Neutral Citation Number: [2020] EWCA Civ 851

Case No: B2/2019/2830

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BRISTOL
His Honour Judge Ralton
E90BS412

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2020

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE KING
and
MR JUSTICE KEEHAN

- -

Between:

JULIA PATRICIA HOLT	**Appellant**
- and -	
HOLLEY & STEER SOLICITORS (A Firm)	**Respondent**

- -
- -

Roderick Moore (instructed by Slee Blackwell LLP) for the Appellant
Benjamin Fowler (instructed by DAC Beechcroft LLP) for the Respondent

Hearing date: 24 June 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Tuesday, 7 July 2020,

Lord Justice McCombe:

Introduction

1. This is the appeal of Ms Julia Holt ("Ms Holt") from the order of 23 October 2019 of HH Judge Ralton, sitting in the County Court at Bristol. By his order, the judge allowed an appeal by the respondent, Holley & Steer Solicitors ("the Firm") from the order of District Judge Watkins of 3 June 2019.

2. The proceedings are brought in respect of Ms Holt's claim for alleged professional negligence against the Firm in the course of their acting for her in financial relief proceedings on her divorce from her husband, Mr Timothy Rawlings ("the Husband"). Her complaint, in essence, is that, in the course of those proceedings, the Firm negligently failed to obtain expert evidence as to the value of certain real properties and jewellery, and to secure permission to admit such evidence at the financial remedies hearing.

3. The District Judge in the present action had found that Ms Holt's claim against the Firm, so far as founded in contract, was time barred, after expiry of the 6 year limitation period, by virtue of s.5 of the Limitation Act 1980, but that her claim founded on tort was not so barred by the equivalent provision in s.2 of that Act. The Firm appealed against the District Judge's order, in respect of his conclusion as to the claim in tort. Judge Ralton allowed that appeal. The judge found that Ms Holt's claim as a whole, therefore, was barred by both s. 2 and s. 5 of the 1980 Act. As a result, he awarded summary judgment in favour of the Firm pursuant to CPR Part 24. The judge ordered Ms Holt to pay the costs of the action to be assessed. He directed that any further application for permission to appeal from his order should be made to this court. Permission to appeal was granted by Floyd LJ by his order of 14 January 2020 (sealed on 16.1.20).

4. The background facts, essentially as stated by the District Judge and adopted in summary by Judge Ralton, are as follows.

Background Facts

5. Ms Holt retained the Firm to act for her in the financial relief proceedings, which had been initiated by the Husband on 15 February 2011. The first directions appointment ("FDA") in those proceedings was held on 1 July 2011 and the financial dispute resolution ("FDR") hearing took place on 11 October 2011. At the FDA, the court ordered valuation of the family home, and of some adjoining land, by a joint expert and that report was available at the FDR. No directions were given for the valuation of some nine "buy-to-let" properties held by Ms Holt and the Husband in their separate names, although an order was made for provision of the completion statements for those properties. At the FDR, further orders were made for the Husband to provide evidence as to the existence and value of items of jewellery that he was claiming that Ms Holt had. No further orders for valuation evidence were sought by the Firm on Ms Holt's behalf. Ms Holt claims in these proceedings that the Firm negligently failed to obtain expert evidence of the value of the investment properties and of her jewellery.

6. The final hearing of the financial relief proceedings was fixed, at or shortly after the FDR, for a date in mid-February 2012. On 19 January 2012, a solicitor at the Firm wrote to a firm of estate agents asking them to provide up-date valuations of the "buy-to-let" properties in Ms Holt's name on a "drive-by" basis, saying that "… the previous values we have given to the court were estimates by [Ms Holt] herself". The agents produced such a valuation on 24 January 2012 and a copy was sent to the Husband's solicitors on 10 February 2012, asking them to agree that the valuation should be admitted in evidence in the proceedings. This new material set the value of Ms Holt's investment properties at £84,500. The Husband's solicitors responded that the values of the properties had been agreed at the FDA and it was impermissible to seek to adduce new, unilateral valuations a matter of days before the hearing. It seems that the matter was not taken further by the Firm by way of application to the court to admit the additional evidence.

7. The hearing before a District Judge (District Judge Daniel) duly took place on 4 days (2 x 2 days), between 16 February and 16 March 2012. He circulated his draft judgment to the parties on 10 April 2012; he handed the judgment down formally on 30 May 2012 and made his order on that day.

8. Departing here from District Judge Watkins' summary of the background facts, in his judgment in the present proceedings, it is convenient to summarise the effect of District Judge Daniel's judgment by reference to the summary given on behalf of Ms Holt in her Particulars of Claim in this action.

9. In respect of the contentious items, namely the property portfolio and the jewellery, District Judge Daniel found that the properties in the names of both parties had a combined net value of £435,000, of which properties worth £217,000 (net) were in the Husband's name and £218,000 (net) were in Ms Holt's name. The jewellery was taken to be worth £50,000. (District Judge Watkins recorded District Judge Daniel's finding that Ms Holt was "… not being straightforward about the extent and values of jewellery in her possession".) Total net matrimonial assets, after deduction of a joint overdraft, were found to be worth £483,000.

