Neutral Citation Number: [2020] EWCA Civ 42

Case No: A3/2019/0538

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHANCERY DIVISION)
HHJ Pelling QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

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Between :

(1) CHRISTOPHER HUGH GOSDEN **(2) JANE SHIRLEY KAYE**	**Claimants/ Appellants**
- and -	
(1) HALLIWELL LANDAU (a firm) **(2) PHILIP LAIDLOW**	**Defendants/ Respondents**

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Teresa Rosen Peacocke and **Gabor Bognar** (instructed by **Blake Morgan LLP**) for the **Appellants**
Katherine McQuail (instructed by **BLM LLP**) for the **Respondents**

Hearing dates : 10-12 December 2019

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Approved Judgment

Lord Justice Patten :

Introduction

1. This is an appeal from an order of HH Judge Pelling QC (sitting as a judge of the High Court) dated 20 February 2019 by which he dismissed a claim against solicitors for damages for negligence. The judge held that the solicitors had been negligent in failing to register a restriction at HM Land Registry in order to protect the claimants' interest in a contract to purchase a freehold property at 8 Denny Crescent, London, SE11 ("the Property") which was subsequently sold to a third party without their consent. But he held that they had not established that the negligence had caused them any loss. The claimants appeal against his order with the permission of Davis LJ. The defendants, by respondent's notice, challenge the judge's finding that the claimants are entitled to rely on the extended limitation period provided for under s.14A of the Limitation Act 1980 ("LA 1980"). If they are right about that then a further issue arises as to whether the six-year period of limitation under s.2 LA 1980 commenced in 2003 when the breach of duty occurred or much later on 29 October 2010 when completion of the sale of the Property took place. The claim form was issued on 26 October 2016.

2. Although the appeal therefore centres on these limited issues of causation and limitation, the relevant factual background is both lengthy and not uncomplicated. I propose therefore to begin by setting out a summary of the facts in order to explain how the issues which we have to decide arose. Where necessary I will refer to some aspects of the evidence in greater detail when I come to consider the particular issues to which they relate.

The facts

3. The claimants are both senior members of the University of Oxford where they live. The first claimant is a Professor of European Archaeology. His wife, the second claimant, is a Professor of Health, Law and Policy. They have two children, Emily and Jack, who were born in 1993 and 1995 respectively.

4. Professor Gosden is the only child of Dr Jean Weddell ("Dr Weddell") who died aged 85 on 10 March 2013. He was born in 1955. When he was only three weeks' old his mother gave him up for adoption. He was subsequently adopted at the age of three months and grew up without knowing the identity of his biological mother. As an adult he moved to Australia where he met his future wife. They came to England for several months in September 1990 and during that time Professor Gosden began the searches and inquiries which led to the identification of Dr Weddell as his mother and to their being re-united. The claimants returned to live in England in 1994.

5. The judge found that a strong and happy relationship developed between Dr Weddell and her son and his family which led to her making a number of gifts to him. These included a sum of £40,000 which was used to pay off the mortgage on their house in Australia. This affection and generosity culminated in the transactions which form the immediate background to the claim in these proceedings.

6. Dr Weddell owned the Property in Kennington where she lived. She also had other investments worth several hundred thousands of pounds. In 2003 she decided that she

wished the Property to pass to Professor Gosden and his family on her death. There was an obvious problem about Inheritance Tax ("IHT"). Her accountant referred her to St James's Place Plc (trading as St James's Place Wealth Management ("SJP")) which was marketing a scheme for the mitigation of IHT known as the Estate Protection Scheme ("EPS"). The scheme was designed to enable the owners of property (typically their principal family home) to dispose of the property on terms which enabled them to continue to live there until death but which reduced the value of the property in their estate for IHT purposes.

7. In order to remain outside of the reservation of benefit provisions contained in s.102 of the Finance Act 1986 which would apply to a gift of the Property with a continued right of occupation the EPS involved the owner contracting to sell the property at open market value to the trustees of a "Property Trust" who would agree to purchase it using a loan note issued by a nominee company of SJP. The Property Trust was set up with an initial capital sum of £10 and gave the owner of the Property (as settlor and principal beneficiary) a life interest in the settled property with gifts over to his or her children or remoter issue subject to an overriding power of appointment in favour of the settlor during his or her lifetime. The contract for the sale of the property was not intended to be completed until 10 years beyond the expected life of the settlor so as to avoid the payment of stamp duty in the meantime. As part of the scheme the settlor was also granted a licence to continue to occupy the Property.

8. Although the interest in possession granted to the settlor under the Property Trust meant that the value of the property would be included in the settlor's estate for IHT purposes, the thinking behind the EPS seems to have been that the value of the property would fall to be reduced by the amount or value of the loan note used as consideration for the sale. The loan note itself was settled under the EPS on the terms of a "Family Trust" under which the settlor would not be a beneficiary but his or her children and remoter issue would be. The gift of the loan note by the settlor into the Family Trust would constitute a transfer of value for IHT purposes but would cease to be taken account of as part of the settlor's estate after 7 years.

9. The EPS was marketed by SJP using two firms of solicitors, one of which was the first defendant, Halliwell Landau. Dr Weddell was referred to Halliwell Landau by Mr Shaun Patrick, a partner in SJP, and became a client of the firm for that purpose. The letter of engagement described the work to be undertaken by Halliwell Landau as:

> "… the preparation and completion of all appropriate documentation to implement St James Place Estate Protection Scheme 1 based on information supplied by [SJP] and shall not extend to advice given by [SJP] in relation to that scheme".

