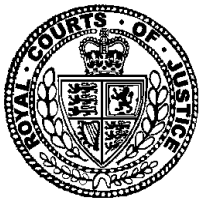

Neutral Citation Number: [2021] EWCA Civ 786

Case No: A3/2020/1048

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**(CHANCERY DIVISION)**
**HIS HONOUR JUDGE JARMAN QC**
**[2020] EWHC 189 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2021

**Before :**

**LORD JUSTICE NEWEY**
**LORD JUSTICE COULSON**
and
**LORD JUSTICE STUART-SMITH**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**Lillo Sciortino**
**- and -**
**Marc Beaumont**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Alexander Hill-Smith** (instructed by **Osmond & Osmond Solicitors**) for the **Appellant**
**Nicholas Davidson QC** (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing date : 5 May 2021

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**LORD JUSTICE COULSON :**

## 1 Introduction

1. The primary issue raised by this second appeal concerns the date when a cause of action in negligence accrues against a barrister who has advised on two separate occasions about the same or similar issues. Is there one single cause of action which accrues when the first negligent advice was given and acted upon (in which case, on the facts of this case, the claim would be statute-barred), or does a separate cause of action – albeit for lesser loss and damage - accrue when the second advice is given and acted upon (in which case the lesser claim here, based on that second advice, would not be statute-barred)? Both Master Teverson ("the Master") and His Honour Judge Jarman QC ("the Judge") concluded that the answer was the former, not the latter, and that therefore all relevant parts of the claim were statute-barred. Permission was given for this second appeal on the basis that the Appellant had a real prospect of success and that the appeal raised "an important point of principle as to the application of limitation in circumstances such as these."

2. In order to understand precisely how this appeal arises, and the detailed nature of the opposing positions on limitation, it is necessary to set out the relevant events in some detail (Section 2 below). I then deal more briefly in Section 3 with the procedural history. In Section 4, I set out the law concerned with limitation in similar circumstances to these. I then analyse and provide an answer to the limitation issue, which I have called Issue 1, in Section 5.

3. It should be noted at the outset that, by way of a Respondent's Notice, the Respondent maintains that, even if the Master and the Judge had been wrong to find that the claims were statute-barred, their orders striking out this part of the claim should still be upheld because, on a proper analysis of the law, it could not be said that the respondent had been negligent. This issue was raised both before the Master and the Judge but, in view of their conclusions on limitation, neither of them dealt with it in any detail. Both said that, in their view, the merits of the allegations of negligence could not be determined by way of summary judgment. On behalf of the Respondent, Mr Davidson QC submitted that they were wrong to reach that conclusion, and that the merits can and should be determined at this stage. I have called that Issue 2, and I deal with the relevant law and Issue 2 itself in Sections 6 and 7 respectively. My summary view as to the proper disposal of this appeal is set out in Section 8.

## 2 The Relevant Events

4. The Appellant was made bankrupt on 29 June 2007. At that date, he was the freehold owner of a property known as 221, Woodham Lane, New Haw in Surrey ("the property"). When the trustees in bankruptcy were appointed on 28 December 2007, the property was therefore part of the bankruptcy estate and vested in the trustees.

5. On 8 June 2010, the then trustee in bankruptcy, Mr Treharne, applied to Kingston County Court for orders for possession and sale of the property. A return date was given for the hearing of the application on 19 July 2010.

6. On 6 July 2010, the solicitors acting for the trustee, Clarke Willmott, confirmed to the Appellant's agent and accountant, Mr Crilly, that the trustee was prepared to give the

Appellant further time to resolve the outstanding debt, and that they would write to the court seeking to vacate the date of 19 July. On that same day, they wrote to the court saying that the trustee was willing to allow the Appellant sufficient time to liaise with HMRC, and asked if the hearing date for the application could be vacated and relisted for the first available date after 9 September 2010.

7. For whatever reason, it appears that this letter did not find its way onto the court file, at least not by the time of the hearing on 19 July 2010. Clarke Willmott did not chase it up, apparently assuming that the hearing would be vacated without further action on their part. In consequence, without knowledge of the letter of 6 July, District Judge Stewart struck out the application for possession as a result of the non-attendance of the parties.

8. When they received a copy of that order, Clarke Willmott wrote again to the court on 22 July, setting out the history, and enclosing a further copy of their letter of 6 July 2010. They asked if the matter could be referred back to District Judge Stewart with a request that the application be re-instated and a hearing listed for the first available date after 9 September 2010. That letter was not copied to Mr Crilly.

9. The court responded on 26 July, saying that District Judge Stewart had looked again at the file which did not contain the letter of 6 July. The District Judge said that he would consider setting aside the order of 19 July only if Clarke Willmott could demonstrate that the letter of 6 July had actually been sent. Clarke Willmott wrote again to the court on 27 July explaining how and why they considered the letter had been sent and repeating many of the points in their previous letter. This exchange was also not copied to Mr Crilly.

10. This second letter from Clarke Willmott was apparently sufficient for District Judge Stewart because, on 29 July, he ordered retrospectively that the hearing on 19 July be vacated, and that the order made on 19 July be set aside. Clarke Willmott sent a copy of that order to Mr Crilly on 5 August 2010 explaining briefly what had happened in respect of the hearing on 19 July, and how the court "has since rectified the matter".

11. The hearing of the application for possession and sale of the property took place before District Judge Stewart on 7 March 2011. The Appellant appeared in person, assisted by his Mckenzie Friend. Although he sought an adjournment of the hearing, that was refused and, after argument, the orders for possession and sale were made. As part of the order, the District Judge declared that the trustee in bankruptcy was beneficially entitled to a 100% interest in the property.

12. Following the orders for possession and sale, the Appellant consulted the Kingston and Richmond Law Centre ("the Law Centre"), and they in turn instructed the Respondent to advise on the prospects of appealing the orders. There was a conference with the Respondent on 20 April which, according to the transcript, lasted almost 3 hours. It covered a wide range of issues, including suggestions that Clarke Willmott had acted improperly in their dealings with the court the previous July. This was to become a recurring theme in the Respondent's advice to the Respondent and, although it does not arise for consideration on this appeal, it forms part of the negligence allegations against the Respondent at paragraph 70 of the Particulars of Claim.

13. Although the transcript of the conference is in note form, it is plain that one of the principal points raised by the Respondent as a possible ground of appeal concerned ss.283A(3) and (4) of the Insolvency Act 1986 ("the 1986 Act"). It is necessary to set those out in order to indentify the Respondent's argument.

14. Section 283A(1) applies where, as here, property comprised in the bankrupt's estate consists of an interest in a dwelling house which was his sole residence. S.283A(2) provides that, at the end of a 3 year period following the date of the bankruptcy, that interest ceases to be comprised in the bankrupt's estate and vests in the bankrupt (without conveyance, assignment or transfer). Sections (3) and (4) provide the exceptions to that regime, as follows:

> "(3) Subsection (2) shall not apply if during the period mentioned in that subsection—
>
> (a)the Trustee realises the interest mentioned in subsection (1),
>
> (b)the Trustee applies for an order for sale in respect of the dwelling-house,
>
> (c)the Trustee applies for an order for possession of the dwelling-house,
>
> (d)the Trustee applies for an order under section 313 in Chapter IV in respect of that interest, or
>
> (e)the Trustee and the bankrupt agree that the bankrupt shall incur a specified liability to his estate (with or without the addition of interest from the date of the agreement) in consideration of which the interest mentioned in subsection (1) shall cease to form part of the estate.
>
> (4)Where an application of a kind described in subsection (3)(b) to (d) is made the period mentioned in subsection (2) and is dismissed, unless the court orders otherwise the interest to which the application relates shall on the dismissal of the application—
>
> (a)cease to be comprised in the bankrupt's estate, and
>
> (b)vest in the bankrupt (without conveyance, assignment or transfer)."