10. District Judge Daniel decided to increase Ms Holt's capital share, from the starting point of equality, to achieve a "clean break" solution in the case, with an absence of any continuing maintenance obligation on the Husband's part, and having regard to Ms Holt's past and future care of the three minor children and her inferior pension provision. He awarded Ms Holt 60% of the net (non-pension) assets, leaving her with approximately £290,000. To implement this, he directed the joint debts to be left with the Husband and ordered him to pay a lump sum of £13,000 to Ms Holt.

11. Ms Holt sought permission to appeal against the order, but her application was refused, with costs to be paid by her, by HH Judge Marston on 21 August 2012. The Husband's costs of the application were assessed at £2,764.80, to be satisfied by set-off against the lump sum order.

The Present Proceedings

12. On 6 February 2016, Ms Holt sent to the Firm a "formal letter of complaint", claiming to have suffered losses, for which the firm was responsible, in the sum of £268,000, made up under numerous heads of loss, including £100,000 for distress and £100,000

in respect of the property valuations. On 26 April 2016, Ms Holt's present solicitors asked the Firm to send to them the financial relief file, in respect of which the Firm then claimed a lien in respect of their unpaid costs. In January 2017, Ms Holt made an application for pre-action disclosure of the file. That order was granted on 8 March 2017.

13. On 16 March 2018, Ms Holt's solicitors wrote a pre-action protocol letter to the Firm, claiming breaches of duty on the Firm's part in failing to advise the obtaining of formal valuations of the property portfolio and of the jewellery, which, they said, had adversely affected her position in the financial relief proceedings. The letter concluded by asserting that limitation in respect of the claim might expire on 10 April 2012 (i.e. 6 years from the date of the circulation of District Judge Daniel's draft judgment) and proposed a "standstill agreement". In their response (on 28 June 2018), the Firm's solicitors asserted that the latest date for limitation purposes was 16 March 2012 (i.e. the last day of the financial relief hearing). In turn, it was contended by Ms Holt's solicitors that the question in issue, for limitation purposes, was when Ms Holt became financially worse off by reason of the breaches of duty alleged; that date, it was said, was only reached when the final judgment was handed down and the order was made (30 May 2012). Until that time, it was argued, any party could have applied to the court in the divorce proceedings to adduce further evidence, including the valuation evidence in question.

14. On 28 March 2018, the Firm issued proceedings against Ms Holt in respect of their unpaid fees in a sum of £48,708.71. On 5 April 2018, the Claim Form in the present proceedings was issued. On the Firm's case, therefore, the claim was instituted after the expiry of the six-year limitation period. On Ms Holt's case, the proceedings were issued within that period. Particulars of Claim were served on 1 August 2018, claiming a total of £124,470.

The Application for Summary Judgment and the Judgments Below

15. On 19 September 2018, the Firm's solicitors issued an application for summary judgment, on the basis that the claim was statute barred, and was therefore bound to fail. The application came before District Judge Watkins on 18 January 2019. He handed down his judgment on 22 May 2019, granting summary judgment to the Firm in respect of the contract claim and dismissing that part of the claim, but finding that the claim in tort was not time barred.

16. Permission to appeal from District Judge Watkins' order was granted to the Firm by HH Judge Ambrose on 1 July 2019. Ms Holt had also sought to appeal from that part of the order that was unfavourable to her, but her appeal was apparently not pursued. The Firm's appeal was heard by HH Judge Ralton on 1 October 2019 and was allowed by his judgment and order of 23 October 2019. Summary judgment was granted in favour of the Firm, dismissing Ms Holt's action.

17. It has, of course, been common ground between the parties throughout that a claim in tort cannot be brought after the expiry of six years from the date on which the cause of action accrued: s.2 of the 1980 Act. In tort, the cause of action accrues when damage is sustained. The dispute in this case is as to the date upon which the alleged damage was sustained. In their careful judgments on this issue, District Judge Watkins and HH Judge Ralton disagreed. The District Judge decided that Ms Holt's alleged

loss was suffered, and the damage was sustained, on 30 May 2012 when District Judge Daniel's judgment in the financial relief proceedings was handed down and his order was made. For his part, Judge Ralton decided that the date of the damage was the date when the claimant was financially worse off. Where legal proceedings are said to have been negligently conducted that date was,

> "… not necessarily the date on when [sic: which] the claim is permanently damaged or lost (e.g. by being struck out) because of the negligence but when the negligence causes a material diminution in the claimant's prospects of success and thus its value" (Judgment at [41(5)])

18. Judge Ralton found that the relevant date was reached on 16 March 2012. He said:

> "43. In my judgment the latest possible date of quantifiable damage must be 16th March 2012 – the last day of the final hearing – because the parties would know without doubt on that date that District Judge Daniel would make his mind up on the basis of the values presented. The loss to the Claimant at that date was measurable as the difference between the value of her properties and jewellery as presented and their true value albeit it was known that the value to be given to the jewellery was contentious and required a discrete factual finding.
>
> 44. It is arguable that the date of damage was earlier albeit I cannot see that date arising until after the financial dispute resolution and the fixing of a hearing date for the final hearing…
>
> 46. I do not accept that the professional negligence in **this** case resulted only in a contingency. The damage done could be provisionally valued on 16th February 2012 (when the final hearing started) and that value might have required adjustment up or down when the judge handed down his judgment but as I read the authorities such "crystallisation" (if that is the right description) does not mean that the cause of action starts on that date any more than the causes of action in the lost civil claims started on the date when they were struck out …"
>
> (Emphasis and underlining in the original)

19. The judge decided, therefore, that Ms Holt's claim in tort against the Firm for professional negligence was barred by the 1980 Act and that she had no real prospect of succeeding on that claim for that reason. Accordingly, he gave summary judgment in the Firm's favour and dismissed the claim in its entirety.