10. Dr Weddell was provided with the draft documentation for the EPS. This included a "Guide for Users" prepared by the second defendant, Mr Laidlow, who was the partner at Halliwell Landau who specialised in trust and private client work and had primary responsibility for implementing the EPS on the instructions of Dr Weddell. The Guide for Users contained a summary of how the EPS operated including the steps which would be taken to protect the interests of the trustees of the Property Trust under the contact of sale during the period between exchange and completion. It stated:

> "To protect the trustees of the Property Trust they will enter a Restriction in the Title Register at HM Land Registry. This will prevent the seller from disposing of the property without notice to the trustees of the Property Trust. Although this may be regarded as unnecessary in the present situation, where the seller and the buyer are connected via a trust and are even the same people, that is what occurs in a normal contract situation where there is a long delayed completion. Similar protection is arranged where the title is not registered at the time of the contract."

11. The Property Trust in this case (which was executed on 1 April 2003) is an irrevocable settlement under which Dr Weddell is both the settlor and the principal beneficiary. The trustees were Dr Weddell and the two claimants. Under clause 3.1 of the trust deed the income was to be paid to Dr Weddell for life. Clause 3.2 contained a power of appointment which the trustees could exercise over the whole or part of the trust fund in favour of Dr Weddell as the principal beneficiary. It was exercisable:

> "… for the benefit of the Principal Beneficiary in such manner as the Trustees shall in their absolute discretion think fit provided that in exercising the powers conferred by this sub-clause the Trustees shall be entitled to have regard solely to the interests of the Principal Beneficiary and to disregard all other interests or potential interests in the Trust Fund."

12. Subject to Dr Weddell's life interest and any exercise of the clause 3.2 power of appointment in her favour, the capital and income of the trust fund was to be held for the specified discretionary beneficiaries in such shares and upon such trusts as Dr Weddell should appoint: see clause 3.4. The discretionary beneficiaries include the claimants and their children and remoter issue. In default of the exercise of this power the trust fund was to be held on trust for Professor Gosden: see clause 3.5. In relation to the power of appointment contained in clause 3.2, the Guide stated:

> "At any time the trustees can advance the trust capital to Dr Weddell. Obviously it is contemplated that this power will never be exercised otherwise some or all of the tax saving would be lost. Nevertheless, it is there for emergencies. Its use would require the consent of all trustees."

13. The contract for the sale of the Property to the trustees was for a purchase price of £485,000. It incorporated many of the Standard Conditions of Sale (3rd Edition) but specified 2 April 2026 as the completion date.

14. Under clause 4.1 of the Family Trust which Dr Weddell executed on 2 April 2003 the trustees (who were Dr Weddell and the claimants) had power to appoint the capital and income of the trust fund for the benefit of one or more of the beneficiaries who included the claimants and their children and remoter issue. Subject to that, the capital and income was to be held on trust for Professor Gosden as the principal beneficiary or, in default, on trust for his children. The Guide explained the purpose of the power of appointment as follows:

> "At any time the trustees can appoint (ie transfer by deed) all or part of the capital underpinning Chris's share to him. This power would be used after Dr Weddell's death, once the IOU had been unravelled, to pay Chris his entitlement from this trust."

15. There is considerable doubt as to whether the EPS was ever effective to achieve the IHT savings that were promised. Some of its elements, such as the loan note; what it comprised; and how it could have been unravelled, remained obscure at the trial. But it was not alleged that the contract and the trust instruments which came into existence in respect of the Property as part of the EPS which Dr Weddell entered into did not take effect according to their terms. The judge therefore proceeded on the basis that on 3 April 2003 Dr Weddell entered into a valid and enforceable contract for the sale of the Property to the trustees of the Property Trust which she had set up two days earlier.

16. The claimants' evidence, which the judge accepted, was that they were also supplied with the EPS documentation by Dr Weddell's accountant. This included the Guide with the explanations as to how the EPS was intended to work. He found that they had relied upon the Guide and that Dr Weddell was keen that the EPS should be implemented properly. Both the claimants and Dr Weddell believed that the scheme would be carried out precisely as set out in the Guide. This included the registration of a restriction to prevent any unauthorised disposition of the registered title to the Property.

17. Notwithstanding the terms of the Guide, no restriction was in fact registered against the title by Halliwell Landau. Dr Weddell remained the registered proprietor with all the powers of a full owner until October 2010 when the Property was sold without the claimants' knowledge or consent to an unconnected third party purchaser. The circumstances in which this sale came about and its aftermath are considered at some length in the judgment and are highly controversial.

18. The claimants' case, which the judge accepted, is that until 2007 the close and loving relationship between Dr Weddell, Professor Gosden and his family remained unchanged. This was confirmed by the fact that despite adverse tax changes introduced in 2005 by the Finance Act 2004 ("FA 2004"), Dr Weddell maintained her desire to pass the Property to her son and to keep the EPS arrangements in place for that purpose. The effect of FA 2004 was to introduce a charge to income tax on the value of Dr Weddell's right to continue to occupy the Property. In response to these tax changes, Halliwell Landau wrote to each of its clients who had used the EPS advising them of the possibility (and the tax consequences) of carrying out what was described as a partial unravelling of the scheme so as to release the liability under the bond used to provide the consideration for the sale of the Property to the trustees of the Property Trust. The intended effect of this unravelling was that the Property should revert to being treated as part of the settlor's estate for IHT purposes, in which case the charge to income tax introduced by FA 2004 would cease to have any application to the settlor's continued occupation of the Property.