15. The argument which the Respondent identified in the conference on 20 April 2011 ran as follows. Pursuant to s.283A(3)(b) and (c), the trustee's application for possession and an order for sale of 8 June 2010 prevented the re-vesting of the property in the Appellant on 29 June 2010, namely 3 years from the date of his bankruptcy. However, s.283A(4) provided that, where such an application "is dismissed, unless the Court orders otherwise, the interest to which the application relates shall on dismissal of the application … vest in the bankrupt". The Respondent therefore advised that it was arguable that the order of 19 July 2010 had dismissed the application for possession and sale, and that therefore s.283A(4) had taken effect, re-vesting the property in the Appellant on that date. The subsequent setting aside of the order did not re-vest the property in the trustee, and there was no mechanism in the Act to permit any such re-vestment. Therefore, the Respondent argued, there was no basis for the trustee to seek possession and sale of the property. I shall call this "the dismissal argument".

16. It should be noted that the first part of the dismissal argument – that the original order of 19 July 2011 had the effect of re-vesting the interest in the property in the Appellant – was never in dispute: Clarke Wilmott themselves said that that was what had

happened in their letter to the court of 22 July 2011 (paragraph 8 above). It was, or certainly should have been, apparent to everyone that it was the second part of the dismissal argument – that thereafter it was impossible for the order, and therefore the re-vesting in the Appellant, to be undone – which would be controversial.

17. On 4 May 2011 the Respondent emailed the Law Centre a draft Notice of Appeal and a skeleton argument which set out the dismissal argument. The skeleton was accompanied by an email. That said:

> "I have now settled the papers for an appeal. This raises a novel point of law. It has reasonable prospects of success in my view. However the other side will fight this appeal. They will be upset by it.
>
> I strongly advise that we try to settle with them.
>
> As to that, we can continue to ask for breakdowns of costs and the like.[The Appellant] was to come back with a figure that he might be able to raise by way of settlement…
>
> Once we have a figure that can be put forward as an offer of settlement, I will correspond with [Clarke Willmott] as discussed and try to settle this case. Please remember if we fight this case and do not succeed, there is a real risk that this will drive up the costs of the bankruptcy and that the Trustee will seek to get a costs order enforced against the proceeds of the sale of the house.
>
> The best time to settle this case is if and when permission to appeal is granted."

18. On 23 May 2011, the Law Centre confirmed the advice given in conference to the Appellant. Amongst other things, this confirmed that the Respondent had advised that "the litigation was a risk, although it was winnable." At this stage, as the letter also made clear, the Respondent's strategy was to obtain permission to appeal and, if that was granted, to endeavour to settle the case before the appeal hearing itself.

19. However, through no fault of the Respondent, that strategy proved to be unsuccessful. That was because, when Vos J (as he then was) considered the application on 14 July 2011, he granted permission to bring the appeal out of time, but ordered that the permission hearing itself would be dealt with at the same time as the substantive hearing (i.e. by way of a "rolled-up" hearing).

20. Vos J made a number of other consequential orders. In his reasons, he said this:

> "B. The application for permission to appeal should now be listed for hearing without delay. The points made in the Appellant's skeleton argument require a detailed response and explanation from [the trustee]. In particular [the trustee] must explain (a) why his solicitors did not apparently contemporaneously copy to the Appellant their letters dated 22 and 27 July 2010 to the Court and (b) why they did not think it

> appropriate to draw the significance of s.283A(4) of the Insolvency Act 1986 to the attention of the Appellant before the hearing on 7 March 2011, bearing in mind he was acting in person.
>
> C. The stay is appropriate since there appears, in the absence of an explanation from [the trustee] to be a properly arguable point to found an appeal.
>
> D. I have not granted permission to appeal at this stage in case there is some answer to the Appellant's point, either in fact or in law, that does not appear from the materials placed before the Court by the Appellant. In particular, I can see that it may be arguable that it was open to the District Judge to withdraw his order of [19] July 2010, and that the effect of his doing so was to reverse the effect of s.283A(4). This will, if [the trustee] so wishes, need to be argued at the hearing…"

21. On 28 September 2011, the legal aid certificate was extended with a cost limit of £5,000. The following day, 29 September 2011, the Law Centre received various documents from Clarke Willmott and sent them on to the Respondent. These included the trustee's Respondent's Notice and no less than three witness statements. The Respondent's Notice said that, if contrary to the trustee's primary case, it was found that District Judge Stewart had not been entitled to make the order for possession on 7 March 2011 because of the events the previous July, the trustee "will ask the Court to review the Judge's order of 19 July 2010 pursuant to s.375(1) of the Insolvency Act 1986 and to vary the same such as it provides (retrospectively) that the interest in the property…shall not cease to be comprised in the bankruptcy estate of the Appellant..." In their email of 29 September to the Respondent, the Law Centre also asked the Respondent for "a short advice for legal aid purposes".

22. On about 12 October 2011, the trustee prepared and served a further skeleton argument which dealt in detail with why it was said that the dismissal argument was wrong. It also explained the alternative argument set out in the Respondent's Notice.

23. On 19 October 2011, the Respondent emailed the Law Centre saying that he had read "the so-called Respondent's Notice" and thought that the evidence served by the trustee was inadmissible. He said that he thought the forthcoming appeal "has merit of, I think, 60% prospects…" He asked if there was any further material from the trustee and, in their reply later on 19 October, the Law Centre said that there was "some extra stuff" and they "would send it over to you today". There is an issue, which cannot be resolved on a summary judgment application, as to whether or not the Respondent was sent the trustee's skeleton argument at this stage. For the purposes of the appeal, therefore, we have to assume that the Respondent also had that skeleton argument at the time that he came to write his advice.

24. Also in their reply email of 19 October, the Law Centre asked the Respondent if the £5,000 on the legal aid certificate was enough. The Respondent replied on 26 October to say that the certificate needed to be extended to £12,500 plus VAT. He had not yet produced the requested advice, so the Law Centre immediately replied to say: "I think

I will need a short advice for the L[egal] S[ervices] C[ommission]- without it I don't think they will agree to a further extension".

25. Later on 26 October 2011, the Respondent sent the Law Centre his written advice. In it, he confirmed that he had read the transcript of the conference on 20 April, the Respondent's Notice and the other materials that he had been sent, and that he had been asked to advise on the merits. He set out the history and then identified the dismissal argument. He said at [19]:

> "The issue of law on this appeal is narrow: whether in setting aside the Order dated 19 July 2010 on 29 July 2010, District Judge Stewart also made an order for the purposes of s.283A(4) of the Insolvency Act as to a re-vesting of title. As he did not do this expressly, can such a re-vesting be implied from his Order setting aside the earlier order of 19 July 2010? We say that the section requires an express re-vesting. [The trustee] will say not. In my view we have 55-60% prospects of success…"

The Advice did not provide further detail as to why the Respondent was optimistic about the dismissal argument. Instead, it went on to make various points about the Respondent's Notice.

26. Sometime before the appeal itself, as a result of the Respondent's 26 October advice, the limit of the legal aid certificate was extended to £12,500 plus VAT.

27. The appeal was heard on 15 November 2011 by Mr Mark Cawson QC, sitting as a deputy judge of the Chancery Division. In a detailed *ex tempore* judgment, he rejected the dismissal argument. As to the efficacy of the subsequent court orders, he said at [47] that "it is difficult to see what conceivable basis the bankrupt could have had for resisting the making of the order of 29 July 2010", and at [48], that the order was plainly intended to be retrospective, and that the District Judge was plainly intending that the order of 19 July 2010 "should be treated as never having been made".

