Court of Appeal hands down judgment in Elliot v Hattens

On 18 May 2021 the Court of Appeal handed down judgment in *Elliot v Hattens*: a solicitors negligence case that goes to the heart of the vexed question of when time starts ticking for the purposes of limitation. Simon Goldstone, instructed by RPC LLP represented the successful appellant.

1. The facts were simple: Kelly Elliott had instructed her solicitors to help her in connection with a property transfer: her husband was to grant her a lease over a workshop, and she would grant an underlease to a Mr Jamie Malster for his fledging mechanics business. She wanted Mr Malster's parents to be guarantors, but the defendant solicitors negligently failed to secure their signature on the contractual documents. To add insult to injury, they forgot to advise her to insure the property, even though she was obliged pursuant to the lease to do so. When the workshop duly burned down, Ms Elliot was left without a rental stream, and her losses were uninsured.

2. Ms Elliott sued the solicitors, who took a limitation defence: the lease documentation had been executed more than six years prior to the claim, so her action in tort was time barred. Ms Elliott's case was that the cause of action in tort had not accrued until she suffered damage, upon the date fire.

3. HHJ Bailey, sitting on his last day prior to retirement, found for Ms Elliott. He decided that prior to the fire any loss was 'purely contingent' which, pursuant to *Law Society v Sephton & Co* [2006] 2 AC 543 ('Sephton'), not actionable damage such as was necessary to crystallise a cause of action in tort. The Judge was aware that his decision was controversial and gave permission for a 'leapfrog' appeal to the Court of Appeal.

4. Lord Justice Newey gave the judgment, with which Asplin and Stuart-Smith LLJ agreed. In allowing the appeal, the Court reviewed the important cases of *Sephton*, *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172, *Bell v Peter Browne & Co* [1990] 2 QB 495, *Shore v Sedgwick Financial Services Ltd* [2009] Bus LR 42, *Axa Insurance Ltd v Akther & Darby,* [2010] 1 WLR 1662 and *Maharaj v Johnson* [2015] UKPC 28, and distilled eight key following points:

   i) In some cases a claimant may allege either that, but for the solicitors' negligence, he would not have entered into the transaction at all (a "no transaction" case); in others, that, had it not been for the negligence, the transaction would have been a better one (a "flawed transaction" case).

   ii) In 'flawed transaction' cases, such as the present, "liability is for the difference between what the plaintiff got and what he would have got if the defendant had done what he was supposed to have done"

   iii) In such cases "it may be relatively easy to infer that the claimant has suffered some immediate damage, simply because he did not get what he should have got".

   iv) That said, "The fact that the transaction was flawed does not by itself mean that the claimant suffered actual damage on entry into it". It is essential to consider the particular facts and deciding whether such … an inference [that there was immediate damage] is properly to be drawn from them".

   v) Sometimes the relevant fault can be so easily remedied that no more than nominal damages will be

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recoverable in an action in contract, and … any cause of action in tort fail.

vi) Risk of loss can equate to loss: 'the fact that the risk to which the claimant was exposed by the defendant's negligence might not eventuate did not mean that the claimant did not suffer loss as a result of being exposed to that risk' and 'It is the possibility of actual financial harm that constitutes the loss'

vii) The Court will consider whether the effect of the transaction was to place the claimant in an objectively less favourable position than if the solicitors had not been negligent: the issue of whether the claimant wanted to assign the lease was irrelevant; what mattered was whether the lease would have been more valuable if the rent had been guaranteed.

viii) Flawed transaction cases involving 'packages of rights' were to be distinguished from *Sephton,* in which the claimant merely assumed a contingent liability, and nothing more.

5. Ultimately, the basis for the decision was this:

"Looking at matters objectively, what she received from the transaction was significantly inferior to what she should have received. The reversion to an underlease with the benefit of Mr Malster's parents as guarantors would plainly have been of measurably greater value than that to the unguaranteed underlease which Hattens' negligence led Mrs Elliott to grant. An expert could doubtless have put a figure on the difference."

Read the full judgment here

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