19. This advice and explanation was contained in a document headed "Choices" which Halliwell Landau prepared in January 2005 and distributed to its clients. A partial unravelling, as I have said, would involve releasing the trustees of the Property Trust

from their obligations under the bond but would not release the Property from the contract or remove the benefit of the contract from the assets of the Property Trust. Clients who wished to do that were advised to obtain the execution by the trustees of a deed of appointment under clause 3.2 of the Property Trust so as to transfer any interest of the trustees in the Property back to the settlor as principal beneficiary.

20. Dr Weddell, however, declined to do this. In a letter to Halliwell Landau of 10 May 2005 she indicated that, having discussed the matter with her family, she had decided that the best option for her was to pay the income tax charge and to leave the EPS arrangements in place. The judge said that these events in 2005 confirmed that a close family relationship continued to subsist between Dr Weddell and Professor Gosden and that she remained ready, willing and able to discuss issues concerning the Property with the claimants. But he also inferred that the decisions which she then made about the Property were hers alone. The judge goes on to say that the exchanges with Halliwell Landau and the claimants about the impact of the FA 2004 charge to income tax also showed that Dr Weddell knew and understood that the EPS itself could be "unravelled" as and when she chose. This is not entirely accurate. What Dr Weddell would have known from reading the "Choices" document was that the sale of the Property to the trustees could be reversed by appointing to her the benefit of the contract. The exercise of the clause 3.2 power would not necessarily have involved the trustees taking into account the interests of the infant beneficiaries under the Property Trust, although they could have done so: see the provisions of clause 3.2 quoted at [11] above. But it would nevertheless have required the consent of the claimants as trustees. A decision by Dr Weddell to leave the trust arrangements in place and to pay the income tax was something that, on the evidence, she could afford to do and was a decision which she could take herself. A decision by the trustees to in effect terminate the EPS by appointing the benefit of the contract back to Dr Weddell was a very different matter. It did require the consent of all the trustees and had much wider implications for both the claimants and for their children.

21. In around 2006 Dr Weddell commenced a relationship with Ms Wendy Cook. Ms Cook is a barrister and a member of Gray's Inn. She met Dr Weddell through mutual friends. She had been in a relationship with Miss Jean Southworth QC but by 2006 Miss Southworth had become very ill and, according to Ms Cook, their relationship was by then purely platonic. However, her relationship with Dr Weddell developed to the point where in May 2007 they entered into a civil partnership. The judge found that from this time onwards the ties between Dr Weddell and the claimants became more distant particularly after Dr Weddell moved to live with Ms Cook at a house on the Isle of Wight in 2010.

22. The judge was faced with a clear conflict of evidence about the cause of this diminution in the contact and relations between mother and son. The claimants laid the blame squarely on Ms Cook. Their case was that she manipulated her relationship with Dr Weddell and took advantage of Dr Weddell's deteriorating physical and mental health so as to turn her against the claimants. Ms Cook's evidence was that the deterioration in relations began at a lunch at the claimants' house in Oxford during a visit there by Dr Weddell in January 2007 while she (Ms Cook) was in Ireland and continued at a lunch at the Property in February 2007 when she was present.

23. Her evidence was that there had been a disagreement between Dr Weddell and the second claimant during the January visit and that at the February lunch Professor

Gosden made the suggestion to his mother that she should consider the possibility of some form of supervised living because Ms Cook "might not always be around". This prompted Dr Weddell to disclose to the Professor Gosden that the relationship between her and Ms Cook was more than a friendship. Dr Weddell was said by Ms Cook to have been very upset by the thought that her son might try to put her into a home. The claimants' evidence was that there was a discussion in which Dr Weddell informed Professor Gosden that she and Ms Cook wished to get married and that it was what Professor Gosden described as a "very odd encounter". But he denied that there was any suggestion of Dr Weddell going into a home or any unpleasantness as a consequence. The judge rejected Ms Cook's evidence of the conversation and said that he found Professor Gosden's evidence on this issue to be entirely convincing. He added that he proposed to treat Ms Cook's evidence with caution save where it was corroborated, admitted or contrary to her interests.

24. The first claimant attended the civil partnership ceremony and even spoke at it. But what does seem to have been common ground is that the visits of Professor Gosden to his mother became less frequent, although when they did meet (at least up to 2008) they were left by Ms Cook to discuss matters alone. In 2010 Dr Weddell moved, as I have said, from the Property to live with Ms Cook at a property on the Isle of Wight called Dolphin Cottage. Ms Cook said (and the judge accepted) that this property was more suitable because of Dr Weddell's mobility issues, although that later changed. But the claimants' case was that from 2006 or 2007 onwards Dr Weddell lacked the capacity to make serious decisions about her affairs and that this would have justified their refusing to agree (had they been asked) in 2010 to unravel the EPS trusts and to a sale of the Property.

25. In February 2010 Dr Weddell made a new will. It was prepared by a firm of solicitors on the Isle of Wight and there is an attendance note of a visit by a solicitor to take Dr Weddell's instructions which the judge relied on as evidence that she retained testamentary capacity. According to the note, Dr Weddell was able to explain what provisions she wished to make and knew and understood what she was doing. She is recorded as having told the solicitor that the Property was to be sold now that she lived at Dolphin Cottage; that she had savings of several hundred thousands of pounds; and that if her estate passed to Ms Cook on her death it would do so free of IHT. The will was to leave £5,000 to Professor Gosden's children at 18 and £200,000 to them at 25. The remainder of her estate was to go to Ms Cook.