28. The deputy judge then went on to deal with how the order tied in with s.283A(4), and concluded at [50] that:

> "As I see it, s.283A(4) is a provision that deems something to have occurred, namely the re-vesting of property in the bankrupt even though there has not been a physical transaction effecting that which is deemed to have occurred, on the happening of the event therein specified, namely the making of an order dismissing proceedings in the circumstances referred to therein. The re-vesting is therefore entirely dependent upon the integrity of the order made. Consequently, if that order is liable to be set aside on grounds such as the order dated 19 July 2010 was, in the circumstances of the present case, or on appeal, and the order is actually set aside, then it is, in my judgment, impossible to see how the original order can still properly be said to have its deeming effect."

In addition, he said at [51] that he considered that s.283A(4) required to be construed:

> "…as taking effect subject to the court process so if an order dismissing proceedings is set aside on appeal, or on grounds such as the present where

> something has gone wrong with the procedure and it has been dealt with by default, then in those circumstances the proceedings can never properly be said to have been dismissed, albeit that a degree of retrospectivity is required in order to reach that analysis".

29. Following the failure of the dismissal argument, there was a further attempt to set aside the possession order, based on separate points devised by the Respondent, but this application was also dismissed, on 24 October 2012. Nothing turns on that for the purposes of this appeal, although it forms part of the background to the other allegations against the Respondent in these proceedings, which will require to be tried at a later date. The property was sold by the trustees in November 2013 for £349,000. It appears from the figures that, although the Appellant's original debt to HMRC was just £19,000-odd, less than £100,000 of the proceeds of sale was eventually returned to the Appellant.

## 3 The Procedural History

30. The claim form in the proceedings against the Respondent was issued on 25 October 2017. The allegations of negligence in the Particulars of Claim cover five different aspects of the Respondent's involvement with the Appellant's bankruptcy (paragraphs 68-72 inclusive). Paragraph 68 is the only one concerned with the dismissal argument. The allegations were based, without any distinction made between them, on the advice given in April/May 2011, and the written advice of 26 October 2011. This was perhaps unwise, given that a quick glance at the dates would have shown that the claim form was issued more than six years after the advice of April/May 2011, but (just) within six years of the written advice of 26 October 2011.

31. The Reply at paragraph 32 accepted that any claim based on the advice of April/May 2011 was statute-barred, but at paragraphs 23 and 31 maintained a claim based on the advice of 26 October 2011. Paragraph 23 of the Reply pleads that "the prospects of success as stated in that advice directly caused the appeal to proceed to a hearing and led to the costs being incurred of that hearing". Paragraph 31 pleads that the claim arising out of the 26 October advice was not statute-barred "and was itself causative of loss, namely the costs incurred thereafter in relation to the appeal, which costs would not otherwise have been incurred". The allegations in paragraph 68 of the Particulars of Claim must therefore be taken to be a series of criticisms of the written advice of 26 October 2011 only, giving rise to a claim for the costs incurred thereafter. Without setting out all the particulars, the essence of the complaint is that the Respondent's advice was negligently optimistic and that, on a proper analysis of the law and the CPR, the appeal based on the dismissal argument was hopeless.

32. On 11 October 2018, the Respondent applied to strike out paragraph 68, or alternatively sought summary judgment on the allegations contained therein. There were two limbs to that application: the first was that the claim was statute-barred; the second was that, on a proper understanding of the principles, it was not arguable that the Respondent had been negligent in any event. It is important to note that the application did not affect the other four sets of negligence allegations at paragraphs 69-72 of the Particulars of Claim, which will therefore require to be tried regardless of the outcome of this appeal.

33. The application was dealt with by the Master on 11 March 2019. His reserved judgment dated 29 April 2019 is at [2019] EWHC 1046 (Ch). Having dealt with the factual

background and one or two of the authorities, the Master addressed paragraph 68 and said:

> "51. It is in my view not possible in the context of the allegations of breach of duty and negligence pleaded under paragraph 68 to treat the written advice given on 26 October 2011 by the Defendant as a new and supervening act or omission giving rise to a new cause of action. On the Claimant's case, the advice was part of the same wrongful acts on the part of the Defendant. The test is not whether the advice was an independent piece of work for which a duty of care was owed. It is whether it gave rise to a new and separate cause of action. In my view it was part of the same cause of action and that it how it is pleaded.
>
> 52. It is in my view significant that in paragraph 68 the allegation of breach of duty and negligence is pleaded both by reference to the written advice on 26 October 2011 and with reference to the email advice of 4 May 2011. That email coincided with the settling of the papers for appeal by the Defendant and accompanied the draft documents. It is in the context of the advice to bring the appeal that the breaches of duty and allegations of negligence under paragraph 68 are framed. This appears most clearly from the underlined parts of sub-paragraphs (vi), (vii) and (viii). By the time of the written advice on 26 October 2011, the appeal had been served and responded to on behalf of the trustee.
>
> 53. It is not sufficient for the Claimant to argue that the written advice given by the Defendant was causative of its own loss. The question is not when the loss occurred but when the cause of action accrued."

34. The Appellant appealed. The appeal was heard by the Judge on 15 January 2020 and his reserved judgment, dated 7 February 2020, is at [2020] EWHC 189 (Ch). He agreed with the Master, saying:

> "33. Mr Davidson QC for the defendant, submits that it is clear from the pleaded case and from the documents that the relevant negligent advice alleged was to appeal against the March 2011 order when such an appeal was hopeless. That advice was given in April and May 2011 and acted upon by the commencement of the appeal in the latter month. Costs in that appeal started to be incurred by the trustees straight away and continued in September 2011 when the trustees prepared and filed documentation in the appeal. Even the defendant's email of 19 October 2011 amounted to advice on request which, although short, was not casual. A further written advice was required to confirm that as Ms Bastin took the view that that is what the LSC would require to raise further the costs limitation on the certificate. The advice was not new, and although there was further documentation in the appeal that did not materially change the advice which was consistent throughout. The

> particulars pleaded in paragraph 68 of the particulars of claim relate to matters which existed at the time of the 4 May 2011 email.
>
> 34. Mr Davidson also submits that the *St Anselm* case is distinguishable because there were separate instructions in respect of each flat. The present case is closer to the *West Wallasey* case where the negligence was alleged to be the bringing of a fundamentally flawed claim. HH Judge Simon Brown QC sitting as a judge of the High Court held that it followed that loss had been suffered when the claim was issued, and costs incurred, and the claim was statute barred.
>
> 35. In my judgment, it is the latter submissions which are to be preferred. The negligence alleged in paragraph 68 is advising the claimant to bring a hopeless appeal. The particulars make it quite clear that the claimant says that the advice should have been not to appeal. Had that advice been given then no appeal would have been made and no costs incurred because of it. Assuming that the advice in fact given was negligent, then loss occurred as soon as the appeal was filed and costs were incurred because of it, which had the effect of diminishing the amount eventually available to the claimant from the proceeds of sale of his home. Certainly, significant costs were incurred by the end of September 2011 when the trustees prepared and filed their evidence. The fact that the 26 October 2011 advice led to the financial limit on the LSC certificate being raised and further costs being incurred at the permission hearing, does not alter the fact that costs had already been incurred in respect of the appeal outside the six year period.
>
> 36. There was only one relevant appeal, and in my judgment Master Teverson was justified in concluding that the pattern of advice in respect of the prosecution of the appeal was continuous from April 2011 and continued with the advice of 26 October 2011. He was also justified in concluding that the cause of action in respect of the alleged hopeless appeal had already accrued before the 26 October 2011 advice, and that the claimant had no prospect of succeeding on this part of the claim as it is statute barred, and in dismissing the same on this basis pursuant to CPR rule 3.4(2)(a) and/or CPR rule 24.2."

