IN THE SUPREME COURT OF NEW ZEALAND

SC 62/2007
[2008] NZSC 65

	BETWEEN	CAMPBELL ROBERT THOM Appellant
	AND	DAVYS BURTON Respondent

Hearing: 8 April 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: D J G Cox for Appellant
C T Walker and P Paterson for Respondent

Judgment: 18 August 2008

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay to the respondent costs of $15,000 and reasonable disbursements.

REASONS

Para No

ELIAS CJ

[1] A prenuptial agreement between Mr Thom and his wife contracting out of the provisions of the Matrimonial Property Act 1976 was void under s 21(8)(a) of the

Act.[1] That consequence arose because on execution of the agreement Mrs Thom did not receive independent legal advice and no certification that the legal effect of the agreement had been explained to her was completed, as required by s 21(5) and (6).[2] As a result, the sharing provisions of the Act ultimately attached to property that, under a valid agreement, would have remained Mr Thom's separate property.[3]

[2] The question raised by the appeal is whether Mr Thom's claim in negligence against the solicitors who acted for him in preparing the agreement and advising him as to his wife's execution of it is barred by the Limitation Act 1950, as the Court of Appeal held.[4] The negligent advice was given to Mr Thom in March 1990. The claim in negligence was not brought until July 2002. Section 4 of the Limitation Act prevents a claim in negligence being brought more than six years from the date on which the cause of action "accrued". It is settled law that a cause of action in negligence arises only when loss or detriment is suffered by a plaintiff by reason of breach of a duty of care owed by the defendant.[5] Whether Mr Thom's claim is barred by s 4 of the Limitation Act turns on when he suffered loss or detriment as a result of the agreement being void.

[3] Mr Thom maintains he did not suffer such loss until December 1999 when the Family Court refused to treat the agreement as effective (as it could have done under s 21(9)[6] if satisfied that non-compliance had not materially prejudiced any

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1 The Act is now renamed the Property (Relationships) Act 1976 and has been substantially restructured. Amendments made in 2001 relating to contracting out agreements apply to agreements under s 21 made before 2001 (s 21S Property (Relationships) Act). Since, however, the underlying matrimonial property determinations, which establish the loss claimed in the present proceedings in negligence, were taken under the provisions as they stood before 2001, it is convenient to continue to refer to the Matrimonial Property Act as it was before the 2001 amendments. Where new sections have replaced the earlier provisions, cross-references are provided in the footnotes that follow. Section 21(8)(a) is now s 21F(1) of the Property (Relationships) Act.

2 Now s 21F(3) and (5) Property (Relationships) Act.

3 An agreement is "void" under s 21(8) either for non-compliance with the requirements of s 21(4), (5) and (6) or "where … [t]he Court is satisfied that it would be unjust to give effect to the agreement". Under the current equivalent provisions in the Property (Relationships) Act, agreements not in conformity with s 21 continue to be void by operation of the statute (s 21F). An agreement is no longer however said to be "void" where the Court is satisfied that to give effect to it would be "unjust". Instead, under s 21J of the Property (Relationships) Act the Court "may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice".

4 *Davys Burton v Thom* [2008] 1 NZLR 193 (William Young P, O'Regan and Arnold JJ).

5 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 at p 1630 (HL) per Lord Nicholls and at pp 1638 – 1639 per Lord Hoffmann.

6 Now s 21H Property (Relationships) Act.

party) and awarded Mrs Thom a share in the proceeds of a house owned by him. On this basis the claim is within the statutory limitation period. The solicitors maintain that the loss was first suffered either on entry into the agreement in March 1990 or in October 1993 when the couple and their children occupied the house as the matrimonial home, with the effect under s 8 of the Act that it became matrimonial property rather than remaining Mr Thom's separate property. On either of these bases the claim is statute-barred.

[4] For the reasons that follow, I am of the view that loss was suffered and the cause of action accrued in March 1990. The claim is out of time and I would dismiss the appeal.

Background

[5] It was held by the District Court that Davys Burton were in breach of the duty of care they owed to Mr Thom in respect of the defective execution of the agreement.[7] The finding of breach of duty is no longer in contention.

[6] On the marriage, the provisions of the Matrimonial Property Act applied immediately to immovable property situated in New Zealand and upon the parties becoming domiciled in New Zealand (as they were from 1993) applied to all property except foreign immovables.[8] While the provisions of the Act maintained separate property of spouses as separate,[9] such status was lost if a property belonging to one spouse was used as the matrimonial home[10] and other provisions of the Act permitted adjustment of interests in certain circumstances on application to the Court.[11]

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7 *Thom v Davys Burton* (District Court, Rotorua, viv-2003-063-83, 10 December 2004, McGuire DCJ).
8 Section 7.
9 Section 9.
10 Section 8(a).
11 Sections 14 – 18; now ss 13 – 18C Property (Relationships) Act.