Appeal to this Court and my Conclusions

20. Against Judge Ralton's decision, the following grounds of appeal are now raised:

> "…1.1 the Appellant did not suffer loss or damage until, at the earliest 30 May 2012; …
>
> 1.2 the Appellant was not financially worse off until, at the earliest 30 May 2012;
>
> 1.3 the Appellant did not suffer measurable/recoverable loss or damage until, at the earliest, 30 May 2012 …
>
> …2.2 accordingly, in terms of alleged professional negligence in the conduct of Ancillary Relief litigation, there is now apparent uncertainty as to whether time runs from the point when the relevant mistake could no longer be corrected, leaving a risk that the spouse's case was thereby weakened, or whether time runs from the point when the mistake actually made a difference through the Family Court's judgment at a final hearing."

21. In support of, and in resistance to, those grounds, we heard two excellent arguments from Mr Moore for Ms Holt and from Mr Fowler for the Firm. I am grateful to them both for their assistance. Having considered the submissions made, I have concluded that these grounds of appeal should fail and that the appeal should be dismissed. My reasons are as follows.

22. Mr Moore's starting point was that the financial relief proceedings in divorce were a very particular type of litigation which cannot be compared with other types of civil proceedings. He emphasised the wide discretion of the court in seeking to achieve a fair distribution of assets between ex-spouses and financial relief generally upon divorce. Such decisions are not clear-cut statements of entitlement to damages, but an exercise of discretion to produce a fair result: before the decision the divorcing spouse has no "right" which can be valued. To an extent, Mr Moore argued, such proceedings are inquisitorial, and the family judge is not necessarily as confined, as in other civil actions, by the parties' approach to what evidence is material and what is not. As to the particular characteristics of financial relief proceedings in general, he referred us to the judgment of Lord Wilson of Culworth in the Supreme Court (with whom the other members of the court agreed) in *Wyatt v Vince (Nos. 1 and 2)* [2015] 1 WLR 1228, 1241 at [27].

23. The result of this, Mr Moore argued, was that whatever the nature of the evidence adduced, the court had a very wide discretion and could call for any evidence it wished. The outcome of the case was, therefore, contingent upon the judgment at the end of the day. In the present case, the failure to adduce the expert evidence, which is criticised in the present proceedings, might have made no difference in the end, depending entirely on the solution adopted by the judge in the division of the matrimonial assets. Whether damage had been sustained could only be known when the District Judge delivered his final judgment.

24. Mr Moore gave us three hypothetical routes to a decision in the financial relief proceedings in this case which, he submitted, might have been adopted and upon which the absence of the valuation evidence, in his submission, would have had no bearing. In such circumstances, he argued, if a Claim Form in proceedings for the

alleged professional negligence had been issued against the firm before the handing down of judgment, it would have been liable to be struck out as disclosing no cause of action.

25. Mr Moore complained vigorously, but courteously, that the judgment below failed to address this point in any way. He also said that the judge had failed to deal with his reliance on a passage of the judgment of Arden LJ (as she then was) in *Axa Insurance Limited v Akhtar & others* [2010] 1 WLR 1662, 1685 at [63], to which I will return below.

26. Both counsel were agreed that the decision on the present type of limitation question has to be intensely fact specific and is dependent upon the nature of the cause of action levelled against the defendant. Thus, even the highest authorities are only capable of giving the broadest guidelines in stating the applicable principles. With that I entirely agree. Nonetheless, it is necessary to consider some of those authorities in the context of the present case.

27. Mr Moore's first citation on this aspect of the case was of a short passage in the speech of Lord Hoffmann in the House of Lords in *Nykredit Mortgage Bank plc v Edward Erdman Group Limited* [1997] 1 WLR 1627, 1639 C-D (a well-known case about damage sustained by a lender owing to a negligent valuation of property for mortgage purposes). Lord Hoffmann said:

> "Relevant loss is suffered when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been"

28. No one disagrees with this general proposition which Mr Moore said led to the conclusion that Ms Holt was not "financially worse off" until the District Judge delivered his judgment.