35. Permission to bring this second appeal was given by Arnold LJ on 7 December 2020.

## 4. The Law/Limitation

36. Section 2 of the Limitation Act 1980 provides that:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

A cause of action in negligence accrues when the claimant sustains actionable damage, which means real as opposed to purely minimal damage: *Cartledge v E. Jopling and Sons Ltd* [1963] A.C.758 at 771; *Khan v Falvey*: [2002] EWCA Civ 400 (cf. para. 43).

Damage is "any detriment, liability or loss capable of assessment in money terms": *Forster v Outred & Co* [1982] 1 W.L.R. 86 at 94.

37. Many of the authorities dealing with the issue of the accrual of a cause of action involving lawyers' negligence are concerned with the limitation issues that can arise when there has been an original, negligent error, which did not become apparent to the claimant until it was too late for the error to be rectified, and where the claim form has been issued more than 6 years after the breach of duty had first occurred.

38. In *Bell v Peter Browne & Co* [1990] 3 WLR 510; [1990] 2 QB 495, the defendant solicitors had failed in September 1978 to protect the plaintiff's one-sixth share in the proceeds of the sale of the matrimonial home, which he had left following the breakdown of his marriage. Eight years later, the plaintiff was told by his former wife that she had sold the former matrimonial home and had spent all the proceeds. In August 1987, the plaintiff issued a writ against the defendant solicitors, claiming damages for professional negligence. His claim was struck out as being statute-barred, a decision upheld both in the High Court and by the Court of Appeal.

39. The Court of Appeal held that the failure by the defendant solicitors to prepare or execute a formal declaration of trust or other suitable instrument, or to cause appropriate entries to be made on the register at the time that the property was transferred, constituted a breach of contract. Although the defendant's obligations were not discharged by the breach, and therefore remained remediable by lodging a caution until such time as the former wife sold the house, the limitation period began to run from the date of the breach in 1978, because that was when real damage occurred. The claim for breach of contract was therefore statute-barred.

40. Nicholls LJ went on to explain why the same analysis applied to the claim in tort. He found that the damage caused by the failure to see that the parties' agreement as to the one-sixth share was recorded formally in a suitable declaration of trust was sustained when the transfer was executed and handed over in 1978. And although there had been a separate failure to protect the plaintiff's interest by lodging a caution, damage due to that failure was also suffered in 1978. Nicholls LJ said:

> "In considering whether damage was suffered in 1978 one can test the matter by considering what would have happened if in, say 1980 the plaintiff had learned of his solicitors' default and brought an action for damages. Of course, he would have taken steps to remedy the default. But he would have been entitled at least to recover from the defendants the cost incurred in going to other solicitors for advice on what should be done and for their assistance in lodging the appropriate caution. The cost would have been modest, but not negligible."

41. In *Knapp v Ecclesiastical Insurance Group Plc* [1997] EWCA Civ 2616; [1998] P.N.L.R. 172, the plaintiffs were advised to enter into the insurance policy in April 1990; the fire occurred in October 1990; and the insurers avoided the policy in April 1991. The writ was issued in October 1996. The issue was whether the cause of action against the broker who advised the plaintiffs to enter into the policy accrued when he gave that advice and the policy was agreed in April 1996, or (as the plaintiffs argued) either when the policy was avoided or, at the earliest, at the date of the fire. The Court of Appeal overturned the first instance decision in the plaintiffs' favour and concluded

that the cause of action accrued when the policy was entered into. The claim was therefore statute-barred.

42. Hobhouse LJ said at 178:

> "It is immaterial that at some later time the damage suffered by the Plaintiffs became more serious or was capable of more precise quantification. Provided that some damage had been suffered by the Plaintiffs as a result of the Second Defendant's negligence which was 'real damage' (as distinct from purely minimal damage) or damage 'beyond what can be regarded as negligible' that suffices for the accrual of the cause of action."

43. The approach in *Bell* and *Knapp* was also adopted in cases where, through negligence, solicitors had allowed proceedings to grow so stale that they were struck out for want of prosecution. The best example is *Khan v RM Falvey* [2002] EWCA Civ 400; [2002] P.N.L.R. 28. There, the claimants had brought proceedings within six years of the claims being struck out, but in circumstances where a decade or more had elapsed since the proceedings had commenced. The claimants argued that their claims were not statute-barred because they had been brought within six years of the striking out; the defendants argued that they were statute-barred because damage had been suffered (in the shape of claims that were likely to be struck out) long before the other side finally took steps to strike them out.

44. The Court of Appeal agreed with the defendants. At [23], Sir Murray Stuart-Smith set out the underlying principle in these terms:

> "A claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period, if he has suffered actual damage **from the same wrongful acts** outside that period". (My emphasis)

45. On the facts of *Khan*, the court said that, because of the delay, the value of the claimants' cases had been diminished, and the claimants had therefore suffered loss, years before the cases were actually dismissed. The diminution in value arose because of the existence of either an inevitability or a very serious risk that the claims would in due course be dismissed for delay. Thus, where there was a long delay before the application to dismiss, the cause of action accrued at a time when there was either a serious risk of dismissal or when the action was at least vulnerable to an application to dismiss. As Sir Murray Stuart-Smith put it at [28]:

> "28. A claim in tort is a chose in action and as such is assignable. But the value of the chose in action depends upon the prospect of success. If for whatever reason it is very likely or almost bound to fail, whether because it is liable to be struck out for want of prosecution, lack of merit or some other reason, it will have no value or no substantial value. In my judgment the Claimant in the present case could not have assigned his causes of action in Cases 1 and 3 for any real value for several years before they were actually struck out, because during that period there was an inevitability or at least a very serious risk that they would be struck out at any time. If this be right, as I believe it to be, it must follow that the claimant had already suffered damage

> by diminution in the value of his choses in action well before the actual striking out of the actions."

46. In the same case, Chadwick LJ made the point that, under the CPR, applications to dismiss for want of prosecution would become increasingly rare (a prophecy that has happily been fulfilled in the 20 years or so since *Khan* was decided). But at [56] he said that, in such cases, it would be wrong to find that further delay "will give rise, day by day, to a further cause of action – on a rolling basis". He went on to say that there may be cases "where there is some new and supervening act or omission", but that otherwise the principle in *Knapp* applied.

47. Chadwick LJ's observation about a cause of action accruing "on a rolling basis" reflects a contention that often arises in these cases, to the effect that the solicitor or barrister defendant generally owes a continuing duty to review or revisit earlier advice. By this means, claimants have sought to argue that, although claims based on the original breach of duty might be statute-barred, there was a later breach of the continuing duty to review which was within the six year period. The existence of such a continuing duty will, of course, depend on the terms of the retainer in any given case but, as a general proposition, was comprehensively rejected by the majority of the Privy Council in *Maharaj v Johnson* [2015] UKPC 28; [2015] P.N.L.R. 27 at [32]-[34].

48. Doubt as to whether there was such a general continuing obligation on the part of professionals to review their previous work for latent errors had been expressed well before *Maharaj*: see, for example, *Bell v Peter Browne*, noted above; *Tesco v Costain Construction* [2003] EWHC 1487 (TCC) at [270], where it was described as a "transparent mechanism for delaying artificially the commencement of some period of limitation"; and *West Wallasey Car Hire Ltd v Berkson & Berkson (a firm)* [2009] EWHC B39 (Mercantile); [2010] P.N.L.R. 14.