[7] If the agreement had not been void, its terms would have excluded the provisions of the Act and preserved the respective assets of the husband and wife at the date of the marriage as separate property, subject to the powers of the Family Court to avoid the agreement if giving effect to it would be unjust.[12] The agreement made particular provision that Mr Thom's house in Devon Street, Rotorua would remain his separate property even if used as the matrimonial home. Without such agreement the terms of s 8 of the Act made the property, if occupied as the matrimonial home, matrimonial property subject to equal sharing,[13] in the absence of "extraordinary circumstances" making such equal treatment "repugnant to justice".[14]

[8] The agreement was properly executed by Mr Thom in New Zealand but was obtained by him from Davys Burton to take to the United States for execution by his wife, an American citizen. The breach of duty ultimately found to have taken place was in respect of the adequacy of the advice given to Mr Thom about the requirements of the Act in relation to the execution by the wife of the agreement. The wife did not receive independent legal advice before signing the agreement, as required by s 21(5) of the Act. The Notary Public who witnessed her signature felt unable to explain to her the "effect and implications of the agreement" because of lack of familiarity with New Zealand law and therefore did not give the certificate required by s 21(6) of the Act. In the absence of compliance with these requirements (non-compliance with the second of which was apparent on the face of the agreement), the agreement was void under s 21(8)(a). In consequence, under s 21(12),[15] the provisions of the Act had effect "as if the agreement had never been made". The agreement was not returned to Davys Burton after its execution by Mrs Thom. It was held by the District Court Judge in the present negligence proceedings that the firm did not see the agreement until the parties separated in April 1998.[16] Only then did it emerge that the agreement did not comply with the provisions of the Act and was void under s 21(8)(a).

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12 Section 21(8)(b); now s 21J Property (Relationships) Act.
13 Section 11.
14 Section 14; now s 13 Property (Relationships) Act.
15 Now s 21M Property (Relationships) Act.
16 At para [25].

[9] In the meantime, after living for a time in the United States, Mr and Mrs Thom settled in New Zealand with their two children in 1993. In October 1993 they moved into Mr Thom's house in Devon Street, Rotorua. Without a valid agreement contracting out of the provisions of the Matrimonial Property Act the house thereupon became matrimonial property in which the wife had a protected interest.[17] They lived together there until their separation in April 1998. Mrs Thom then brought a claim under the Matrimonial Property Act for determination of her interest in the matrimonial property. Mr Thom applied to have the agreement given effect under s 21(9) of the Act, under which the court can declare a defective agreement to have effect in whole or in part if "satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement". On 13 December 1999 Judge Somerville in the Family Court awarded Mrs Thom a one-third interest in the Devon Street Property.[18] The Judge refused the application by Mr Thom to give effect to the agreement.[19] He held that the wife had been materially prejudiced and in those circumstances there was no jurisdiction under s 21(9) to give effect to the agreement. On appeal to the High Court, the decision in relation to the agreement was upheld and the award to Mrs Thom was increased to three-eighths of the proceeds of sale of the house.[20] This was the substantial loss claimed by Mr Thom to have been caused by the negligence of Davys Burton and for which he claimed compensatory damages.

[10] The claim against the solicitors for negligence in relation to the agreement was brought by Mr Thom in the District Court in July 2002. The firm denied breach of the duty of care and also pleaded the Limitation Act as a defence. Mr Thom succeeded in the claim of breach of duty of care, although his contributory negligence was assessed at 50 percent.[21] Judge McGuire did not accept that breach was made out in respect of "ensuring" correct execution of the agreement.[22] But he held that the firm was in breach of its duty of care to Mr Thom in failing to provide clear written instructions on the way in which the agreement was to be completed by

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17 Sections 8 and 20(2); now ss 8 and 20B Property (Relationships) Act.
18 *Thom v Thom* (1999) 19 FRNZ 29 at p 36.
19 At p 35.
20 *Thom v Thom* (High Court, Rotorua, AP 5/00, 31 August 2000, Robertson J).
21 At para [56].
22 At para [35].

his wife.[23] The Limitation Act defence however succeeded. Judge McGuire held that loss or detriment to Mr Thom arose on 29 March 1990, when Mrs Thom signed the agreement.[24] At that point he considered that Mr Thom lost the protection of his interest in the Devon Street property which the agreement had been intended to confer. Judge McGuire found there was no need to consider whether the cause of action should accrue from the date of reasonable discoverability by Mr Thom of the defect in the agreement. He found on the facts that the deficiencies were reasonably discoverable by Mr Thom at the time of the execution of the agreement.[25] In addition, the Judge agreed with a submission from counsel for Davys Burton that the "primary purpose" of the agreement "irrevocably failed" when the Devon Street property became the matrimonial home in October 1993.[26] At that stage, without an effective contracting out of the provisions of the Matrimonial Property Act, there was immediate loss "by virtue of the change of status of the property".[27] On either approach, the claim was statute-barred.