29. Earlier in the *Nykredit* case, Lord Nicholls of Birkenhead had considered the question of when damage was sustained in a case of an allegedly negligent valuation given to a mortgage lender. A number of passages from his speech were cited to us. At 1630 C-F, Lord Nicholls said:

> "In *Forster v. Outred & Co.* [1982] 1 W.L.R. 86, 94, Stephenson L.J. recorded the submission of Mr. Stuart-Smith Q.C.
>
> > "What is meant by actual damage? Mr. Stuart-Smith says that it is 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 plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. It was also suggested in argument … that 'actual' is really used in contrast to 'presumed' or 'assumed.' Whereas damage is presumed in trespass and

> libel, it is not presumed in negligence and has to be proved. There has to be some actual damage."
>
> Stephenson L.J., at p. 98, accepted this submission. I agree with him. I add only the cautionary reminder that the loss must be relevant loss. To constitute actual damage for the purpose of constituting a tort, the loss sustained must be loss falling within the measure of damage applicable to the wrong in question."

30. His Lordship then addressed a number of hypotheses relevant to claims arising out of alleged negligent valuations from which (with respect to Lord Nicholls) I found less could be drawn in the circumstances of our case, but the remarks can provide us with some pointers. At p. 1631D, Lord Nicholls noted that in some cases, even if a borrower defaults there may be no loss to the lender. He continued (at 1631 D-E):

> "When, then, does the lender first sustain measurable, relevant loss? The first step in answering this question is to identify the relevant measure of loss. It is axiomatic that in assessing loss caused by the defendant's negligence the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty of care and (b) the plaintiff's actual position…"
>
> … For what, then, is the valuer liable? The valuer is liable for the adverse consequences, flowing from entering into the transaction, which are attributable to the deficiency in the valuation. This principle of liability, easier to formulate than to apply, has next to be translated into practical terms. As to this, the basic comparison remains in point, as the means of identifying whether the lender has suffered any loss in consequence of entering into the transaction. If he has not, then currently he has no cause of action against the valuer. The deficiency in security has, in practice, caused him no damage. However, if the basic comparison throws (1632) up a loss, then it is necessary to inquire further and see what part of the loss is the consequence of the deficiency in the security"

31. As I have noted, Mr Moore laid stress upon a passage in Arden LJ's judgment in the *Axa* case. That was a case in which insurers sued certain solicitors in respect of their vetting of claims for the purpose of the decision whether or not to issue "after the event" insurance policies, enabling potential claimants to bring personal injury claims on a "no win, no fee" basis underwritten by the insurers. On those claims, it was held that the cause of action arose when the ATE policies were issued. At [63], Arden LJ said:

> "In my judgment there must be a correlation between the measure of damages and the incurring of loss for the purposes of the accrual of the cause of action. This is because loss must be recoverable loss if its incurring is to be relevant for accrual purposes: see per Lord Nicholls in the *Nykredit (No. 2)* case [1997] 1 WLR 1627, 1630F. I would however agree with the

> judge that damage can be incurred when a transaction is entered into even if damages fall to be assessed on the "no transaction basis". In this case, on the assumed facts, loss was incurred by NIG when it wrote the policies." (Emphasis added)

32. As Mr Fowler pointed out, however, Arden LJ was referring specifically to the passage in Lord Nicholls' speech at p. 1630F in *Nykredit*, quoted above, where his Lordship was approving the passage in Stephenson LJ's judgment in *Forster v Outred & Co.* and sounding the reminder that loss for these purposes must be relevant loss. It had to be loss "falling within the measure of damage applicable to the wrong in question". I agree with Mr Fowler that the focus must, therefore, be on the facts which are said to have given rise to the cause of action. In this case, as in most, those facts are discernible from the Particulars of Claim in the proceedings.

33. The breach that is alleged (in para. 11) is failure to obtain expert valuations of Ms Holt's property portfolio (and of the CGT liability attaching to it), and of her jewellery, and thereafter to secure permission to adduce that evidence in the proceedings. That is said (in para. 15) to have caused the Husband to have cogent objection to the later admission of the "drive-by" valuations and, therefore in the end, to the lack of consideration of any such evidence by the District Judge in deciding the case. It is then specifically pleaded (in para. 31) what values the District Judge would have had before him if the additional evidence had been obtained. That would have required (as alleged in para. 32) the judge to direct a balancing payment of slightly more than £89,000 (instead of £13,000 as ordered) in Ms Holt's favour to make a 60/40 split between the spouses. In a further table (in para. 33), the actual difference in result achieved, owing to the alleged negligence, is said to have been £76,038. As Mr Fowler submitted the pleaded claim argues that the failure to procure the admission of the late valuation material for the properties, and the "over- valuation" of the jewellery, led inexorably to the result identified.

34. It seems clear to me that Mr Fowler was correct to assert, on the basis of this pleaded case, that there was no difficulty in measuring a loss at a time when the chance of introducing further valuation evidence became in reality impossible. At that stage, Ms Holt had lost the opportunity to invite the judge to assess her case based on what she asserted were the proper values of the properties and the jewellery. On that hypothesis, she had lost a chance of arguing her case for a better outcome on fuller evidence. "Loss of a chance" was one of the "…illustrations of a kind of loss which is meant by actual damage …" described by Stephenson LJ in the passage of his judgment in *Forster v Outred & Co.* (supra) which was approved by the House of Lords in *Nykredit*. (I do not forget, and I note here, that this passage needs to be read with some qualification in the light of comment upon it in *Law Society v Sephton & others* [2006] 2 AC 543 ("*Sephton"*). I return to this a little later.)