49. The latter case is not an easy case to decipher and I respectfully doubt if it is, in truth, a reliable authority for anything very much at all, but the Judge in the present case relied on it, so I should address it briefly. It appears from the judgment of HHJ Simon Brown QC that:

    a. Advice as to the original claim was given in May 1999, and any negligence claim in respect of that advice was statute-barred. The judge made no finding that that original advice had been negligent in any event.

    b. The judge was sceptical about the existence in principle of any continuing duty on the part of a barrister to review previous advice: see [54] and [55]. It was in that context that he referred to "the act of negligence there is the launching of a worthless but overvalued claim". That was not a description of the original claim in that case, but part of an attempt to contrast such a clear cause of action in principle with the more difficult claim alleging a duty to review, based on what the judge called "the incidental failure to reconsider whether or not they [the lawyers] had been negligent earlier";

    c. In respect of the first allegation of negligence against the barrister defendant within the limitation period, the judge found that the barrister was not asked to advise on the merits; had not assumed a duty of care to advise on the merits; and was not negligent in any event: see [63]-[87];

d. As to whether there was a duty to review the earlier advice, the judge rejected that in principle: see [103] –[107];

e. The judge found no negligence on the part of the barrister in respect of the second time he was asked to advise, just before the hearing. Again, on the facts, the judge held that the barrister was not obliged to review his earlier advice: see [108]-[117].

50. Thus far, I consider that the law can be summarised as follows. Where a defendant's breach of duty has caused a claimant some loss outside the limitation period, the fact that further loss is caused by that same breach within the limitation period will not save the claim from being statute-barred. What is more, that result cannot generally be avoided by the suggestion that there was a continuing duty on the part of the lawyer to review his or her previous advice.

51. But what about the situation where there are two alleged breaches of duty, one outside the six year limitation period, and one within it? Is there any reason in law why a claim for the damages caused by the later breach should not succeed?

52. An answer to that question is provided by the decision of David Richards J (as he then was) in *St Anselm Development Company Ltd v Slaughter & May* [2013] EWHC 125 (Ch). There, the claimant instructed the defendant firm in relation to the drafting and negotiation of two new leases, which replaced the existing underleases of flats 27 and 26 in the same block. The defendant solicitors' negligent error was encapsulated in their letter of 24 March 1999 which was concerned with what the new leases needed to contain. However, although that advice was general, the claimant had issued two separate sets of instructions to the defendants, one in respect of each flat, and each set of instructions gave rise to particular steps on their part. The new (flawed) lease for flat 27 was agreed on 2 August 1999; the new lease for flat 26 was agreed on 2 November 1999. Those were the dates on which damage was suffered. The claim against the defendants was issued on 10 August 2005. Counting back six years from that date, this meant that the claim in respect of flat 27 was outside the limitation period whilst, on the face of it, the claim in respect of flat 26 was brought within time. However, Master Teverson disagreed with that view, finding that the losses flowed from the same mistake, made by the defendant solicitors in their letter of 24 March 1999, and that there was therefore a single cause of action which was statute-barred.

53. David Richards J allowed the claimants' appeal. He said:

> "50. In my judgment, the correspondence and other facts summarised above show that the defendant solicitors were instructed, and indeed separately instructed, in respect of each lease. Their duty was to use reasonable skill and care to safeguard the interest of their client in respect of each lease. The duty continued as regards the lease for flat 26 independently of the lease for flat 27. Agreement of the terms of the lease for flat 27 did not absolve the defendant solicitors from their duty as regards the other lease.
>
> 51. On the evidence, it appears clear that the defendant solicitors gave active consideration to the position on the indemnity provision only once, in March 1999. Quite naturally, having

> investigated it then and thought they had given the correct advice, they did not positively re-visit the issue in May/June 1999 when considering the terms of the lease for flat 26. But their duty to take reasonable care to ensure the protection of the claimant's interests as regards the lease for flat 26 was not diminished because of advice previously given on the lease for flat 27.
>
> 52. It is possible to imagine circumstances in which a client seeks and obtains advice on an issue common to a number of proposed transactions, on the basis that the solicitors would not again re-consider the issue when dealing with the individual transactions. Whether even then there would be only one cause of action with loss arising when the first transaction was made, I need not consider. In this case, there is no basis on the evidence presently before the court to suggest that the defendant solicitors were instructed on any such basis. Equally, in the present case, the defendant solicitors might have been instructed to advise once on a draft lease to be used for both flats, but that was not what happened.
>
> …
>
> 61. …The defendant solicitors accepted instructions to protect the interests of the claimant in respect of the new lease of flat 26. In accordance with those instructions, it considered the terms of the draft lease in early June 1999 but did so negligently, as it must be assumed for present purposes. That breach of their duty of care led later in 1999 to the loss in respect of flat 26 against which it was their duty to protect the claimant. The fact that, incidentally, proper performance of their duty in June 1999 would also have led to the prevention of loss in respect of flat 27 does not change their duty as regards flat 26 into a duty as regards both flats. There are separate causes of action in respect of each flat, and the cause of action in respect of flat 26 was not complete until November 1999 when agreement was reached on the terms of the new lease for flat 26."

54. No other authorities were cited to this court where two alleged errors had been made, the first outside, and the second within, the relevant limitation period.

## 5. Issue 1: Analysis and Conclusions

### 5.1 The Nature of the Appellants' Claim

55. For the reasons set out below, I consider that both the Master and the Judge were wrong to conclude that the claim in negligence arising out of the advice of 26 October 2011 was statute-barred.

56. Both were plainly distracted by the way in which the case has been pleaded in paragraph 68 of the Particulars of Claim. There, the allegations of professional negligence

expressly referred both to the advice of April/May, and the advice of October, without differentiating between them. That can be clearly seen at [46] of the Master's judgment. It is therefore perhaps unsurprising that both the Master and Judge took the elision of the two advices as their starting point.

57. However, as I have said, the concession in the Reply, that any claims arising out of the April/May advice are statute-barred, means that paragraph 68 must be read as alleging negligence based on the October advice alone. It must also be accepted that, in consequence, any claim for the costs of issuing the original appeal against the District Judge's orders for possession and sale, and other costs liabilities incurred during the period prior to 26 October, cannot be recovered by the Appellant from the Respondent. But what about the Appellant's costs and costs liabilities thereafter, and in particular the costs of the hearing on 15 November 2011? That is the damage for which, on the Appellant's pleaded case as it now stands, he seeks to make the Respondent liable.

58. In my view, if the October advice had been the only advice provided by the Respondent in this case then, on the face of it, a claim in negligence based on that advice, limited of course to the costs incurred in reliance upon it from 26 October onwards, would not be statute-barred. All the necessary ingredients would be in place: a relevant duty; a breach of that duty; a foreseeable category of loss and damage for which the barrister would be liable; and importantly, the necessary causation between the breach and the loss. On the Appellant's case, the written advice caused the legal aid cap to be lifted to £12,500. If the advice had been different, it is said, the cap would not have been lifted, there would have been no appeal hearing, and the Appellant would not have incurred the costs of the appeal hearing or any further costs attributable to the continuation of the appeal.

59. The question then becomes whether the existence of the earlier advice in April/May (and in particular the fact that, on the basis of that earlier advice, an appeal against the orders for possession and sale was already up and running by October 2011), renders a claim based solely on the October advice statute-barred? If I was unconstrained by authority, I would answer that question in the negative, both as a matter of general principle and on the particular facts of this case.