[11] On appeal to the High Court, Simon France J took the view that loss or detriment was not suffered by Mr Thom until the Family Court refused to enforce the agreement.[28] Despite the fact that the Property (Relationships) Act provides that non-complying agreements are "void", he considered that the "reality of the statutory context" was that, whether complying or non-complying, agreements are only "prima facie void" or "prima facie valid":[29]

> Within the scheme of the Matrimonial Property Act 1976, I am satisfied that s 21 agreements generally have a degree of contingency, and that, in particular, non-compliance with the execution requirements does not thereby make an agreement ineffective. Ineffectiveness occurs only when a Court determines that errors have led to material prejudice.

Applying this approach, Simon France J held that Mr Thom suffered loss only when the Family Court refused to give effect to the agreement in December 1999.[30] On that basis, the claim brought in July 2002 was not barred by the Limitation Act.

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23 At para [45].
24 At para [76].
25 At para [87].
26 At para [75].
27 At para [76].
28 *Thom v Davys Burton* [2006] NZFLR 116.
29 At paras [32] and [41].
30 At para [43].

[12] The Court of Appeal allowed the appeal by Davys Burton. The judgment of the Court, delivered by Arnold J, acknowledged that, "in the usual run of cases", immediate loss is suffered on entry into an agreement that "does not achieve what it is supposed to achieve".[31] The case of an agreement contracting out of the Matrimonial Property Act was, however, thought to be unusual, for reasons similar to those expressed by Simon France J:[32]

> Here the agreement, even if validly made, would not necessarily have been enforceable, given the Court's discretion under s 21(8)(b). Equally, although the agreement was invalidly made it was not necessarily unenforceable, given the Court's discretion under s 21(8)(a). So a s 21 agreement, whether validly or invalidly executed, is, to some extent at least, a backdrop for the exercise of a statutory discretion by the Court. And the Court will only be called upon to exercise its discretion if the parties' marriage breaks down. The question is whether these factors mean that the respondent did not suffer an actual loss at the time he acted on his solicitor's negligent advice, but suffered it only at some later point.

[13] The judgment of the Court acknowledges substantial arguments in favour of the action accruing at the date of execution of the agreement.[33] While a valid agreement would not guarantee that Mr Thom would be able to protect the Devon Street property, he could expect that it would be given effect unless it would be unjust to do so. Overcoming the defect in execution set up a significant hurdle for Mr Thom because he had to demonstrate that his wife was not materially prejudiced. Equally however the Court thought that there were strong arguments against the date of execution being the date on which the cause of action accrued.[34] It considered there were too many uncertainties to make the assessment that the benefits obtained by Mr Thom were outweighed by the burdens so that it could confidently be said that he had suffered financial loss. The Court distinguished *D W Moore & Co Ltd v Ferrier*,[35] a case where a cause of action for negligence in the drafting of an unenforceable restraint of trade clause was held to have accrued at the time of entering into the agreement in which it was contained, on the basis that there was immediate impact on the goodwill of the business in that case. It also distinguished *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*,[36] where the cause

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31 At para [67].
32 At para [68].
33 At para [70].
34 At para [71].
35 [1988] 1 WLR 267 (CA).
36 [1997] 1 WLR 1627 (HL).

of action arose on the grant of a loan against a security negligently overvalued, on the basis that the overvaluation had immediate financial impact on the bank's loan book, "which is, of course, saleable".[37] In the present case, by contrast, the Court considered that it was "difficult to see any immediate financial impact even though there was a general detriment in the sense that [Mr Thom] did not get what he wanted".[38]

[14] In the end, the Court of Appeal found it unnecessary to reach a final view on the matter. It considered it clear that Mr Thom suffered actual loss or damage in October 1993, when the Devon Street property became the matrimonial home.[39] At that stage, many of the uncertainties were removed. Although it was not impossible (though unlikely) that a court would later validate the agreement, "it can fairly be said that the respondent was financially worse off as a result of his solicitor's negligence, or that from his perspective 'burdens outweighed benefits'".[40] In addition, the Court of Appeal agreed with the District Court Judge that there was a "powerful policy argument" against treating the relevant loss as arising on the date of the Family Court's determination not to give effect to the agreement.[41] The period between the conduct and the accrual of the cause of action on that basis could be lengthy. The Court accordingly held that the cause of action had accrued in October 1993, when the parties moved into the Devon Street property, and that the claim was statute-barred.[42]

When does loss arise?