35. In every financial remedies dispute on divorce there are two necessary stages to the exercise: the computation stage (where the values of the parties' assets are ascertained) and the distribution stage (when it is determined how those assets are to be split). It is always on the basis of the evidence leading to the computation that the final distribution decision is made. One can agree with Mr Moore that there may be more than one way in which a judge may achieve the final distribution of matrimonial assets on divorce, but the building blocks of that eventual distribution are set when the values of the parties' assets are computed. In many cases, the potential consequences

of a negligent approach to valuation can be seen and, to some extent, it can be assessed before any judgment is delivered. Indeed, that is precisely what has been done by the Particulars of Claim in this very case. While the precise loss is pleaded with reference to the actual outcome, there is no difficulty in measuring in outline the damage that had been done to Ms Holt's financial position in the proceedings, whether by way of seeking to achieve a settlement or through a final result in court. The value of her position is said to have been somewhere in the region of £90,000 worse than it would have been if she had had a properly arguable case that her property values were as she asserted them to be.

36. Mr Moore submitted that this was a case where the damage suffered by Ms Holt was dependent upon a contingency that might never occur, that contingency being the final judgment reached by District Judge Daniel in the divorce proceedings. It was, Mr Moore submitted, a case of the same character as *Sephton*. It is in this case that the passage from Stephenson LJ's judgment in *Forster v Outred & Co.* (quoted and approved by Lord Nicholls in *Nykredit*) came to be considered again.

37. In *Sephton*, a solicitor, practising on his own, engaged the defendants, as accountants, to prepare and certify accounts for the purpose of compliance with the Accountant's Report Rules 1986-91, which the solicitor was obliged to file with the Law Society. Between 1989 and 1995, a partner in the defendants' firm had signed reports certifying that the solicitor had complied with the Solicitors' Accounts Rules. The partner had failed to make a proper examination of the relevant documents and failed to notice that the solicitor had misappropriated some £750,000 of clients' money in the period between 1990 and 1996. The Law Society intervened in the practice and the solicitor was struck off the roll. In July 1996 a former client of the solicitor made a claim for compensation from the Solicitors Compensation Fund and over the ensuing years the Law Society made payments out of the fund to clients who had lost out through the misappropriations.

38. In May 2002, the Law Society began proceedings against the accountants for negligence, claiming that they had relied on the reports made when deciding not to exercise their statutory investigation and intervention powers before May 1996. At a preliminary hearing, a judge held that the Society's cause of action had accrued as soon as the solicitor misappropriated money, thereby exposing the Society to the risk of a claim on the fund. The Court of Appeal reversed that decision and the accountants' appeal to the House of Lords was dismissed. It was held that the misappropriations gave rise to a possible liability to pay a grant out of the fund, contingent upon the misappropriations not being otherwise made good and upon a claim in proper form being made. Such a liability would be enforceable in public law and would count as "damage" for the purposes of determining the date of accrual of a cause of action. However, it was held that a contingent liability, such as the possibility of an obligation to make a future payment, was not damage until the contingency occurred. Thus, there was no loss or damage until a claim upon the fund was made and no cause of action had accrued until then. The claim was not statute barred.

39. The concept of a "contingent" damage gave rise to consideration of the passage in Stephenson LJ's judgment (in *Forster*) approved by the House of Lords in *Nykredit*. Lord Hoffmann addressed the passage quoted in Lord Nicholls' judgment at [12] – [14], referring first to an earlier passage in Stephenson LJ's judgment as follows:

> "12. Stephenson LJ recorded at p. 93, the submission of Mr Stuart-Smith QC, for the defendants:
>
> > "when she [Mrs Forster] signed the mortgage deed she suffered actual damage. By entering into a burdensome bond or contract or mortgage she sustained immediate economic loss; her valuable freehold became encumbered with a charge and its value to her was diminished because she had merely the equity of redemption, varying in value at the whim of her son's creditors …"
>
> 13. Later, at p 94, he recorded Mr Stuart-Smith's submission on the meaning of the "actual damage" needed to complete a cause of action in negligence:
>
> > "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 plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases."
>
> 14. Stephenson LJ said, at p 98, that he accepted Mr Stuart-Smith's statement of the law. The ambiguity in these passages (in an unreserved judgment in an interlocutory appeal) arises from the inclusion of the words "it includes liabilities which may arise on a contingency" in the second quotation. As appears from the first passage, the thrust of Mr Stuart-Smith's argument was that the mortgage, although the liability which it secured was contingent, had the immediate effect of depressing the value of Mrs Forster's farm. But the reference to contingent liabilities in the second passage could give the impression that merely incurring a possible future liability (for example, by giving a guarantee or indemnity unsecured upon any property) counted as immediate damage."

