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# FOIL UPDATE 19th May 2021




# Professional negligence: when is damage sustained?

*Elliot v Hattens Solicitors (a firm) 2021 EWCA Civ 720*

The defendant/appellant, a firm of solicitors, were retained by the claimant/respondent in 2011, to act for her in connection with a transaction pursuant to which her husband was to grant her a lease and she would grant an underlease to another party (the sub-lessee). The intention was that the sub-lessee's parents would guarantee his obligations under the underlease.

By mistake, the defendant failed to name the sub-lessee's parents as parties to the underlease, and the parents neither executed the underlease nor otherwise became guarantors. Further, the defendant did not advise the claimant to obtain insurance for the property, as required by her lease.

On 6 November 2012, there was a fire at the premises which effectively destroyed the buildings there. The sub-lessee subsequently vacated the property without undertaking repairs. The claimant also lost rent and she had not taken out any insurance.

The present proceedings, seeking damages for negligence, were issued on 10 April 2018, more than six years after the lease and underlease were executed but less than six years after the fire. The defendant was said to have been negligent in essentially two ways: failing to ensure that the sub-lessee's parents entered into a guarantee and failing to

**IN BRIEF**

The Court of Appeal held that damage was sustained when a sub-lease was prepared negligently, omitting guarantors and, at the same time, the claimant had not been advised to insure the property.

The cause of action for limitation purposes was not the later date, when a fire occurred in the demised premises and the loss occasioned by the negligence became apparent.

advise the claimant of her insurance obligations under the lease and underlease.

The defendant pleaded in its defence that the claim was statute-barred. The judge in the court below found in favour of the claimant on the preliminary issue of limitation on the basis that it was only when the various contingencies occurred that the cause of action arose for the claimant, i.e., there was no measurable loss before the fire and the claimant did not suffer any actual loss or damage as a result of the absence of a guarantee until after the sub-lessee had defaulted on his obligations and did not suffer any actual loss or damage as a result of the defendant's failure to advise on insurance until after the fire.

Allowing the defendant's appeal, the Court of Appeal held that this was a "flawed transaction" case. The claimant would still have taken a lease of the premises and granted an underlease if there had been no negligence. Had, however, the defendant not been negligent, the sub=lessee's parents would have guaranteed his obligations and, it was to be assumed, the claimant would have been warned of the need to insure and would have done so.

The question then arose whether "the value to [the claimant] of the flawed transaction was measurably less than what would have been the value to [her] of the flawless transaction". On the face of it, the answer was obvious: apart from anything else, the claimant's lease must have been less valuable because there was no guarantor in respect of the underlease she had granted and, for good measure, it was not within her power to remedy the deficiency without the cooperation of the sub-lessee's parents. What she received from the transaction was significantly inferior to what she should have received.

A contingent liability did not 'of itself' constitute 'damage': there must be "something more". Here, the defendant's negligence did not cause the claimant to assume any *liability*: the position was rather that she obtained less advantageous rights. More importantly, perhaps, there was "something more". The fact that the underlease had no guarantor affected property of the claimant, viz. her lease.

The simple fact was that the claimant did not obtain the package of rights that she subjectively desired. A claimant can potentially suffer relevant damage as soon as a flawed transaction is entered into even though the value of that transaction is not objectively lower than that of the intended transaction. Where, on the other hand, a flawed transaction is objectively less valuable from the start, the cause of action accrues at the outset. If negligence on the part of a solicitor served to reduce the market value of an asset, the claimant could not defer the expiry of the limitation period.

In the circumstances, there was no doubt that the defendant's failure to ensure that the sub-lessee's parents were guarantors caused the claimant damage as soon as the lease and underlease were entered into and, hence, that her cause of action accrued at that point and was now statute-barred. The failure to give advice as to the need to insure did not fall to be treated any differently from the failure to ensure that the sub-lessee's parents became guarantors.