[15] A cause of action in negligence arises not on breach of a duty of care, but when the plaintiff first sustains loss attributable to the breach of duty of the defendant.[43] It is unnecessary in the present case to consider whether the cause of action should be treated as arising only when the damage was reasonably discoverable by the plaintiff, in extension of the approach adopted in the case of

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37 At para [71] (CA).
38 At para [71].
39 At para [72].
40 At para [73].
41 At para [74].
42 At para [72].
43 *Nykredit (No 2)* at p 1630 per Lord Nicholls and at pp 1638 – 1639 per Lord Hoffmann.

latent damage to buildings in *Invercargill City Council v Hamlin*.[44] Such potential argument is foreclosed by the finding in the District Court that the defect in the agreement was reasonably discoverable by Mr Thom from the time of its execution. The sole question is rather when recoverable loss attributable to the negligent advice was first suffered.

[16] The general measure of loss recoverable for negligent professional advice is the cost of putting the plaintiff in the position he would have been in had the defendant fulfilled his duty. This basic comparison turns on questions of fact, as Lord Nicholls emphasised in *Nykredit (No 2)*:[45]

> The moment at which the comparison first reveals a loss will depend on the facts of each case. Such difficulties as there may be are evidential and practical difficulties, not difficulties in principle.

Difficulties in quantification, such as arose on the facts in *Nykredit (No 2)*, where a security negligently undervalued by a professional adviser had yet to be realised, do not mean that no measurable loss and no cause of action arises. The cause of action arises as soon as the plaintiff who relied on the advice is "financially worse off",[46] even if quantification is difficult and its measure in a particular case may ultimately depend on further contingencies. As Lord Walker pointed out in *Law Society v Sephton*:[47]

> It is a commonplace of negligence actions of all sorts that a cause of action may arise long before it is possible to quantify precisely the damages eventually recoverable.

[17] A plaintiff may be made "financially worse off"[48] or suffer "economic loss or damage"[49] in a number of different ways. Brennan J in *Wardley Australia Limited v*

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44 [1996] 1 NZLR 513 (PC), approving [1994] 3 NZLR 513 (CA).

45 At p 1632.

46 *Nykredit (No 2)* at p 1639 per Lord Hoffmann (Lord Nicholls at p 1634 referred simply to the plaintiff being "worse off", but in the context of a discussion about "measurable, relevant loss" (at p 1631)); and see *Law Society v Sephton* [2006] 2 AC 543 at para [43] per Lord Walker.

47 [2006] 2 AC 543 at para [41] and, to same effect, at para [28] per Lord Hoffmann (doubting on this point the views expressed in *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514 which he though overstated the policy objections to requiring accrual of a cause of action before the extent of loss can be quantified with some certainty). See also *Nykredit (No 2)* at p 1632 per Lord Nicholls.

48 The term used by Lord Hoffmann in *Nykredit (No 2)* at p 1639.

49 *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514 at para [3] per Brennan J.

The State of Western Australia, in a passage cited with approval in both *Nykredit (No 2)*[50] and *Sephton*,[51] gave examples arising "by transfer of property, by diminution in the value of an asset, or by the incurring of a liability".[52] Where diminution in the value of an asset is the damage claimed, the assessment may be relatively straightforward. Other cases may not be as straightforward, depending on the type of loss in issue. When the damage claimed is based upon the consequences of the plaintiff's entering into a transaction (as is common in cases of misrepresentation), economic damage will often not be suffered at the time of the transaction. Where a plaintiff has been induced by a misrepresentation to part with property, make payments, or incur liabilities in the context of an executory contract, the plaintiff may not suffer any loss until the net position obtained after benefits gained through the transaction are brought into account. *Nykredit (No 2)* was a case of this sort. So too was *Wardley*, where the liability incurred under the agreement was expressed to arise on the "net loss" as between the principal debtor and the bank.[53] Similarly, a liability that is wholly contingent may give rise to no immediate economic or financial detriment. So, the liability of the Law Society to indemnify on claim for the defalcation by a solicitor was found in *Sephton* to be purely contingent until claim was made.[54] It was a "possible future liability" and wholly contingent.[55]

[18] It is unnecessary for present purposes to express a view on whether, in the absence of security over assets,[56] entering into an indemnity for an existing debt by a third party constitutes economic detriment giving rise to a cause of action before default by the principal debtor. Some authorities seem to treat liability under a guarantee or indemnity as if always wholly contingent until default of the principal debtor, unless secured over assets or perhaps accounted for as a liability.[57] I would not be prepared to be as definite without full argument in a case where the point properly arises. Such an obligation may have measurable economic detriment

