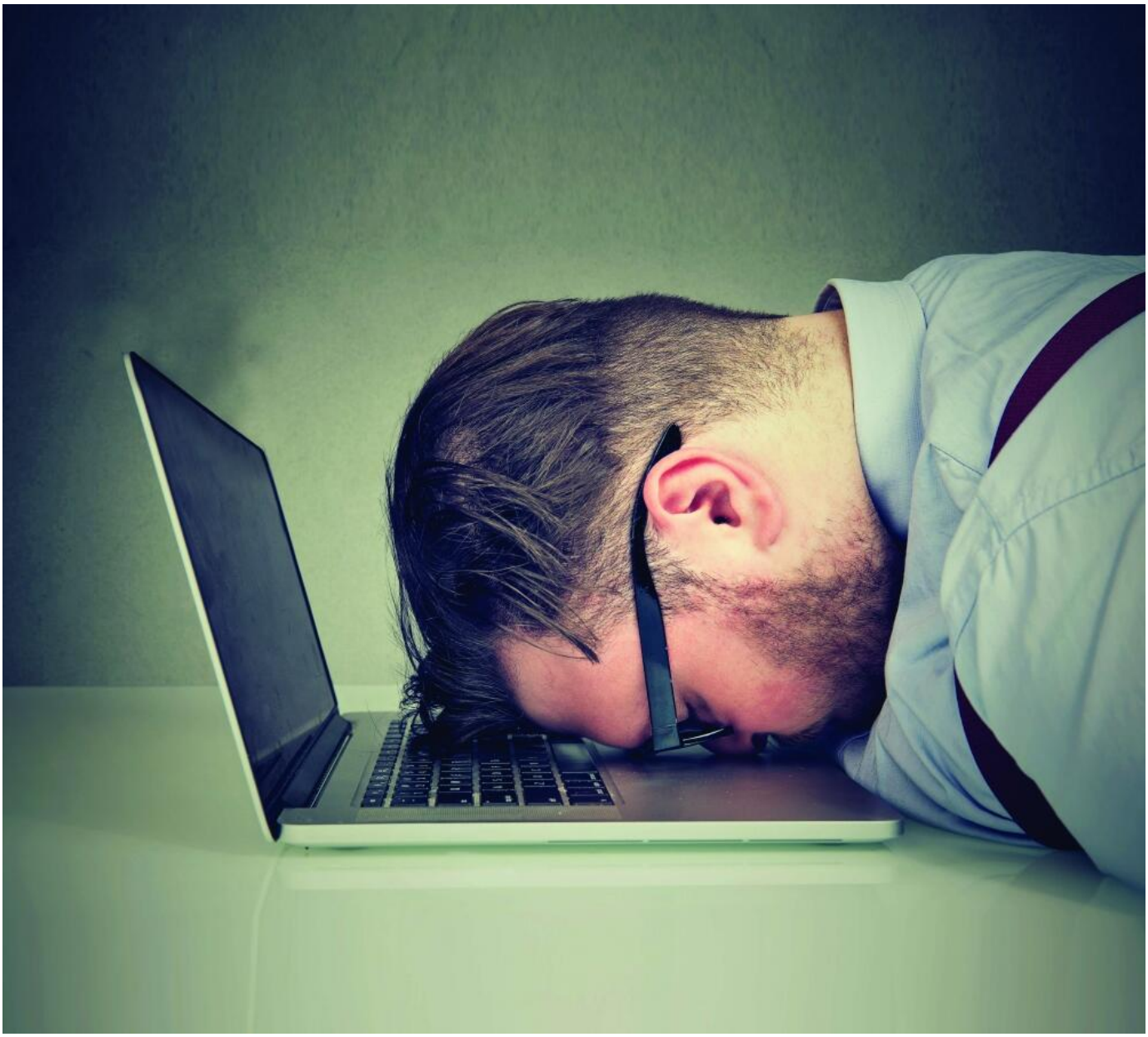
Not only… but also

Inheritance tax and trusts | Professional standards



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Keith Gordon looks at a case which considers the extended period sometimes available to claimants in cases of professional negligence

Key Points

What is the issue?

Professional negligence claims should generally be commenced within six years, though the commencement of the six year period can differ. However, in many cases, the underlying negligence might remain unknown
for many years.

What does it mean to me?

Many disputes concern the question as to when the knowledge threshold is crossed, as shown in the case of Gosden v Halliwell Landau.

What can I take away?

If a client is thinking of making a claim (for example, against an earlier adviser), it is important to keep time limits in mind. Appropriate legal advice should be taken promptly.

This article concerns a case which considered the Limitation Act 1980, which applies only in England and Wales. The article does not cover every aspect of the Limitation Act 1980; for example, the common practice of entering into stand-still agreements so as to avoid claims being rushed shortly before a time limit expires. Accordingly, even more so than usual, readers should treat the article as no more than an introduction to the subject.

It is generally known that professional negligence claims should generally be commenced within six years. The commencement of the six year period can differ depending on whether a claim is being made on the basis of contract law or the law of tort. However, in many cases, the distinction is of little comfort because the underlying negligence might remain unknown for many years. To address such cases (yet to ensure that prospective defendants have some finality), an extended period of up to 15 years is made available by the Limitation Act 1980 ss 14A and 14B.

For this extension to be available, a claim has to be commenced within three years of the prospective claimant having ‘both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action’. As per s 14A(10), however, ‘knowledge includes knowledge which [the

claimant] might reasonably have been expected to acquire’.