26. The judge said (at [40]) that the attendance note demonstrated that Dr Weddell was fully aware of who were the members of her family and the impact which her civil partnership with Ms Cook would have upon them. It also indicated that she knew that the Property was to be sold. The new will was consistent, he said, with Dr Weddell's priorities which had changed since her civil partnership. All of this was consistent with Dr Weddell having testamentary capacity.

27. The judge therefore concluded that in the absence of any relevant medical evidence and despite Ms Cook's assertion that Dr Weddell started to exhibit signs of dementia in 2008, he could not infer from the available evidence that Dr Weddell lacked capacity by 2010 to give instructions for the sale of the Property. He therefore considered that he was bound by s.1(2) of the Mental Capacity Act 2005 to assume that she had capacity. But, as Davis LJ observed when granting permission for this appeal, that cannot be conclusive of whether the claimants would have given their

consent in 2010 for the exercise of the power of appointment or for a sale had they been asked by or on behalf of Dr Weddell to do so. The claimants' case on this appeal is that the judge should also have taken account of the fact that (rightly or wrongly) they in fact believed that Dr Weddell lacked the necessary capacity and was being manipulated by Ms Cook. That would have been a powerful factor in any decision they would have made.

28. The evidence of Professor Gosden was that he did not visit his mother whilst she was living on the Isle of Wight with Ms Cook and that his contact with her was limited to a few phone calls. The impression he was given, he said, by the contact which he did have was that Dr Weddell was very confused and physically frail. But in March 2013 he was telephoned by Ms Cook and told that his mother was dying. He travelled with his wife and daughter to visit her in hospital. She was unable to speak to them. She died, as I have said, a few days later on 10 March 2013. Her funeral took place on the Isle of Wight about a week later, followed by a memorial service in London on 5 April 2013.

29. Professor Gosden's evidence was that Ms Cook told him at the memorial service that his children were to receive gifts under Dr Weddell's will but made no mention of the Property. He said (and the Judge accepted) that although the claimants knew that Dr Weddell was no longer living at the Property, they were not aware that it had been sold and did not become aware of that until much later. The Property was in fact marketed for sale in May 2010 and contracts were exchanged on 22 October 2010. Completion took place on 29 October 2010 at a sale price of £710,000 and the transfer to the purchaser was registered on 3 December 2010.

30. Ms Cook told the judge that Professor Gosden became aware of the proposed sale before it took place and had mentioned it in a conversation with his mother at the time. But the judge rejected that evidence. It was common ground that in 2015 the claimants had made enquiries of SJP about the EPS trusts. The judge concluded the enquiries were made in terms which were inconsistent with any previous knowledge that the Property had been sold. They discovered that a sale had taken place as a result of a Zoopla internet search which the second claimant made some time between 30 April and 12 May 2015. Although this was a long time after the sale and after Dr Weddell's death, the judge attributed the delay in making enquiries to what he described as the very significant distress, regret and anxiety which was caused to Professor Gosden by his lack of contact with his mother after 2008 and the effect on him of her death. That these events did have that effect on Professor Gosden is not challenged by the respondents on this appeal.

Causation

31. The claimants, as I have explained, blame Ms Cook for the reduction in contact between them and Professor Gosden after 2008. They gave evidence at the trial that Ms Cook displayed hostility towards them both before and after Dr Weddell's death and obstructed access to Dr Weddell by both her family and her friends. Ms Cook was cross-examined about this at some length during the trial but the judge accepted her evidence that she had not deliberately excluded the claimants from contacting Dr Weddell. Reliance was placed on the fact that there have also been proceedings against Ms Cook in relation to the validity of Miss Southworth's will under which she received 60% of the residue of her estate. But those proceedings were eventually

compromised in 2015 with the result that the estate was administered in accordance with the terms of the will. The judge also found, as I have said, that Dr Weddell did have testamentary capacity at the time of making her own will in 2010. He said (at [51]) that there was no evidence that her mental capacity deteriorated significantly between the making of the will and the sale of the property later in 2010. He therefore inferred that she did have capacity to give instructions for the sale and that although the conveyancing file no longer exists, there was nothing to indicate that the solicitors who were instructed raised any concerns about the matter.

32. But the significance of the distrust between the claimants and Ms Cook and of their doubts about the capacity of Dr Weddell to give instructions for the sale of the Property lies in the effect which those concerns would have had on any request by Dr Weddell to sell the Property free from the constraints imposed by the restriction on the register of title and the trusts created under the EPS. It is to be assumed that had Dr Weddell been asked to explain why a sale was necessary and what, if any, arrangements would replace the EPS trusts she would have disclosed that her 2010 will had made the provision I have described for her grandchildren but that otherwise Ms Cook would be the only beneficiary of her estate.

33. The judge accepted Ms McQuail's submission that causation fell to be determined on the basis of a loss of a chance. Had the restriction been registered as it should have been, its existence would have come to light when the purchaser's solicitors made the usual Land Registry searches and they would have required its removal in order for the sale to proceed. This would have led to a discussion between Dr Weddell and the claimants in which their consent would have been sought to a sale. The judge said that what the claimants therefore had to prove was that they had a real or substantial chance that, following the discussions, Dr Weddell would have agreed to postpone or cancel the sale.