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50 At p 1634 per Lord Nicholls.
51 At para [19] per Lord Hoffmann.
52 (1992) 175 CLR 514 at para [3].
53 At para [10] per Mason CJ and Dawson, Gaudron and McHugh JJ.
54 At para [18] per Lord Hoffmann.
55 At para [14] per Lord Hoffmann.
56 The feature of *Forster v Outred & Co* [1982] 1 WLR 86 (CA) stressed in *Sephton* at para [48] per Lord Walker.
57 See *Gilbert v Shanahan* [1998] 3 NZLR 529 at p 544 (CA) per Tipping J. There are statements in *Sephton* by both Lord Hoffmann at para [30] and Lord Walker at paras [51] – [52] which provide some support for this approach.

irrespective of whether its performance is secured or accounted for. It may be the better view is that where the principal debt is not itself contingent and does not depend on the net position on the benefits and burdens of an executory contract,[58] that the liability is not properly seen as a "possible future liability", but an existing liability causing measurable loss. The question of actual detriment to the person giving the guarantee or indemnity is one of fact, turning on the terms of the obligation and the existence of the principal debt. This seems to me to be consistent with the approach taken in *Wardley*. Mason CJ, delivering the decision of himself and Dawson, Gaudron and McHugh JJ, said of the indemnity there in issue:[59]

> The indemnity was not one of a kind which generates an immediate non-contingent liability to pay upon execution of the instrument. It was neither a promise to meet a liability of the promisee to make a payment, nor a promise to pay a debt owing by a third party to the promisee … In our view, the indemnity, on its true construction, was one which created a liability on the party of the respondent to the bank to make payment if and when the Bank's relevant "net loss" was ascertained and quantified … subject to the making of a demand for payment by the Bank. The liability was, therefore, in conformity with the opinion of the Full Court, contingent and executory. The likelihood, perhaps the virtual certainty, that there would be a loss, in the light of [the principal debtor's] actual financial position as it stood when the indemnity was executed, did not transform the liability into an actual or present liability at that time.

[19] The present claim however is different. It is based on the immediate consequences of the defendant solicitors not performing their duty. Lord Hoffmann in *Sephton* considered that loss in such a claim was more readily inferred than in cases where the loss depends upon the outcome of a transaction into which the plaintiff has entered by reason of a misrepresentation:[60]

> If the liability is for the difference between what the plaintiff got and what he would have got if the defendant had done what he was supposed to have done, it may be relatively easy, as Bingham LJ pointed out in *DW Moore & Co Ltd v Ferrier*, to infer that the plaintiff has suffered some immediate damage, simply because he did not get what he should have got.

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58 As was the case in *Wardley*, where the liability was to make payment "if and when the Bank's relevant 'net loss' was ascertained and quantified … subject to the making of a demand for payment by the Bank" and was held to be "contingent and executory": see at para [10] per Mason CJ and Dawson, Gaudron and McHugh JJ.

59 At para [10].

60 At para [21].

[20] The present case is therefore comparable to cases such as *Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd*,[61] *Bell v Peter Browne & Co*,[62] *D W Moore*, and *Knapp v Ecclesiastical Insurance Group plc*.[63] They are cases where the plaintiff, through the negligence of the defendant, did not obtain the rights he should have obtained or had imposed on him liabilities or obligations that should not have been imposed.

[21] In *Bell*, the negligence of solicitors in not securing the position of the plaintiff on transfer of property to the sole ownership of the wife was held to make the plaintiff "actually, and not just potentially, worse off than if the solicitors had performed their task competently",[64] even though at the time the wife's wrongful dealing in the property so as to defeat his unsecured interest (which made the breach irremediable) lay in the future. The negligence of the solicitors in *D W Moore*, in failing to provide an effective restrictive covenant, meant that the business which should have been protected by a valid restrictive covenant suffered immediate financial detriment, even though it was wholly uncertain at the time whether there would ever be occasion to invoke the covenant.[65] In *Knapp* and in *Iron Trade Mutual Insurance*, where the negligence of the plaintiffs' insurance brokers led to policies being voidable, the plaintiffs were held to have suffered immediate damage on entering into the policies because they did not get the protection they should have had, even though the eventual uninsured losses and the avoidance of the policies were wholly contingent at the time the insurance agreements were made and might never have eventuated.[66] In all these cases, immediate quantifiable damage arose even though further damage arising from the flawed transactions remained contingent. Such further contingencies "only go to quantum … and [do] not affect the fact that the damages were suffered on [the date of the breach of duty] …because [the plaintiff] did not get what she should have got".[67] In *Sephton*, Lord Walker

