise. Areas of that sort are those in which it is most likely that a claimant may know the basic facts, but not know what, to an expert, they add up to.": Lord Walker in *Haward* at paragraph 64.

them to huge losses. The court held that the issues of actual and constructive knowledge should go to trial. Hoffmann LJ pointed out that, while it is true that section 14A(9) says that it is not necessary for a claimant to know that the relevant act or omission amounts to negligence for time to run, it may still (on appropriate facts) be necessary for a claimant to appreciate that the prospective defendant has been at fault for him to have knowledge of the AOCN.

43. *HF Pension Trustees v Ellison* [1999] Ll Rep PN 489.

Lords Walker and Mance regarded this case as wrongly decided. Trustees of a pension fund had impermissibly transferred money to a different fund in reliance on legal advice. Much later on they took other legal advice and learned that the original advice had been flawed. They could not reasonably have been expected to have acquired that knowledge at an earlier stage, since the point in question was a technical trust law point. The judge held that time ran from the date of the original transfer, since the trustees knew that the money had been paid out in reliance on the impugned advice, and the only thing they did not know was that the advice was negligent, which was irrelevant because section 14A(9) so provided.

Not so. Without knowledge of the erroneous nature of the original advice, the trustees did not know that damage had been suffered in any real sense (Lord Walker[17]); alternatively did not know of the AOCN (Lord Mance[18]). The fact that the matter of which they were ignorant was a point of law did not prevent it from being material to the question of when time started to run under section 14A.

44. Other cases falling into this category are:

- *Irshad Ali v Courtaulds Textiles Limited*[19]

---

[17] Paragraph 61.
[18] Paragraph 117.
[19] [1999] Ll Rep Med 301: claimant needed expert medical advice to appreciate that his deafness might be attributable to excess noise at work.

- *Oakes v Hopcroft*[20]

- *3M United Kingdom PLC v Linklaters & Paines*[21]

45. If a claimant can show that his case is of the technically complex type, then his prospects of relying on section 14A to circumvent a limitation defence will be much enhanced. He will still have to face the argument that he is fixed with constructive knowledge of matters that would have been revealed by the timely instruction of appropriate experts. However, if he has gone to experts[22] and they have let him down, he can as a last resort throw himself on the proviso to section 14A(10):

> "A person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

"They are paying for my opinion not my doubts"

Robust advice on settlement of litigation: barrister and solicitor liable; apportionment of liability 2/3: 1/3 against barrister

Hickman v Blake Lapthorn & Fisher [2005] EWHC 2714

46. In *Moy v Pettman Smith* [2005] UKHL 7 the House of Lords acquitted a barrister of negligence where she had advised at court that an application to adduce further evidence was likely to succeed and should be pursued. She did not elaborate her reasons, and the advice was surprisingly optimistic in the particular circumstances of the case. The tenor of the speeches in the House of

[20] [2000] Ll Rep PN 394: claimant reasonably relied on medical and legal advice in supposing that her condition had not been mis-diagnosed by an expert orthopaedic surgeon, and time did not run until a further expert gave her reason to suppose that there had been a misdiagnosis.
[21] [2005] PNLR 46: legal advice required for a claimant to have knowledge that an assignment of a lease had made a break clause incapable of being used.
[22] Including, arguably, lawyers – though it has been said that lawyers will not normally count as experts within section 14A(10).

Lords was to the effect that – even today – barristers are paid for their opinions and not for their doubts and that it would be a disaster if findings of negligence dissuaded lawyers from giving their clients firm and robust advice.[23]

47. *Hickman v Blake Lapthorn & Fisher* was also concerned with advice given at court. Mr Hickman was a young man who had suffered serious head injuries in a road traffic accident. The negligent driver had been a friend of his, and was not insured. So the claim was brought against the MIB. The MIB defended the claim. Its case was that Mr Hickman had actual or constructive knowledge that his friend was driving uninsured. This, if proved, would have amounted to a complete defence. There was also a point taken in relation to Mr Hickman's failure to wear a seat belt. This would on its own have justified a deduction to the claim of around 25%.

48. It was directed that the issue whether Mr Hickman knew that his friend was driving uninsured should be determined at a preliminary hearing. The second defendant, junior counsel with substantial experience in personal injury litigation, was briefed. He had not previously advised on the quantum of the claim, and would have had no reason to consider quantum issues in any depth in the course of preparing for the preliminary hearing. He had, though, been sent a number of medical reports which showed that the claimant's head injury was relatively serious and – judging by the summary of the reports appearing in the judgment – suggested that there was a strong possibility that the claimant might never be able to obtain full-time employment.

49. At court the MIB made a sequence of offers to settle the entire claim. They started at £50,000, plus costs. They moved upwards to £60,000, and then to £70,000. This last offer was accepted by Mr Hickman, on advice from counsel which was (perhaps only implicitly and tacitly) endorsed by the solicitor.

[23] A similar conclusion was reached in *Luke v Kingsley Smith* [2005] PNLR 2.

50. Years later, Mr Hickman brought an action against his two legal advisers. He alleged negligent under-settlement. The claim was defended. It may be that the defendants' advisers and insurers were emboldened by the decision in *Moy*.

51. The difficulty for the defence was that the claim did indeed appear to have been settled at a surprisingly low level. It was, broadly, common ground that the probability of the MIB making good its primary defence to the claim had been around 50%. The settlement at £70,000, therefore, effectively valued the claim (net of a 25% deduction for contributory negligence) at about £140,000.