34. The claimants say that this was a misdirection as to what they needed to establish in terms of causation and that it had the consequence of requiring them to prove that Dr Weddell would have agreed to cancel the sale or to provide for them in a different way from the EPS trusts rather than addressing the prior and different question of whether they would have consented to a sale. The judge's approach to that question was that the claimants would simply have agreed to whatever Dr Weddell wished to do. He said at [76]:

> "First, notwithstanding suggestions to the contrary, I am satisfied that whilst physically weak the Deceased had the capacity to decide on how she wanted her personal affairs arranged in 2010 and that it is highly probable that she would have insisted on her wishes being complied with. In my judgment it follows from this that any discussion between the claimants (in reality the first claimant) and the Deceased would have followed much the same pattern as had the discussions in 2005 when the issue being considered was whether to unravel the trusts or maintain them and pay the tax that had become payable. There would have been a discussion and then the Deceased would have decided how to proceed and the claimants led by the first claimant would have acceded to her wishes."

35. The reference to the discussions in 2005 is a reference to the discussions which followed the "Choices" document which Halliwell Landau sent to Dr Weddell following the tax changes introduced by FA 2004: see [19]-[20] above. The decision which Dr Weddell made on that occasion was to leave the EPS trust arrangements in place so that the claimants were never faced with being asked to consent to any form of unravelling of the Property Trust. The question as to how they would have responded had such a request then been made was therefore entirely hypothetical. But Professor Gosden was asked in cross-examination to address this question on the basis that his mother had told him that she could not afford to pay the new tax charge imposed on her continued residence of the Property:

> "Q. But if Dr Weddell had said to you, "I can't actually afford it", you would've been happy to say, "That's all right. We'll unwind the scheme and I'll probably inherit under your will anyway, won't I?"
>
> A. Well – well, I mean, again, that's a conversation that never happened so it's hard for me to comment on it.
>
> Q. But it would've been essentially her decision to unwind the scheme, wouldn't it? You wouldn't have stood in her way if she – she'd have wanted to unwind the scheme.
>
> A. Well, again, it very much depends on the nature – I really can't comment on – on conversations that never happened."

36. The judge (at [22]) treated this evidence as tantamount to an admission by Professor Gosden that he would have agreed with whatever Dr Weddell decided to do. He said:

> "It was suggested to the first claimant in the course of his cross examination that if the Deceased had suggested that the scheme be unwound to avoid the charge to income tax from and after April 2005 he would have agreed. His reply was that the Deceased did not make that suggestion and that it was not for him to comment on her decision. His reply suggests to me that the claimants would have agreed with whatever the Deceased had decided. This is unsurprising since the Property had been hers to do with as she chose, the first claimant had no interest in it other than his prospective interest under the EPS and any income tax that was payable would be paid by the Deceased."

37. On this basis he inferred in the passage at [76] which I have quoted that the claimants would have adopted the same position in 2010 had they been asked to consent to the sale so that the only issue which remained was whether Dr Weddell would have agreed to postpone or cancel the sale had she been asked by the claimants to do so. As to that, the judge considered that her priorities are likely to have changed following her civil partnership with Ms Cook in 2007 and her subsequent dependence on her for her care. Confirmation of this was provided, he said, by the terms of her 2010 will. Dr Weddell was likely, the judge concluded, to have wanted to benefit her partner and to enable them to live out their life together where and how they chose.

That wish would not have been affected by Dr Weddell's knowledge that Ms Cook was a substantial beneficiary under Miss Southworth's will. Insofar as she felt an obligation to provide for her grandchildren, that had been done under her own 2010 will. If the claimants had raised with her the change in their own expectations that the exercise of the power of appointment and a sale would involve, she is likely, the judge said, to have made clear to them that her wishes and circumstances had changed in the light of events since 2005.

38. The judge (at [80]) makes reference to some of the evidence which Professor Gosden gave in cross-examination when he was asked directly what would have happened had he been asked in 2010 to consent to the sale. But the judge does not refer to a number of the exchanges which the claimants say are critical to understanding what their position would have been in the hypothetical discussions. Professor Gosden in his evidence in cross-examination made it clear that the Property had been a much loved family home for Dr Weddell which she was anxious to pass on to her family by means of the EPS. He did not believe that moving to the Isle of Wight was necessarily in her own best interests. He said that he believed that it was Ms Cook rather than his mother who chose to sell the Property and many of his answers indicate a deep distrust of Ms Cook and her motives.

39. On a number of occasions he was reluctant to give a simple answer to the question whether in certain circumstances he would have agreed to a sale. His main concern, he said, was his mother's wellbeing and he would have wished to know what were the reasons for the sale and to satisfy himself that it was something which his mother really wanted to do and was in her best interests. As he put it on one occasion, he would have wanted to know what was going on. This would have included asking his mother what she was going to do about the Property Trust.

40. One of the scenarios put to Professor Gosden by Ms McQuail was that the discussions took place at a time when Dr Weddell had already expended money on fees and other expenses connected with the sale of the Property and risked losing the purchase. The suggestion put to him was that he would have agreed to a sale provided that the proceeds of sale were held safely in an account in the names of the trustees. But he was still unwilling to accept that he would have consented. It would have depended, he said, on the actual circumstances.