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61 [1990] 1 All ER 808 (QB).
62 [1990] 2 QB 495 (CA).
63 [1998] PNLR 172 (CA).
64 At p 513 per Mustill LJ, agreeing with Nicholls LJ.
65 At p 278 per Neill LJ and at p 279 per Bingham LJ.
66 See Hobhouse J in *Knapp* and Rokison QC (sitting as Deputy Judge of the High Court) in *Iron Trade Mutual Insurance* at pp 820 – 821.
67 *Baker v Ollard & Bentley* (Court of Appeal (Civil Division), 12 May 1982, Transcript No. 155 of 1982, Lawton, Templeman and Fox LJJ) per Templeman J (cited by Buxton LJ in *Knapp*).

described cases such as these (in terms earlier used by Saville LJ in *First National Commercial Bank plc v Humberts*)[68] as transactions where the plaintiff suffered quantifiable loss "then and there" because he should have had greater rights or lesser obligations and instead ended up "with a package of rights less valuable than he was entitled to expect".[69]

[22] Nicholls LJ in *Bell* suggested that whether a cause of action arises at the date of a transaction flawed through the negligence of the defendant can usefully be tested by considering whether at its date the plaintiff could immediately have recovered the costs of putting it right.[70] In that case he thought it clear that the plaintiff could have recovered the "modest, but not negligible" costs of going to other solicitors for advice and lodging an appropriate caution to prevent dealing with the property.[71]

[23] Mr Thom argues that he suffered no immediate actual loss in March 1990 but was simply exposed to a contingent liability under the Matrimonial Property Act. He says that contingency was realised only when the Family Court in December 1999 declined to enforce the agreement and awarded Mrs Thom a share in the Devon Street property. Mr Thom maintains therefore that the date on which he suffered relevant actual damage and the cause of action against his solicitors accrued was December 1999.

[24] The argument that in March 1990 Mr Thom was exposed to a wholly contingent liability seems to me to be based on wrong analysis. The purpose of the contracting out agreement was to exclude application of the Matrimonial Property Act regime, particularly in relation to the Devon Street property considered by Mr Thom to be vulnerable. If not void for non-compliance, the agreement would have maintained the property as Mr Thom's separate property, despite its future use as the family home, subject only to the ability of the court to set it aside as unjust. The power to set aside an unjust agreement does not in my view mean that such

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68 [1995] 2 All ER 673 at p 679 (CA).
69 At para [45].
70 At pp 502 – 503.
71 At p 503.

agreements are rightly characterised as only "prima facie valid".[72] There is no effective symmetry between the treatment of non-complying agreements and complying agreements under s 21(8)(a) and (b) which suggests that a valid agreement is simply a "backdrop" to the exercise of a statutory discretion by the Court.[73] The distinct treatment of non-complying and unjust agreements is more sharply made in the Property (Relationships) Act,[74] but is in any event plain enough on the terms of s 21(8). The scheme of the Act is that a complying agreement is effective unless "unjust", a high hurdle of real value to someone seeking to rely on the agreement. The immediate effect of the negligent advice is that Mr Thom did not achieve his object in securing that protection. The Matrimonial Property Act regime attached immediately upon his marriage, which was effectively contemporaneous with the agreement. While the eventual impact of the Matrimonial Property regime depended on future eventualities, the application of the Act was not contingent. Its attachment brought about the result the agreement was designed to exclude. That is the harm occasioned by the negligence.

[25] Mr Thom did not obtain the benefit he should have secured if the defendant had not been negligent: the exclusion of the provisions of the Matrimonial Property Act. He suffered immediate loss on his marriage without the protection of a valid contracting out agreement because he "did not get what he should have got". His assets were diminished by an existing, not contingent, liability through attachment of the Matrimonial Property Act regime. Although the extent of the loss became much worse when the house was used as the matrimonial home and when the marriage failed, Mr Thom would have had an immediate cause of action in March 1990 to compensate him for the defective agreement. The valuation of his diminished package of rights may have been difficult to assess with precision, at least until the Devon Street property became the matrimonial home and the wife thereby obtained an immediate protected interest under s 20 and a presumption of equal sharing on separation under s 11. His measurable loss would have been subject to discount for future contingencies in the application of the Act even in respect of a complying agreement (such as the power to avoid for supervening unjustness provided by

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72 Compare Simon France J in the High Court at para [32].
73 Compare Arnold J in the Court of Appeal at para [68].
74 Section 21J.

s 21(8)(b) and (10)[75] or the power to adjust interests in the circumstances described in ss 14 to 18). The difficulty of the exercise is not however unusual in the assessment of damages. It could not be said that a claim in negligence "would have been bound to fail for want of any damage as an essential ingredient of the cause of action".[76]