40. Lord Hoffmann then noted the approval given to the second of the passages quoted from Stephenson LJ's judgment in *Nykredit* and said (at [19]):

> "19. My second quotation from the judgment of Stephenson LJ in *Forster v Outred & Co* [1982] 1 WLR 86, 94 was approved by this House in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, 1630, but the House did nothing to resolve the ambiguity (551) which I have identified. There was no need to do so because the context was altogether different. In the *Nykredit (No 2)* case the surveyor's negligent valuation had led to the plaintiff obtaining what turned out to be inadequate security for his loan. There was no question of a contingent liability; the issue was whether a cause of action arose immediately or when the amount he was owed exceeded the value of his rights under the transaction

> (borrower's covenant plus security). The House decided that it was the latter…"

At [20], Lord Hoffmann continued:

> "20. The *Nykredit (No 2)* case [1997] 1 WLR 1627 therefore decides that in a transaction in which there are benefits (covenant for repayment and security) as well as burdens (payment of the loan) and the measure of damages is the extent to which the lender is worse off than he would have been if he had not entered into the transaction, the lender suffers loss and damage only when it is possible to say that he is on balance worse off. It does not discuss the question of a purely contingent liability."

41. The decision in *Sephton* was that until a claim was made, without the misappropriation having been otherwise made good, the damage to the Law Society was purely contingent and no loss or damage to the fund had been suffered before that stage: see per Lord Hoffmann at [18].

42. Certain other passages from *Sephton* were cited to us by Mr Moore in support of the submission that the damage to Ms Holt remained wholly contingent in this case until delivery of judgment. I need refer only to one of these from the speech of Lord Walker of Gestingthorpe at [40] - [41] where he said:

> "40. …Sephton contend that the Law Society was worse off from the time of each new misappropriation following the issue of successive untrue certificates (and knew it was worse off from the moment of the investigating accountant's report as to the true facts). The need to wait for claims on the compensation fund to be made and settled, in order to quantify the damage, did not mean that damage had not already been suffered."
>
> 41. This last point is plainly right, in the limited sense that a claimant does not have to wait for final quantification of his damage. It is a commonplace of negligence actions of all sorts that a cause of action may arise long before it is possible to quantify precisely the damages eventually recoverable. But there are other situations in which the correct legal analysis is that, however great may be the prospect (or risk) of economic loss, actionable damage has not yet occurred (just as there are situations in which there is grave and obvious risk of personal injury or damage to property, but actionable damage has not yet occurred)."

43. The question arising for us, from all this, is into which of Lord Walker's two categories (summarised in his [41] above) does the present case fall. Mr Moore insists that it is the latter. If specifically asked, Mr Fowler would have said the former. None of the cases that I have mentioned in this judgment so far answers that question precisely. The core question is still to identify the point at which Ms Holt was "financially worse off"/had suffered "measurable" damage. However, apart from the

clarification of the "ambiguity", as to the concept of "contingency", in the important passage in Stephenson LJ's judgment in *Forster v Outred & Co.*, identified by Lord Hoffmann, the broad thrust of what Stephenson LJ said (with the approval of it by the House of Lords in *Nykredit*) still stands.

44. In my judgment, as I have already said, I consider that Ms Holt's Particulars of Claim show that her loss was sufficiently well measurable, if not precisely quantifiable, when she lost the ability to adduce the evidence that she avers that she should have been able to produce before District Judge Daniel in the financial remedies proceedings. That date may, in reality, have been shortly after the FDR. It may have been when the Firm (as is to be inferred) recognised, in January 2012, that any application to the Family Court to adduce more valuation evidence would have been bound to fail. In the present case, it could hardly have been later than the end of the hearing on 16 March 2012.

45. It goes without saying that Ms Holt did not have to issue her proceedings against the Firm *before* the District Judge's judgment. She could wait until quantification became clearer after the judgment. On any footing, however, she would have had nigh on the full six years to do that, even assuming that damage had been suffered in late 2011 or early 2012.

46. I take the view that Mr Fowler was right in his submission that this is not a true contingency case, like *Sephton*, at all. In *Sephton*, the loss was contingent upon the failure to make good any misappropriation and upon a claim being made by a former client of the solicitor. In this case, Ms Holt's prospective result in the financial remedies hearing was diminished in quality because the base line for distribution of the matrimonial assets would be defined by what she contended were the inflated values of an important part of her assets. The sum that she would be likely to receive either on settlement or upon judgment would be calculated on those inflated values.

47. The closest analogy to our case, in my judgment, lies in the cases involving allegations of negligence against solicitors in the conduct of other types of litigation. We referred to a number of these: *Khan v Falvey* [2003] EWCA Civ 400 ("*Khan*"); *Hatton v Chafes* [2003] EWCA Civ 341; and *Berney v Saul* [2013] EWCA Civ 640 ("*Berney*"). All were cases of alleged negligence leading to the dismissal, or potential dismissal, of a client's earlier proceedings because of delay.

48. In *Khan*, this court said that the client had suffered damage years before a number of cases, which were in issue in the proceedings, had been struck out, because of the existence even at an early stage of an inevitability (or at least a very serious risk) that they would in due course be dismissed for delay. In such cases, the court said that if the application to dismiss were made promptly it might be difficult to conclude that there had been any diminution in the value of the claim before the strike out order. However, where there was a long delay before the application, the cause of action would accrue when there was a serious risk that the original action would be dismissed or when the action became vulnerable to dismissal.