52. The defendant lawyers said that they had valued the claim at £144,000 gross, i.e. disregarding the 25% deduction for contributory negligence. On this premise, settlement at £70,000 was plainly in the claimant's interests. However, the valuation of the claim at £144,000 was accepted to be a rough and ready estimation, made necessary by the global settlement offer received outside the door of the court.

53. The trial judge, Jack J., found that the claim could have been worth as much as £500,000. Much would depend on the loss of earnings claim. If, as was obviously possible, it proved to be a "never-work-again" case, then it would be worth a sum in the region of £500,000. On this footing, settlement at £70,000 was manifestly too low. The claimant should not have been advised to settle at that level at that stage. Both the barrister and the solicitor were held to have acted negligently. *Moy* was cited. The judge acknowledged that the general tenor of the speeches in *Moy* suggested that he should be very cautious about making a finding of negligence in relation to settlement advice. But he proceeded to make such a finding. The judgment is not being appealed.

54. The judge found that there would have been no settlement at court if the claimant had received appropriate advice. He then went on to make findings about the underlying quantum issues which led to an agreement that the claim against the negligent lawyers should be valued at £130,000 inclusive of interest.

Apportionment between barrister and solicitor

55. The judge dealt shortly with this issue:

> "The main factors on Mr Fisher's side are his role as to barrister having the conduct of the case, and consequent on that, the leading role taken by him in the valuation of the claim … and his greater seniority and experience. Against that … there is Mrs Howard's [the solicitor's] greater knowledge of the case."

On this basis liability as between the defendants was apportioned 2/3: 1/3 barrister:solicitor.

56. There is almost no case law on the apportionment of liability between barrister and solicitor, no doubt because until *Hall v Simons* barristers were infrequently sued. This short finding is, then, likely to be of some practical importance, although it is, of course, closely tied to the particular facts of the case. The judge's reasoning appeared to run like this: "the barrister must get most of the blame, given that he was the principal adviser, and was dealing with an issue (the quantification of a substantial PI claim) on which a solicitor would be expected to take counsel's opinion – however, on the particular facts of this case, the apportionment should attach more blame to the solicitor because she was much more familiar than the barrister with the evidence on quantum". This last consideration was case-specific, and arose simply because the barrister had been instructed to appear at court on a preliminary issue unrelated to quantum.

57. It is reasonable to infer that an apportionment that was more favourable to the solicitor would have been reached if the barrister had been expressly instructed to advise on quantum in advance of the hearing. On that premise, one might expect to see the solicitor facing at most 25% of the 'bill', and in some cases a complete 'reliance-on-counsel' defence might be available.

Costs: a postscript

58. There was an interesting debate on costs following judgment. The case turned out to have been one in which one defendant (the solicitor) had been much more eager to settle than the other (the barrister). The claimant had been prepared to settle for £150,000 plus costs, i.e. only marginally more than the sum that he recovered at trial. The solicitor defendant had wanted to compromise at this level, but the barrister defendant had been much more bullish about the chances of avoiding liability altogether, and had been unprepared to make more than a modest contribution to the cost of settlement.

59. The judge recognised that the unyielding stance taken by the barrister had greatly increased the costs incurred by both defendants. He recognised, also, that it was not reasonable to expect the solicitor defendant to have settled the entire claim and pursued a contribution claim against the barrister. This is always an extremely hazardous course, because it exposes the party who settles first to an argument that the case has been settled too high, and requires that party to prove the contribution claim by adducing evidence from a claimant who has no continuing interest in the proceedings.

60. The solicitor submitted that in all the circumstances the barrister should be responsible for all the costs incurred in the later stages of the litigation on the basis that his unreasonable failure to mediate or otherwise negotiate constructively had caused those costs to be incurred. It is clear from a fairly lengthy and fully reasoned judgment on costs that the judge took this submission seriously. He held that the determinative issue was whether the barrister's stance was to be characterised as unreasonable. He held that it was not. This passage represents an important part of his reasoning:

> "The [barrister's] insurers were not prepared to take a 'commercial' view like the first defendants: they were not prepared to pay more than they thought the claim was worth because, if costs were taken into account, it would save them money. I consider that this was a legitimate stance because, as I have stated, otherwise the threat of a costs consequence can be used to extract more than a claim is worth."

61. Sometimes a decision to fight a case can be irrational, if judged solely by reference to the possible outcomes (in terms of payment of damages and costs)

in the instant case, but can at the same time be rational and objectively justifiable by reference to longer term considerations. The value in the long term to an insurer of acquiring a reputation of not paying over the odds in order to buy off risk, and being prepared to go to trial and judgment in an appropriate case, is incalculable but potentially very substantial indeed. Of course, these 'long view' considerations are more likely to operate on the mind of a monopolistic insurer (eg. SIF, in the old days; the Bar Mutual), than on the mind of an insurer who only covers a small proportion of the risk in any particular market.

62. The decision on costs in *Hickman* in effect declines to penalise a defendant's insurer who decides to 'take a stand' in circumstances in which it would, for costs reasons, almost certainly be cheaper in the short run to settle. Whatever the merits of the settlement decisions taken in *Hickman* itself, the judge's reasoning is sound. High cost civil litigation often savours of blackmail: "I may not have much of a case but it will be so expensive for you to go to court that you must buy me off, if you know what is good for you". The use of a CFA can make the 'blackmail' doubly effective (*Hickman* was not a CFA case and these observations have nothing to do with the approach to settlement of the claimant in that case, which appears from the judgment on costs to have been entirely reasonable). It is refreshing to find a judge making it clear that a defendant who decides not unreasonably to take a stand will not be severely penalised in costs even if at trial he goes down fighting.

PATRICK LAWRENCE QC
4 New Square
Lincolns Inn

10 July 2006