41. The judge treated this evidence as supportive of his view that Professor Gosden would have agreed to comply with his mother's wishes and that this would have left Professor Kaye to do likewise. But her evidence-in-chief was that she doubted whether Dr Weddell was capable of managing her own affairs in 2010 and that she would not have agreed to a sale. The EPS trusts had been how Dr Weddell wished to arrange her affairs, the Property was important to Professor Gosden and she was suspicious about Ms Cook's intentions in respect of Dr Weddell's assets. She would not therefore have agreed to unravel the trusts or to a sale of the Property. None of this was really challenged in cross-examination. It was put to Professor Kaye that in relation to financial and inheritance matters, including as between Dr Weddell and Professor Gosden, she would have stepped back and agreed with her husband. But she was adamant that she had a mind of her own and would not blindly follow what her husband asked her to do.

42. In my view, the judge was wrong to treat this as a claim based on a loss of a chance unless the starting point of the claimants had been that they would, as a matter of course, have consented to whatever Dr Weddell ultimately wished to do with the Property but would have attempted to persuade her to change her mind. It might then be said that the prospect of persuading her not to sell the Property represented a chance which they had lost due to the respondents' failure to register the restriction. But that is not how their claim was formulated. It was pleaded and presented on the basis that what they had lost through the respondents' negligence was the power to veto the sale. Had Halliwell Landau registered the restriction in accordance with the duty of care which they owed to the claimants, no sale could have taken place without their consent. The claimants' case is not that they had a real or substantial chance of persuading Dr Weddell not to go ahead with the sale. It is that they would not have given consent to a sale or to an exercise of the clause 3.2 power of appointment in the circumstances prevailing in 2010. If that is right then the question whether they could have persuaded Dr Weddell to cancel or postpone a sale simply does not arise.

43. As is apparent from the passages in the judgment I have quoted, the judge's analysis of what is likely to have occurred in 2010 is largely based on his view of the events of 2005. But that seems to me to be a very slender basis for inferring that the claimants, as the judge put it, would have agreed with whatever Dr Weddell decided to do. In 2005 nothing changed. Dr Weddell decided to pay the additional tax involved and to leave the EPS arrangements in place. The claimants were not called upon to make any decision of their own. The decision which Dr Weddell made was one which merely served to confirm her intention that the trusts and the contract should remain in place.

44. But the circumstances, as the judge himself recognised, did change significantly between 2005 and 2010 and any assessment of whether the claimants are likely to have consented to a sale in 2010 must be made by reference to how things then stood. By that time Dr Weddell had gone to live with Ms Cook on the Isle of Wight. There had been the significant diminution in contact between Professor Gosden and his mother as I described earlier and a corresponding concern on the part of both claimants about Dr Weddell's capacity and what they regarded as the malign influence of Ms Cook in the arrangement of Dr Weddell's affairs.

45. The question of whether consent to the exercise of the power of appointment and a sale would have been forthcoming needs to address the existence of those concerns and suspicions as part of the factual matrix against which any decision could have been made. Both claimants gave evidence to the effect that they would not have given consent absent a justification for the sale and the use of the proceeds of sale which would have put those concerns to rest. In the case of Professor Kaye, her evidence was more emphatic. Such was her concern about Ms Cook's influence that she would not have given her consent to the sale of the Property and the dismantling of the trust arrangements which that would involve.

46. By contrast to his treatment of the evidence of Ms Cook, the judge found both claimants to be honest witnesses whose evidence he accepted. None of their evidence which I have referred to was in terms rejected by the judge. Indeed, he accepts that they had the concerns to which I have referred. In these circumstances, it is difficult to see upon what evidence the judge could properly have based his conclusion that the claimants would readily have consented to the sale. The conclusion that this could be

inferred from what happened in 2005 is untenable and the assumption which the judge makes that the claimants would readily have consented to whatever Dr Weddell wished to do with the Property because it originally belonged to her ignores the legal effect of the trust arrangements and assumes that the claimants should have regarded them and their duties as trustees as of no consequence or value. In fact, their evidence suggests the contrary. Recent authorities both in this Court and in the Supreme Court (which are too well-known to require citation) have emphasised the primary role of the trial judge as decision-maker and the reluctance which should be shown by appellate courts to interfere with factual findings available to the judge on the evidence. But none of that jurisprudence has disturbed the requirement that there should be evidence capable of supporting the findings of the judge.

47. In this case, in my view, the necessary evidential foundation for his conclusions about consent was missing. The judge, it seems to me, fell into error by approaching the issue of causation in terms of whether Dr Weddell could have been persuaded to abandon a sale and of treating the consent of the claimants to what she decided as a given. Instead, as I explained earlier, he should have regarded the likelihood of the claimants giving consent as the primary issue. The claimants' evidence, put at its lowest, was that they would not have considered agreeing to a sale and to the end of the EPS arrangements without being given an explanation or justification for the sale and the use of its proceeds which both indicated that the sale was the product of an independent, informed decision by Dr Weddell and was in her own best interest. The judge heard no evidence from Ms Cook or any other witness which allowed him to conclude that in 2010 any such justification could have been given. Ms Cook gave no evidence as to who had made the decision to sell or the reasons for it. Any explanation which she might have given would also need to be treated with considerable caution given that she was the ultimate beneficiary of the proceeds of sale and that much of her evidence had been found to be unreliable. On the evidence which he did hear the only realistic and proper conclusion available to the judge was that the claimants would not have consented to the sale. The judge was therefore wrong in my view to have held that the defendants' negligence had not caused the claimants any damage.