49. I note that in that case, Sir Murray Stuart-Smith (as Mr Stuart-Smith QC, counsel in the *Nykredit* case, had by then become), giving the first judgment in this court, said at [28] that a claim in tort was a chose in action and, as such, was assignable; its value was based upon its prospects of success. If it were likely to be struck out it would

have no substantial value and, in two of the cases in issue, they would not have had any real value for many years prior to being struck out.

50. I see, of course, that a claim to division of assets upon divorce is not a chose in action of the same assignable character. It is, however, a valuable right sounding in money. If, as I think is the case in the present matter, that right is essentially quantifiable and is rendered either valueless or of diminished value in a manner sensibly calculable, as this right has been shown to be by the Particulars of Claim in the action, I see no reason in principle for saying that it is not damaged if it is rendered less valuable by the negligence of a solicitor charged with its enforcement.

51. In my judgment, to make a distinction between matrimonial finance proceedings and other forms of civil litigation on the technical basis that one claim is assignable and the other is not would be a triumph of technicality over reality. The object of the law is to compensate for damage caused by the loss or diminution of valuable rights by professional negligence. The valuable rights of a spouse on divorce should be subject to the same rules in this context as other such rights and should not be the subject of artificial technical distinctions, serving no useful purpose. It is here that I believe that the policy consideration identified by Lord Nicholls in *Nykredit*, and cited to us by Mr Fowler, can properly come into play. At 1633C-D of the report of his speech in that case, Lord Nicholls said:

> "I can see no necessity for the law to travel the commercially unrealistic road. The amount of a plaintiff's loss frequently becomes clearer after court proceedings have been started and while awaiting trial. This is an everyday experience. There is no reason to think that the approach I have spelled out will give rise to any insuperable difficulties in practice. In their practical conduct of litigation courts are well able to ensure that assessments of damages are made in a sensible way. It is not necessary, in order to achieve a sensible and fair result, to go so far as asserting that the plaintiff has no cause of action, and hence may not issue a writ, until the assessment can be made with the degree of precision that accompanies a realisation of the security. Further, within the bounds of sense and reasonableness the policy of the law should be to advance, rather than retard, the accrual of a cause of action. This is especially so if the law provides parallel causes of action in contract and in tort in respect of the same conduct. The disparity between the time when these parallel causes of action arise should be smaller, rather than greater."

52. Just as in any other civil proceedings, it must be the everyday experience of lawyers that the amount in money terms that a client is likely to realise in matrimonial proceedings will become clearer as the case progresses and his or her "rights" will have a readily estimable value that might fluctuate in estimation in the course of the case. That is not to say that it does not have value at the outset or until judgment or settlement. It does not mean either that that value cannot be damaged by negligent conduct of the litigation in the period up to judgment.

53. As Lord Nicholls said, it is a sensible policy to advance rather than retard accrual of the cause of action in such circumstances, especially when the parallel cause of action in contract (as was recognised by both parties here) had clearly expired at the time of issue of these proceedings. I do not see this point negated, the circumstances of the present case, by Lord Mance's disinclination to adopt the same policy point in *Sephton* at [80]. Divorce litigation in the present context is no different from other litigation. A client's rights can be sensibly evaluated, and can be damaged by negligence, at almost any stage of the proceedings; their lack of assignability, to my mind, is by the way.

54. The most helpful authority to which we were referred was *Berney*. That was a case of alleged professional negligence in the conduct of a personal injury claim. The claimant had been injured in a car accident on 20 April 1999. Negligence on the part of one "L" was admitted. In May 1999, she instructed the defendant solicitors. Proceedings were issue on 12 April 2002, with the limitation period due to expire on 20 April. However, they were mistakenly admitted against L's husband. On 8 August 2002 proceedings were issued against L and no point was taken about limitation. Particulars of Claim were due to be served on 11 August but were not served. The claim at that stage was limited to £50,000. There followed extensive delay while there were discussions about medical experts. In June 2004, counsel advised the claimant that the action was vulnerable to strike out, but the defendant's solicitors gave express assurances that they would not take procedural points about the delay. On 25 January 2005, the assurances were withdrawn, and the claimant's solicitors were told that application would have to be made to the court to file Particulars of Claim out of time. In April 2005, the claimant instructed new solicitors and on 13 June 2005 they asked the defence solicitors for their agreement to late filing of particulars of claim; the new solicitors were told that any application for late filing would be opposed. On 1 November 2005, the claim was settled for £25,000, plus costs. The settlement was finalised by court order on 6 February 2006.