**5.2 General Principle**

60. The general principle must be that a claim based on negligent advice, given to and relied on by a claimant during the relevant limitation period, gives rise to a valid claim. That can be tested in this way. Assume that a barrister gives negligent advice on the merits at the outset of the litigation. Instead of advising that the underlying claim will fail, he advises that it has a good prospect of success. In consequence, costs of £200,000 are incurred up to the pre-trial review. Immediately before the pre-trial review the barrister is asked to advise on the merits again. Obviously, there is considerably more material available at that stage. It gives the barrister the opportunity to say, "No, I was wrong, this claim will fail". But he does not take that opportunity, and instead advises that there is a strong chance of success. In consequence, another £100,000 is incurred by the client, and the claim fails.

61. Those additional costs of £100,000 are attributable to the negligent advice given on the eve of the pre-trial review. If there is a limitation issue in respect of the original advice, but no limitation issue in respect of the advice given before the pre-trial review, I can

see no reason in principle why the barrister would not be liable in damages for the £100,000.

62. In short, in a case where there are two (or more) allegedly negligent advices, and therefore two separate breaches of duty, there is no general principle of logic or common sense which requires any sort of 'relation back', such as to say that the limitation period was triggered by the first occasion on which the negligent advice was given, regardless of any subsequent breaches of duty.

63. I accept, however, that this general principle may be subject to the facts of the individual case. If, for example, the claimant was irretrievably committed to a course of action as a result of the first negligent advice, then it may be that the second negligent advice will not have caused any further loss. A consideration of the facts of this case, however, brings me to the second reason why I consider that, in this case, the claim in respect of the 26 October advice is not statute-barred.

### 5.3 The Factual Background to and the Nature of the Two Advices

64. In the conference in April 2011, as summarised very shortly in the email of 4 May 2011, the Respondent said that there were good prospects of success on the appeal. That was of course sufficient to allow the appeal process to be launched. But he said expressly that his strategy was to endeavour to obtain permission to appeal on the basis of the dismissal argument, and then look to negotiate a settlement. It was therefore advice given with a very limited and specific aim in mind.

65. In any event, the advice could not but be limited because the Respondent did not have all of the relevant information. One of the areas of debate at the conference was the nature of the communications with the court in July 2010 to which the Appellant had never been a party. Moreover, because they did not exist when the Respondent first advised in April, he did not have (and so could not take account of) the detailed observations by Vos J in July 2011, or the Respondent's Notice, or the three witness statements served in September, or the trustee's skeleton argument provided in October.

66. In contrast to the limited information available and the limited strategy that had been devised in April/May, by October 2011, when he was asked to advise in writing on the merits for the specific purpose of obtaining an extension of legal aid to enable the appeal to proceed, the Respondent was in possession of all the relevant material. By then, his original strategy had been thwarted, because permission to appeal had not been granted in advance of the appeal hearing itself. It was therefore an appropriate time, with all the information available, and the possible need for a new strategy, for the Law Centre to ask the Respondent to advise on the merits. There was also the need to extend the legal aid certificate.

67. Of course, it was open to the Respondent on 26 October to advise that, because permission was now being dealt with at a rolled-up hearing, and in the light of all of the new information which had become available, the appeal had less chance of success than he had previously thought, and even to advise that the appeal should be abandoned. The Appellant was not bound to fight the appeal to the bitter end simply because the process had been started. He was not irrevocably committed to the costs of a hearing if that hearing was going to result in defeat. Here, the Respondent did not give such negative advice, and so the appeal went on to the hearing.

68. It seems to me that any alleged negligence in October 2011 was different in nature and extent to any prior negligence in April/May. The Respondent was being asked to give different and more comprehensive advice, in very different circumstances. Although there was an overlap – the merits of the dismissal argument obviously remained a crucial element of both advices - there were also significant differences in the nature and scope of the advices provided and the material available for consideration on each occasion.

69. Mr Davidson sought to persuade us that the advice of 26 October was merely confirming the earlier advice that had been given by the Respondent outside the limitation period. This was to allow him to argue that, where a second advice is merely confirmatory of a first advice, the relevant cause of action accrues at the earlier date. I do not accept either premise.

70. First, for the reasons that I have given, I do not accept that, as a matter of fact, the advice of 26 October was merely confirmatory of the advice of April/May, or even the brief advice in the email of 19 October (paragraph 23 above). It was a separate and full advice on the merits that took into account a raft of material that had not previously been considered by the Respondent. On a fair reading of the advice itself, I would venture to suggest that that was how the Respondent saw it too. But secondly, I do not accept that there is any rule of law that requires the court to ignore for limitation purposes a second negligent advice (where that breach of duty gave rise to specific loss), and to find that, because the ultimate issue on which both advices were sought was the same or similar – should there be an appeal and will it succeed? – there was only one cause of action and it accrued at the date of the first negligent advice.

71. I should mention here that, in connection with the Appellant's argument that, if the advice of 26 October had been different, the legal aid certificate would not have been extended and there would have been no appeal hearing on 15 November 2011, Mr Davidson referred us to some parts of the Legal Services Commission Manual. This was, I think, to demonstrate that, because the case was concerned with Housing, and was of overwhelming importance to the Appellant, it did not necessarily follow on the facts that a less optimistic advice shortly before the hearing would have meant that there would have been no appeal hearing. That may well be part of the argument to be deployed at trial, but it cannot be resolved summarily, and the pleaded causative link between the advice, the certificate and the hearing on 15 November 2011 must be assumed in the Appellant's favour for present purposes.

72. For these reasons, on the facts as they are or as we must assume them to be, I consider that a claim limited to the losses caused by the alleged negligent advice on 26 October was not statute-barred.

### 5.4 The Authorities

73. The remaining question, therefore, is whether the authorities constrain me to reach a different conclusion. In my view, on a proper analysis of the authorities, they do not: on the contrary, I consider that the analysis set out above is supported by them.

74. The authorities are primarily concerned with the situation where the original breach gave rise to real damage outside the limitation period, and then that same breach (what Sir Murray Stuart-Smith called "the same wrongful acts" in *Khan*) gave rise to further

damage within the limitation period. The occurrence of that further loss did not prevent the claim from being statute-barred: see *Bell*, *Knapp* and *Khan*. Although I do not consider the label very helpful, I agree with Mr Hill-Smith that they are all cases of non-feasance, in the sense that nothing further was done after the original error.

75. Those authorities are not concerned with the situation where there are two separate breaches, or two separate causes of action, one outside and one inside the limitation period. Chadwick LJ's reference to the possibility of a later "supervening" event (which I do not consider should be elevated into any form of test or rule in any event) is intended to highlight the different considerations that may apply where, for example, there are two separate breaches of duty. In my view, a second breach, giving rise to a separate cause of action, would, *a fortiori* comprise a "supervening event".

76. As I have said, it is to avoid this difficulty that claimants have often sought to argue that the lawyers owed a continuing duty of care to review their earlier advice, in order to found their claim on a later breach of that continuing duty which was within the limitation period. That might be called an attempt to turn a non-feasance case into a misfeasance case. That has consistently failed, at least as a general proposition: see *Bell*, *Khan* and *Maharaj*, as well as the other cases referred to at paragraph 48 above.

77. In contrast, the present case is not concerned with non-feasance, and has no need of the potential artifice of an alleged continuing duty to review previous advice. Instead, this is a case about misfeasance in which there were two separate alleged errors: the negligent advice in April/May 2011, which led to the launching of the appeal, and the negligent advice in October 2011, which led to legal aid being extended to fight the appeal through to a conclusion. The claim in respect of the first advice is statute-barred, and so there will be elements of the costs of the appeal against the possession and sale orders which the Appellant incurred and which he will not be able to recover from the Respondent. But there is no reason in law to conclude that the claim in respect of the second advice is statute-barred: it simply gives rise to a separate, albeit smaller, claim.