Limitation

48. The primary period of limitation for a claim in tort for negligence is, of course, six years from the date when the cause of action first occurred: see LA 1980 s. 2. Both sides accepted before the judge that the situation in this case was governed by the decision of this Court in *Bell v Peter Browne & Co* [1990] 2 QB 495 which also concerned a failure by solicitors to register a caution in order to protect the claimant's interests under a property settlement on a divorce. There it was held that loss was suffered and the cause of action therefore accrued at the point in time when the solicitors should have registered the caution. The loss in question was represented either by the legal and other costs which would have been involved in remedying the situation or by the diminution in the value of the claimant's interest in the property obtained on the divorce caused by the lack of protection in the form of the caution. On this basis, the judge found that in this case the cause of action would have accrued on 22 April 2003.

49. The primary limitation period therefore expired long before the issue of the claim form on 26 October 2016 and the claimants were compelled to rely on the provisions

of s.14A LA 1980 in order to prevent their claim being treated as statute-barred. So far as material, this provides:

> **"Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.**
>
> (1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.
>
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either—
>
> (a) six years from the date on which the cause of action accrued; or
>
> (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
>
> (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> (6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—
>
> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant

> who did not dispute liability and was able to satisfy a judgment.
>
> (8) The other facts referred to in subsection (6)(b) above are—
>
> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.
>
> (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
>
> (10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
>
> but 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."

50. On the judge's findings as to when the claimants first knew that the Property had been sold, the starting date for the alternative three-year limitation period under s.14A(4)(b) and (5) would not have been before 30 April 2015. But the knowledge required for bringing an action for damages in respect of the relevant damage within the meaning of s.14A(5) includes knowledge which the claimants might reasonably have been expected to acquire from facts obtainable or ascertainable either by themselves or with the help of appropriate expert advice which it was reasonable for them to seek: see s.14A(10). The judge was therefore required to apply an objective test which meant that he was compelled to disregard the effect on Professor Gosden personally of his mother's death and the other surrounding factors I have referred to and instead to have asked what a reasonable person in the position of the claimants would have done.

51. The judge considered that it would not have been reasonable for the claimants to have made enquiries until after the memorial service on 5 April 2013. On that basis they

were not likely, he said, to have acquired all the knowledge necessary for bringing the claim much before the end of February 2014. He based this period on the fact that it would not have been sufficient for the claimants merely to discover that the Property had been sold. In order to know that damage had been caused by an act or omission of the respondents, the claimants would have needed to know that the restriction had not been registered and they could not reasonably be expected to have discovered this without the assistance of solicitors.

52. What the claimants had done in 2015 was to contact SJP asking whether the EPS trust arrangements were still in place. Professor Kaye sent an email on 22 April 2015. SJP told her that there was no evidence that Dr Weddell had unravelled the trusts but that they would need to obtain the relevant files from storage. On 30 April 2015 SJP confirmed that there was no sign of the trusts being unwound and suggested that the claimants should contact Mr Laidlow at his new firm (Gateley LLP). It was at this point that Professor Kaye made the internet search which revealed that the Property had been sold. She then told Professor Gosden that she had been in contact with SJP who had confirmed that the trust remained in existence. The sale of the Property therefore, as she put it, made no sense. She therefore contacted Mr Laidlow on 27 May 2015 and asked him to act on their behalf and to take what she described as immediate steps to realise the benefit under the trusts.

53. This was followed up by various emails to Mr Laidlow asking whether he required information. Eventually in September 2015 another solicitor at Gateley contacted Professor Kaye attaching an email from her colleague in the litigation department (Mr James Seed) in which he outlined the possible claims which might be brought against Dr Weddell's estate and Ms Cook to recover the proceeds of the unauthorised sale of the Property. At this stage no mention was made of the failure by Halliwell Landau to register the restriction or of any claim which might exist in respect of that, even though Mr Laidlow (and presumably Gateleys) knew that Halliwell Landau had failed to register the restriction.

54. The focus of the claimants remained therefore on seeking to recover the proceeds of sale but on 25 January 2016 they received a further letter from Mr Seed. This outlined the results of various searches which Gateley had made (including a bankruptcy search against Ms Cook) all directed to the recoverability of the proceeds of sale. Mr Seed also outlined the claims which could be brought against Ms Cook, However, in the final paragraph of the letter he informed the claimants that because the trusts had been set up in 2003 when Dr Weddell was a client of Halliwell Landau and because Gateleys had subsequently acquired parts of Halliwell Landau's business it was possible that a conflict of interest might exist were they now to accept instructions to take proceedings against Dr Weddell's estate. He said that he would confirm whether this was an obstacle to Gateleys accepting instructions once he had discussed the matter with his partners. On 29 January 2016 he sent Professor Kaye an email confirming that his firm could not act but said that they would provide a recommendation for another firm which the claimants might then instruct. What neither Mr Seed nor Mr Laidlow told the claimants was that no sale could have taken place had the restriction been registered by Halliwell Landau back in 2003 and that in addition to any claims which they might bring against Dr Weddell's estate or Ms Cook, there was also the possibility of a claim being brought against Mr Laidlow and Halliwell Landau.

55. The claimants did thereafter instruct their present solicitors in May 2016 who issued the claim form on their behalf on 26 October 2016.