55. On 10 January 2011, the claimant instituted proceedings against her first solicitors for damages for negligence. The claim form stated that damages "not exceeding £250,000" were sought. On 21 February 2011, the defendant solicitors applied for summary judgment because (among other reasons) the claim was statute barred. They argued that damage had been suffered at the latest on 2 June 2004, when counsel had advised that the original claim had become liable to be struck out for delay. The application succeeded in the County Court, but an appeal to the Court of Appeal was allowed (on 5 June 2013). It was held by the majority of the court (Moses and Rimer LJJ) that actual damage only arose after 25 January 2005 when the solicitors acting for the defendant in the original action withdrew their agreement to any further delay in filing of the Particulars of Claim. Therefore, proceedings issued on 10 January 2011 were within the six-year limitation period. [1]

56. Gloster LJ would have been prepared to say that damage was not suffered until 1 November 2005 when the original claim was settled, because there was no real risk

[1] In the end Ms Berney's claim was dismissed by the High Court. The trial judge found that she had suffered no loss in fact because the sum of £25,000 was not a sum which she could have bettered in the light of the medical reports she held. Permission to appeal to this court was refused on the papers by Gloster LJ and was also refused on a renewed oral application for permission on 9 November 2016 by Longmore LJ: see [2016] EWCA Civ 1190.

before then that an extension of time for filing Particulars of Claim would not have been granted by the court. She did not agree that the claimant's loss arose from the diminution of the value of her claim; she considered that the loss was suffered from having to settle the claim in November 2005.

57. In contrast, Moses LJ (with whom Rimer LJ agreed) said (at [86]):

> "In my view there was a real risk that prior to the date of the settlement had Ms Berney's solicitor … made an application to the court to extend time for service, she would have been confined either to a sum of £50,000 which she had originally claimed, or to such lesser sum as the evidence based on the medical reports disclosed at that time …"

At [88] he continued,

> "Nor do I agree that it is incorrect to characterise Ms Berney's claim as one for "diminution of the value of her chose in action" … [I]t is true that she claimed for having to settle her loss at a figure far below the true value of the claim. It remains for her to prove that the true value was greater. But *non constat* that the cause of action did not commence at a date before the settlement. A claimant cannot avoid the identification of an earlier date as the date when she suffered actual damage merely by the form of her pleading, whether relying on an actual strike out or a settlement. If in fact the value of her claim was diminished before settlement then her cause of action arose before settlement.
>
> 89. This proposition is made good by reference to the passage … of Schiemann LJ in *Khan v Falvey*:
>
> > "The mere fact that the claimant does not plead any damage prior to the strike out does not necessarily mean that he has suffered no damage prior to that time."
>
> The same must be true where damage has been suffered prior to settlement …"

Then at [91] Moses LJ said:

> "Prior to the settlement, a real risk had arisen that the claim would have been restricted to a value less than that which the claimant now asserts. It had entered that period to which Chadwick LJ refers in *Khan*, when it was impossible to say that damage had not occurred as a consequence of previous delay.
>
> 92. …[U]p to 25 January 2005 there was no risk that time would not have been extended or that the claim would have been restricted…

> 93. … After that time, … there was a real risk that Ms Berney's claim would have been restricted. From 25 January onwards she had suffered actual damage, measurable by the risk of a restriction being imposed …"

58. In the present case, judged by these standards, it is clear that after the FDR, or at latest after the Husband's solicitors made it clear in January 2012 that they would object to new valuation evidence, there was a real risk (indeed perhaps a near certainty on the present facts) that the base line value of Ms Holt's assets would be taken at what she says was an inflated value for the purpose of the financial relief proceedings. That inevitably meant that the value of her rights vis-à-vis the Husband were diminished (or "restricted", per Moses LJ). If one postponed that inevitability to 16 March 2012 (the end of the hearing), as Judge Ralton did, it makes no difference to the outcome: damage was still suffered more than six years before the commencement of this action.

59. I do not ignore the theoretical possibility of a judge in divorce proceedings, of his/her own motion, taking the view that the evidence before the court is unsatisfactory and requires improvement or clarification. Authority shows that a judge can change his/her mind as to the outcome of a case, before an order is drawn up, even after delivering a draft judgment: see *Re L and anor. (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 (SC (E)). However, in a case like the present the reality is that the expert evidence of values upon which a party may rely, and upon which proceedings will be resolved, will be settled well prior to the date of the hearing. If one party, owing to a solicitor's negligence, loses the opportunity to adduce the expert evidence that puts his/her case in the best possible light then the value of that party's claim is inevitably diminished. As Mr Fowler put it, at that stage (as in any other civil claim) an important and identifiable part of that party's "armoury" has gone.

60. I also accept Mr Fowler's submission that, on the pleaded case, Ms Holt's chance of achieving in the divorce proceedings the result which she contends that she should have achieved was most unlikely (absent the further evidence). It is nothing to the point that other outcomes were theoretically possible. Those possibilities are not ingredients of the cause of action. They are not ones which it is said in this case that Ms Holt would, on balance of probabilities, have achieved.

61. In the result, I consider that, on her case, Ms Holt suffered "measurable damage" and was "financially worse off" at the latest by the end of the hearing on 16 March 2012, as Judge Ralton held, and in all probability much earlier than that. Therefore, her claim for damages in tort was barred by s.2 of the 1980 Act before the claim form was issued on 5 April 2018.

Proposed Outcome

62. For these reasons, I would dismiss this appeal.

Lady Justice King:

63. I agree.

Mr Justice Keehan:

64. I also agree.