[26] Moreover, I think it clear that in March 1990 Mr Thom would have had an immediate claim for the costs of remedying the deficiencies in the agreement. They would have included the costs of obtaining legal advice on the options then available to him. There were a number of possible courses of action open to him, all of which would have entailed cost if Mr Thom was to be put in the position he would have been in but for the negligent advice. If Mrs Thom had been unwilling to enter into a further agreement on the same terms, Mr Thom might successfully have sought a different agreement to preserve the home as his separate property. Any additional benefit obtained by the wife as the price for entry into the agreement could well have been recovered as the measure of his loss. If his wife had not been willing to enter into an agreement, Mr Thom could have made application to the Court under s 21(9) for a declaration that the agreement have effect. Alternatively, he could have sought an order under s 25(3) as to the separate status of the Devon Street property, notwithstanding the fact that he remained living with his wife.

Result

[27] Mr Thom suffered measurable economic loss in March 1990 when, as a result of the negligent advice of Davys Burton, he entered into a non-complying matrimonial property agreement and married without the protection he would have obtained from a valid agreement. His cause of action against the firm accordingly accrued at the same date and was barred by s 4 of the Limitation Act when his claim was brought in July 2002.

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75 Now s 21J(4) Property (Relationships) Act.
76 *DW Moore* at p 280 per Bingham LJ.

BLANCHARD J

[28] I agree with the other members of the Court that Mr Thom suffered actual loss or damage on 29 March 1990 when the matrimonial property agreement was entered into. His claim against his solicitors for negligence in relation to the advice given concerning the requirements of the Matrimonial Property Act 1976 (as the statute was then titled) about execution by his wife was not commenced within six years of that date and is therefore statute-barred. His appeal must accordingly be dismissed with the consequences stated in the judgment of the Chief Justice.

[29] This is a case in which, as a result of the negligence of the solicitors, the plaintiff received a flawed asset, namely an agreement which was void unless validated. There was immediately a detriment to him which was capable of measurement. Loss was not wholly dependant upon future events, as Wilson J explains.

[30] I would, however, reserve my position, as the Chief Justice does in para [18] of her reasons, concerning the circumstances in which it can truly be said that someone who has entered into a contract of guarantee or indemnity has not suffered any immediate loss. It seems to me that it may prove difficult to make any sensible distinction between a situation in which a particular asset of the claimant has been exposed to the possibility of a claim and one in which all the plaintiff's assets collectively have been put at risk because the plaintiff is exposed to a claim which is unconnected to any particular asset. The appropriate inquiry in both situations is surely whether there is immediately some measurable loss to the plaintiff either in relation to a certain asset or to the plaintiff's overall net worth.

TIPPING, McGRATH AND WILSON JJ

(Given by Wilson J)

Introduction

[31] We agree with the Chief Justice that this appeal should be dismissed. We reach this conclusion for the following reasons.

[32] The appellant, Mr Thom, was granted leave to appeal on the single issue of whether the Court of Appeal was wrong to decide, for limitation purposes, that he had suffered loss or damage because of the negligence of the respondent firm of solicitors, Davys Burton, by October 1993, at which time Mr Thom and his former wife moved into his home.

[33] The facts which give rise to this issue are uncontroversial and may be stated briefly. In contemplation of his wedding in the United States to Ms Lawrence, a citizen of that country, Mr Thom instructed Mr Rodgers of Davys Burton to prepare a prenuptial agreement. Under the terms of that agreement, a house property in Rotorua owned by Mr Thom would remain his separate property if he and his wife subsequently lived there. The agreement was signed by Mr Thom in the presence of Mr Rodgers. Mr Rodgers added the certificate required by s 21(6) of the Matrimonial Property Act 1976.[77] Mr Thom took the agreement to the United States on 26 March 1990. On 29 March he and Ms Lawrence visited a Notary Public, who witnessed the signing of the agreement by Ms Lawrence but who was unable to advise Ms Lawrence on the relevant New Zealand law and was therefore unable to provide the necessary certificate that she had done so. The agreement remained uncertified. Mr Thom and Ms Lawrence were married on 31 March. They returned to New Zealand and lived together in Mr Thom's house from October 1993 until they separated in April 1998. It was only then that Mr Thom gave the executed agreement to Davys Burton.

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[77] As it was known prior to the enactment of the Property (Relationships) Amendment Act 2001.

[34] In the proceedings which Ms Lawrence then brought, the prenuptial matrimonial property agreement was declared void on 13 December 1999 by the Family Court, because the person who had witnessed her signature had not given the required certificate and because she had not received independent legal advice. Ms Lawrence was awarded one-third of the value of the house. On appeal, the High Court confirmed that the agreement was void and slightly increased the award to Ms Lawrence to three-eighths of the proceeds of the sale of the house. On 25 July 2002, Mr Thom issued the present proceedings against Davys Burton, alleging that because of their negligence in not ensuring that the agreement was validly executed he had suffered loss by recovering only five-eighths of the value of the property.