78. There is no authority to support the proposition that, if there were two advices, the cause of action accrued at the time of the first and the second was irrelevant: see paragraphs 62 and 70 above.

79. On the contrary, because there were two separate breaches here, the situation is akin to that in *St. Anselm*. Although there was an attempt to distinguish *St. Anselm* on the basis that there were two separate sets of instructions in relation to the two separate flats, that is not a point of distinction at all. Here, there were also two separate sets of instructions: the original instructions to advise in conference in April; and the later instructions in September and repeated in October for a written advice on the merits of the forthcoming appeal hearing.

80. On analysis, the Appellant's position is even stronger than that of the successful appellant in *St. Anselm*. There it was found that the claim in respect of the lease of flat 26 was not statute-barred, even though the negligent error in respect of the lease of flat 26 was precisely the same error as had led to the negligent advice in respect of the lease of flat 27. Here, on the other hand, for the reasons set out above, the factual position in October 2011 was very different to that in April/May, so that the advice and therefore the negligence - if that is what it was - was also very different.

### 5.5 Conclusions

81. For these reasons, I consider that the Master applied the wrong test at [51] of his judgment (see paragraph 33 above). This was not a case where Chadwick LJ's comment about "a new or supervening act or omission" was relevant. That approach may be applicable in cases of a single breach which caused damage outside and then later inside the limitation period, not cases where there were two separate breaches of duty, the second of which was within the limitation period, and gave rise to a distinct head of loss which would not have been suffered if the second breach had not occurred.

82. Further and in any event, for the reasons that I have given, I consider that, even if that was a proper approach in a case like this, the circumstances in October 2011 which prompted the second advice were new and different, and that advice caused definable, separate damage. It was therefore a separate cause of action which, on any view, comprised a supervening event.

83. For completeness, I should say that, in my view, the Judge was wrong at [35] and [36] of his judgment (paragraph 34 above) to focus on the fact that there was just one appeal and that, once the appeal had been launched, the Appellant's position was somehow irremediable. It was open to the Respondent in his written advice of 26 October 2011 to point out that, through no fault of his own, his preferred strategy had not worked and that the new information meant that the appeal was likely to be lost. On the assumptions that must be made for the purposes of this appeal, such advice would have caused the legal aid certificate not to be extended, and there would have been no appeal hearing. The Judge failed to recognise that a claim for the costs consequences from 26 October onwards was a claim that was referrable to the negligent advice of 26 October 2011, regardless of what may have happened before.

84. I therefore conclude that the claim in respect of the advice of 26 October 2011 was not statute-barred. Subject to Issue 2, I would set aside the relevant part of the orders of the Judge and the Master.

## 6. The Law/Summary Judgment in Cases of Professional Negligence

85. Generally, it is all but impossible to obtain summary judgment in professional negligence cases (whether for the claimant or the defendant) because the court requires expert evidence as to the appropriate standard required of the profession in question. Claims arising out of solicitors' or barristers' negligence are different because, ordinarily, the court does not require expert evidence, and is instead in a position to make its own assessment of the relevant standard of care: *Bown v Gould & Swayne* [1996] P.N.L.R. 130.

86. The test to be applied is that summarised by Lord Diplock in *Saif Ali and Anr v Sydney Mitchell and Co.(a firm) and Others* [1980] AC 198 at 220D:

> "The fact that application of the rules that a barrister must observe may in particular cases call for the exercise of finely balanced judgments upon matters about which different members of the profession might take different views, does not in my view provide sufficient reason for granting absolute immunity from liability at common law. No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the

> result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon"

87. In *Saif Ali,* the House of Lords was keen to stress that the law should not discourage barristers from seeking to extend the law and thus to pursue novel arguments in the interests of their clients: see for example Lord Wilberforce at 214F-G and Lord Salmon at 231C-D. The same point was made by Lord Carswell in *Moy v Pettman Smith* [2005] UKHL 7; [2005] 1 WLR 581 at [59] and [60]. Merely because an argument (which a solicitor or barrister has advised was likely to succeed) fails to find favour with the court, does not mean that a negligence action is automatically triggered, let alone assured of success.

88. There is no authority which suggests that, because of the absence of expert evidence, allegations of negligence against a solicitor or a barrister are ordinarily capable of being resolved by way of summary judgment. I note that in both *Moy v Pettman Smith* and *West Wallasey*, the allegations were the subject of detailed evidence from the lawyers involved. So whilst I accept in theory that the absence of expert evidence may make allegations of professional negligence against a solicitor or a barrister capable of resolution at an interim stage, that will be very much the exception rather than the rule.

## 7. Issue 2: Analysis and Conclusions

### 7.1 The Decisions Below

89. On behalf of the Respondent, Mr Davidson submitted that both the Master and the Judge were wrong not to accede to his submission that the claim against the Respondent should be dismissed summarily on its merits. He submitted, either by reference to the decision in Northern Ireland of *Re Davey* [2014] NI Ch 2; [2017] N.I. 32 (what he called the short cut), or by reference to a wider consideration of the relevant material (what he called the longer way round), the claim against the Respondent was untenable in law.

90. The Master did not agree that the merits were capable of summary determination, saying:

> "60. I do not however consider the issue (limitation apart) to be of a type suitable for summary determination. The issue is not merely a question of another lawyer or judge assessing the merits of the legal argument identified by the Defendant as providing 55% to 60% prospects of success. The issue falls to be considered in the context of the circumstance of the case as a whole. Advice appropriate to one client may not be appropriate in the circumstances of another.
>
> 61. The court should in my view resist any temptation to conduct a mini-trial which would involve trying to review in depth the notes of the advice given in conference by the Defendant and his subsequent advice to attempt to determine how that would have presented itself to the Claimant. In addition, the court is not in a

> position to assess the instructions that the Claimant gave to the Defendant or the impression that came across in conference as to the Claimant's appetite for risk or his ability to understand the potential practical consequences of seeking to save his home.
>
> 62. In reaching the conclusion that this issue would not have been suitable for summary determinism, I am not to be taken as expressing a view on the quality of the advice given to the Claimant by the Defendant. My conclusion is rather that the issue is not purely about the merits of a legal argument, I would have concluded the Claimant should have been allowed to pursue this issue to trial."

91. The Judge reached the same conclusion at [40]-[41]. It therefore follows that there is no decision of either of the lower courts concerning the merits of the negligence allegations.

### 7.2 Threshold Point

92. In my view, the Respondent's attempt to reopen this issue faces a threshold difficulty. In *TFL Management Services Limited v Lloyds TSB* [2014] 1 WLR 2006, Floyd LJ warned at [27] of the dangers of summary disposal of one issue out of many which, because of appeals, might delay the underlying trial itself (see also *Partco Group Ltd v Wragg* [2002] 2 Lloyd's Rep 343 at [27]-[28]).

93. Notwithstanding the time that has already elapsed since the start of these proceedings, that still seems to me to be an apposite warning here. An appeal from any decision of this court on the merits of the paragraph 68 allegations is likely to take longer to be heard than a trial of those issues in the High Court. Furthermore, the outcome of the paragraph 68 issue will not affect the need for a trial of all the allegations unaffected by the appeal, namely those at paragraphs 69-72 of the Particulars of Claim. I cannot help but feel that a summary decision now on the underlying merits of just one part of this claim, even if that were possible, would be an unsatisfactory use of the civil litigation system.