Many disputes concern the question as to when the knowledge threshold is crossed. The recent Court of Appeal decision in Gosden v Halliwell Landau [2020] EWCA Civ 42 is a further example.

The facts of the case

The claimants were Professor Gosden and his wife, Professor Kaye. The claim concerns Professor Gosden’s late mother’s home in South London.

In 2003, Professor Gosden’s mother (Dr Weddell) decided that she wished to pass her home to Professor Gosden and his family on her death. To give effect to her wish, Dr Weddell entered into an arrangement which involved her selling the home to a trust, albeit with completion deferred until 2026 (long beyond Dr Weddell’s life expectancy). The purpose of the arrangement was to allow Dr Weddell to continue living in the property until her death without triggering the gifts with reservation provisions. This was an essential part of the arrangements, as it ensured Dr Weddell’s ability to continue residing in the property during her expected lifetime but also avoided the crystallisation of a stamp duty charge (this being several months before the introduction of SDLT).

Although the subsequent introduction of the pre-owned assets regime meant that the arrangements became less attractive than when first implemented, Dr Weddell opted to pay the annual income tax charge rather than forgo the planned-for inheritance tax savings.

The expectation in 2003 was that a restriction would be entered on the registered title of the property so as to prevent it being sold in the interim. However, the solicitors who implemented the scheme failed to carry out this step. Ordinarily, this would not necessarily matter in practice, but for a deterioration in the family relationships and a possible loss of Dr Weddell’s mental capacity, leading to a sale of the property to a third party purchaser in October 2010 without the knowledge of the claimants. At the same time, Dr Weddell moved to the Isle of Wight, where she lived until her death in 2013 with a new partner, which presumably explains why the claimants were not alerted to the sale of the property.

It was in about 2015 when the claimants started to revisit the arrangements entered into by Dr Weddell. When doing so, they first found out that the property had been

sold several years earlier.

The claimants then sued the solicitors for negligence as they were therefore unable to enjoy the benefit of the London house that had been promised to them.

In the High Court, however, the judge dismissed the claim on the basis that he thought that the claimants would have consented to the 2010 sale had they been alerted to it by Dr Weddell. The consequence of this finding was that the earlier negligence by the solicitors had not caused any loss to the claimants (as this consent would have been similarly given had the restriction on the property been entered and therefore the claimants were in no different a position).

The claimants appealed.

The court's decision

In the Court of Appeal, the case came before Lord Justices Patten and Peter Jackson and Lady Justice Asplin. The court recognised that the trial judge is the primary decision maker and appellate courts should be slow to interfere with factual findings reached which are based on the evidence before the trial judge. However, the Court of Appeal felt that there was insufficient evidence before the judge to justify his findings. On the evidence that the High Court judge had heard, 'the only realistic and proper conclusion was that the claimants would not have consented to the sale'.

This then led the court to consider whether the claimants were entitled to make their claim in October 2016. In this regard, the court accepted the conclusions of the High Court judge. In particular, the judge had accepted that there was no reason for the claimants to have been aware of the property sale in early 2013 (when Dr Weddell died and at the subsequent memorial service). Furthermore, although not a part of the statutory test, the claimants had acted reasonably by first making enquiries of the solicitor who had acted back in 2003. Furthermore, that solicitor and his new firm failed to notify the claimants of any problem. Consequently, the claimants could not reasonably have known about the ingredients for making a professional negligence claim until long after October 2013. As the claim was made within three years of the requisite knowledge being held (and within the over-arching 15 year time limit), the claim was not out of time.

As a result, the claimants' appeal was allowed.

Commentary

As noted above, many cases turn on the question as to what constitutes the relevant knowledge that triggers a new three year time period for making a claim. The court gave some useful guidance in this regard.

First, the claimants in this case could not have been expected to have obtained the requisite knowledge without engaging the services of a solicitor.

Secondly, the defendants could not reasonably argue that the claimants acquired the requisite knowledge once they learned that the property had been sold. (As this knowledge was not obtained until 2015, the point became moot.) Indeed, the mere knowledge that the property had been sold would have led to proceedings being commenced only against the residuary beneficiary of Dr Weddell's estate. What the statute is concerned with, however, is 'the knowledge required for bringing an action for damages'. Such a claim against the solicitors depended on the claimants knowing that the restriction had not been placed on the register.

Of course, that guidance was directed at the facts of the case and so care should be taken before applying it too widely, although the gist of the guidance represents a common sense approach which is capable of generalisation. In particular, it is important to realise that the three year claim period does not necessarily start as soon as one learns about a problem, but when one knows (or can reasonably be expected to know) that a claim could be made.

It is also noteworthy that, at the heart of this case, was a tax avoidance scheme, and one where the Court of Appeal noted that its efficacy was subject to 'considerable doubt'. However, that did not appear to distract the Court of Appeal from applying the statutory test before it. Indeed, when relating the facts of the case and mentioning that Dr Weddell had decided in 2003 to pass her home to her son, the court continued by noting that:

'There was an obvious problem about inheritance tax.' An alternative viewpoint could have been that Dr Weddell needed to do no more than direct the property in her will with the consequence that inheritance tax would be payable out of what was left in her estate at her death. Nevertheless, the court appears to have taken the view that the potential incidence of inheritance tax represented not only a problem but
an obvious one.

What to do next

If a client is thinking of making a claim (for example, against an earlier adviser), it is important to keep time limits in mind. In such a case, appropriate legal advice should be taken promptly. Similarly, it is worth remembering that the standard six year time limits are not necessarily the final word, although one has to act particularly promptly and clearly demonstrate what was known (and knowable) and when such knowledge was acquired.