56. The judge's view was that the claimants had acted reasonably in pursuing the matter through Gateleys in the way that they did and that even if they had commenced the process shortly after the memorial service in April 2013 there was no reason to suppose that it would have taken any less than the 10 months which passed between April 2015 and January 2016 when Gateleys indicated that they could not act together with the additional time needed for the new solicitors to take instructions and subsequently issue these proceedings. If the starting date is any later than 26 October 2013 then the claim was brought in time.

57. The respondents' challenge to the judge's decision on this issue really focussed on whether it was reasonable for the claimants to have pursued their inquiries using Gateleys as their solicitors. It is not, nor I think could it be seriously argued, that the claimants could realistically have acquired the knowledge necessary to bring the claim without engaging the services of a solicitor. It was submitted that the judge was wrong when he said (at [72]) that relevant knowledge of the material facts for the purposes of s.14A(6)(a) did not need to include knowledge of the absence of a restriction but was satisfied by knowledge that the Property had been sold. But that is also untenable in my view. Although knowledge of the sale was obviously the trigger for further enquiries about the circumstances in which it took place, the possibility of a claim against Halliwell Landau depended on at least knowing that no restriction had been placed on the register in 2003 to prevent any such sale. Otherwise the focus of any claim would have been on the recovery from Ms Cook of the proceeds of sale and not on the responsibility of Halliwell Landau.

58. As part of her submissions Ms McQuail produced a number of suggested timetables within which, she submitted, the claimants could reasonably have reached the point of being advised by solicitors that no restriction had been registered and that there was the basis for a claim. The suggested periods range from a few weeks following the memorial service on 5 April 2013 to one of four months and a week which is equivalent to the period between Gateleys' email of 25 January 2016 to the date in May 2016 when the claimants instructed Blake Morgan and a claim against Halliwell Landau came to be considered. This would take the starting date to 15 September 2013. If therefore the period taken up with first consulting Gateleys (or even a reasonable part of that time) is included the starting date will fall after 26 October 2013.

59. Ms McQuail, in her very clear and realistic submissions, accepted that if it was reasonable for the claimants to have consulted Gateleys then the respondents are fixed with the way in which Gateleys carried out their instructions. The judge, I think, was also right to assume that they would have handled the matter in the same way had they been instructed in 2013.

60. It seems to me that the claimants did act reasonably in choosing to go to Mr Laidlow in the first instance. He indicated to them that he was prepared to accept instructions in relation to the trusts and to investigate how the Property had come to be sold. From the claimants' point of view, he was in many ways the obvious choice. He had set up the trusts and had continued to advise Dr Weddell when the position changed in 2005. He had complete understanding of the EPS scheme and how it was intended to

operate. He was therefore best placed, one might have thought, to provide the claimants with a relatively swift explanation as to what had gone wrong. It was certainly not unreasonable for them to select him as their first port of call. We, of course, know that he was aware that the restriction had not been registered but did not disclose this to the claimants even though it was, I think, part of his obligation to them as clients to notify them that he could not act because they might have a claim against him. The fact that he and Gateleys chose not to make that disclosure is not something which should be held against the claimants. They acted reasonably in first consulting Mr Laidlow and if one takes that into account then, as Ms McQuail accepts, the starting date falls after 26 October 2013. The judge was therefore right in my view to conclude that the claimants had established their case for relying on the extended period of limitation under s.14A LA 1980.

61. In these circumstances, it is strictly unnecessary for us to deal with the other question raised on this appeal by the claimants which is whether the judge was in fact right that the primary period of limitation under s.2 LA 1980 did not begin back in 2003 when the breach of duty occurred. Very shortly before the hearing of this appeal the claimants applied to amend their grounds of appeal to include a challenge to the judge's decision that he should follow and apply what this Court decided in *Bell v. Peter Browne & Co* even though, as I have said, it was common ground at the trial that these were the correct principles. Ms Rosen Peacocke submitted that the judge should instead have been guided by the decision of the House of Lords in *Law Society v Sephton & Co* [2006] UKHL 22 and treated this as a case of contingent liability which did not result in damage until the contingency occurred. On this argument that would have been when the Property came to be sold in 2010.

62. My own view of this application to amend the grounds of appeal is that it is misconceived. *Sephton* was a claim by the Law Society against a firm of accountants whom they alleged had acted negligently in producing reports which confirmed that a solicitor had complied with the Solicitors Accounts Rules. The accountants had failed properly to examine all the relevant documentation which would have revealed that the solicitor had misappropriated clients' money. In reliance on those reports the Law Society had failed to intervene in the solicitors' practice until much later and the losses caused to the clients led to claims on the Solicitors' Compensation Fund. The claim against the accountants sought to recover what the Fund had paid out.

63. The issue on limitation turned on whether damage in the form of the loss to the Fund was suffered earlier than when the Fund received and was obliged to pay out the claimants. Under its rules the Fund is one of last resort and the risk of being liable for the claims was therefore contingent on the misappropriation not being made good by any other means including direct action against the solicitor. The House of Lords held that exposure to a contingent liability was not itself damage and that for the purposes of s.2 the damage was not suffered until the contingency occurred.

64. In the present case, as in *Bell v. Peter Browne & Co*, the loss which the claimants suffered from the breach of duty was not the incurring of a liability nor was it contingent. The failure to register the restriction exposed them and their interests under the Property Trust to an immediate risk which would have cost money to rectify and arguably reduced the value of those interests.

Conclusions

65. For these reasons, I would allow the appeal but refuse the application for permission to amend the grounds of appeal.

Lord Justice Peter Jackson :

66. I agree.

Lady Justice Asplin :

67. I also agree.