94. Moreover, we should not lose sight of the fact that the narrow question for this court is whether or not the Master and the Judge were wrong in principle to decline to deal with the merits of the allegations of negligence on a summary basis. That is the primary question on appeal; not the merits themselves.

### 7.3 Are the Allegations Suitable for Summary Judgment?

95. In my view, it was not wrong in principle for the Master and the Judge to decline to deal with the merits of the allegations by way of summary judgment. Moreover, I consider that the Master was entirely right to say that, in a case like this, the question of context is very important. As I have said, the April/May advice was clearly focussed on getting permission to appeal and then negotiating. There was also clear advice as to the financial risks for the Appellant in the email of 4 May. But the position in October was different and required the Respondent to stand back and consider the situation in the round, prior to the rolled-up hearing. A trial of the allegations of negligence in

October 2011 will require a detailed consideration of this context and factual background.

96. In addition, in his skeleton argument, Mr Hill-Smith set out a number of topics on which he said that he would wish to cross-examine the Respondent. These included matters such as whether the Respondent gave any consideration to the potentially wide powers that a court would have (under both the CPR and the Insolvency Act itself) to set aside earlier court orders, or to the probable meaning of 'dismissal' in the context of the Act, and whether that was bound to mean substantive, rather than procedural, dismissal. Mr Hill-Smith said that these were not matters which could be dealt with summarily. I agree with him. I have already said that, in my view, the written advice did not explain in any detail why the Respondent was relatively optimistic about the prospects of success. The underlying reasons for the Respondent's view are therefore a proper matter for cross-examination.

97. I therefore agree that the allegations of negligence arising out of the 26 October advice are not suitable for disposal by way of summary judgment.

### 7.4 The Merits

98. Those conclusions are sufficient to deal with Issue 2. I should respectfully add, however, as to the argument about the merits, that I was not impressed with Mr Davidson's 'short cut' submission by reference to *Re Davey*. There, Horner J was pointing out that, after the expiry of the three year period, there was no mechanism available to re-vest the bankrupt's interest in the property in the trustee. That seems to me to be an unremarkable construction of the equivalent provision to s.283A(2) of the Insolvency Act 1986. The very different point in the present case, namely the legal effect of the court orders in July 2010, simply did not arise in *Re Davey.*

99. Mr Davidson also spent some time endeavouring to demonstrate that, notwithstanding the decision of the deputy judge on 15 November 2011, the dismissal argument was plainly right. He acknowledged, with his customary good humour, the sceptical response to that submission from all three members of this court; as my Lord, Lord Justice Newey, observed during argument, that contention would give rise to the bizarre result that, if a dismissal order had been wrongly made in the first place and was thereafter successfully appealed, the appeal would have no effect because the original, wrongful dismissal order could not be undone. Suffice to say that I was not persuaded that the deputy judge had erred in any way when he rejected the dismissal argument on 15 November 2011[1].

100. Of course, it is quite another thing to say that, because the dismissal argument was rejected, it must have been negligent for the Respondent to identify and run the argument in the first place. That does not follow at all. In the present case, there was no dispute that the property had vested back in the Appellant as a result of the original order of 19 July 2010, so the platform for the dismissal argument was firmly in place. Moreover, Vos J described it as "a properly arguable point to found an appeal". These,

[1] Mr Davidson made the point, by reference to *R (George) v SoSHD* [2014] UKSC 28; [2014] 1 W.L.R. 1831 that it was not unknown for a court order to be quashed, but for the effect of that order to persist. However, as he fairly accepted, that was a case about a particular statute concerned with immigration and nationality, and I derived no assistance from it in relation to this appeal.

and Mr Davidson's other submissions, are all plainly arguable. But they are arguable at the trial; they should not be determined by way of summary judgment.

## 8. Disposal

101. For the reasons that I have given, if my Lords agree, I would allow this appeal and would decline the invitation proffered in the Respondent's Notice summarily to dismiss the paragraph 68 allegations.

## Lord Justice Stuart-Smith:

102. With one possible gloss, I agree with the judgment of Coulson LJ, which I have had the advantage of reading in draft. I add a short judgment because of [56] of *Khan v Falvey*, where Chadwick LJ said:

> " … [I]f measurable damage has arisen from the delay, then the cause of action is complete. To hold that further delay will give rise, day by day, to a further cause of action – on a rolling basis – would seem to me inconsistent with the principle in *Cartledge v Jopling & Sons Ltd* [1963] AC 758. There may, of course, be cases where there is some new and supervening act or omission. But, otherwise, as Hobhouse L.J. put it in *Knapp v Ecclesiastical Insurance Group plc* [1998] P.N.L.R. 172, at 178:
>
> "It is immaterial that at some later time the damage suffered by the plaintiffs became more serious or was capable of more precise quantification. Provided that some damage has been suffered by the plaintiffs as a result of the second defendant's negligence which was "real damage" (as distinct from purely minimal damage) or damage "beyond what can be regarded as negligible" that suffices for the accrual of the cause of action.""

103. In my judgment, the relevant principles are now well established.

i) Where a negligent act or omission causes actionable damage outside the limitation period and further attributable damage inside the limitation period, there is one accrued cause of action and it is statute barred: see *Khan v Falvey* at [11]-[12], [23] and [56].

ii) Where, in addition to a negligent act or omission which causes actionable damage outside the limitation period, there is a second negligent act or omission inside the limitation period which causes actionable damage that would not have occurred but for the second negligent act or omission, there are two accrued causes of action. The first, arising out of the first negligent act or omission, is statute barred. The second, arising out of the second negligent act or omission, is not. That is this case, for the reasons given by Coulson LJ.

iii) There may be cases where it is suggested that the damage following the second negligent act or omission would have been suffered even if the second negligent act or omission had not occurred. This will typically be in those relatively

> uncommon cases where it is held that the tortfeasor owed a continuing duty to remedy his earlier failing, though it is possible to conceive of others. In such cases, it remains essential to concentrate on whether the second negligent act or omission gave rise to a second accrued cause of action. That concentration is likely to require close examination of questions of causation and the scope of liability. If the conclusion is that a second cause of action has accrued, then it cannot be statute barred because both the negligent act or omission and the actionable damage have occurred inside the limitation period.

104. Adopting this approach, I share the doubts expressed by Coulson LJ about what Chadwick LJ meant in [56] of *Khan v Falvey* where he said "[t]here may, of course, be cases where there is some new and supervening act or omission." The use of the words "supervening act or omission" are familiar in other contexts, such as where the issue is whether the occurrence of an insured peril was the proximate or effective cause of the loss; but that does not seem to me to be an apposite use here. Counsel suggested that Chadwick LJ had meant an act that disrupts the flow of consequences of the first negligent act or omission. That may be right, but I am unable to see how that would be an exception to the principles identified in *Knapp v Ecclesiastical Insurance,* to which Chadwick LJ immediately referred. I would therefore go rather further than Coulson LJ in cautioning that Chadwick LJ's observation about supervening acts or omissions should not be treated as giving rise to a test or touchstone for courts to adopt when considering whether a second act or omission has given rise to a second accrued cause of action and, if so, when that cause of action accrued.

**Lord Justice Newey:**

105. I, too, consider that the appeal should be allowed for the reasons given by Coulson LJ. Chadwick LJ would, I think, be surprised to learn of the significance which Mr Davidson sought to attach to his reference to "some new and supervening act or omission" in *Khan v RM Falvey*. At any rate, I agree with Coulson LJ that Chadwick LJ's remark should not be should be elevated into any form of test or rule.