[35] In the District Court,[78] Judge McGuire held that Mr Rodgers had been negligent in failing to provide written instructions for the correct execution of the prenuptial agreement, but that Mr Thom was contributorily negligent to the extent of 50 percent. The Judge held that the cause of action was complete when the agreement was executed incorrectly on 29 March 1990. Mr Thom suffered an immediate and non-contingent loss at that time in the sense that he did not acquire the expected "benefit" of the agreement's protection. As the proceedings were commenced in 2002, Judge McGuire held that the negligence action was statute-barred by the Limitation Act 1950. However, the Judge also concluded that Mr Thom suffered immediate loss in October 1993, when the couple moved into the house and it became matrimonial property rather than separate property.

[36] Mr Thom appealed against Judge McGuire's decision to the High Court,[79] where Simon France J overturned it on the limitation point. Simon France J held that loss was not suffered until the Family Court refused to give effect to the agreement. Until that date, the loss was merely contingent and the cause of action was not complete. The proceedings were therefore not time-barred. Simon France J reasoned that s 21 agreements are "a creature of statute that are contingent on Court decisions both in relation to the enforceability of the agreement, and the overall disposition of property".[80]

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78 *Thom v Davys Burton* (District Court, Rotorua, CIV-2003-063-83, 10 December 2004, McGuire DCJ).

79 *Thom v Davys Burton* [2006] NZFLR 116.

80 At para [32].

[37] The Court of Appeal unanimously held, for reasons given by Arnold J, that the proceedings were time-barred.[81] Whether or not actionable loss or damage occurred when the agreement was signed by Ms Lawrence, it was clear that Mr Thom suffered actual loss or damage when the couple moved into the house in October 1993, and the limitation period therefore ran from that date at the latest. Many of the uncertainties which existed earlier had been resolved by that date, and Mr Thom was by then financially worse off as a result of the negligence of Davys Burton. From the perspective of Mr Thom, the burdens then outweighed the benefits. Policy arguments supported this outcome; a marriage breakdown might not occur until many years after the marriage, and a very long delay could therefore occur between the date of a prenuptial agreement and proceedings based on it if the cause of action did not arise until the Family Court refused to validate the agreement.

Legal principles

[38] A cause of action in negligence does not exist until there is, first, an act or omission of the defendant which breaches a duty of care owed by the defendant to the plaintiff and, secondly, loss or injury caused by that act or omission suffered by the plaintiff. The existence of loss or injury is an element without which the cause of action does not exist and accordingly until it occurs time does not run against the plaintiff for limitation purposes.

[39] On facts not dissimilar to the present, a husband sued his former solicitors in *Bell v Peter Browne & Co*,[82] for transferring the former matrimonial home into his wife's name in 1978 following a marriage breakdown without protecting his agreed interest. In 1986, the plaintiff was told by his former wife that she had sold the house and spent all the proceeds, thereby depriving the plaintiff of his interest. At issue was whether any cause of action in negligence arose in 1978. Nicholls LJ said when discussing the position as at 1978 if the wife subsequently disputed the interest of the husband:[83]

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81 *Davys Burton v Thom* [2008] 1 NZLR 193.
82 [1990] 2 QB 495 (CA).
83 At pp 502 – 503.

> The extent of that prejudice depended on the attitude adopted thereafter by his former wife. All we know is that, according to the pleadings and the plaintiff's affidavit evidence, when she sold the house she disposed of all the proceeds and did not account to her former husband for his agreed one-sixth share. But the uncertainty surrounding her future intentions goes only to the quantum of the loss the plaintiff sustained when the transfer was executed without him having the same degree of protection as would be provided by a formal document.
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> 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 solicitors 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.

[40] In *Wardley Australia Ltd v The State of Western Australia*,[84] the proceedings were based on an indemnity against net loss under a banking facility. The indemnity was said to have been given because of misrepresentations as to the financial position of the recipient of the facility. The question therefore arose of whether any cause of action in negligence arose when the indemnity was given, or only when the indemnity was called upon. The majority judgment of Mason CJ, Dawson, Gaudron and McHugh JJ summarised the English authorities as follows:[85]

> It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date.

The High Court majority thus supported the view that there are two ways in which "actual damage" may occur; either the loss is immediate and obvious, and there is no

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84 (1992) 175 CLR 514.

85 At p 531.

issue, or the plaintiff suffers some kind of measurable loss at an early point, but the quantification of that loss does not occur until later. In contrast, a contract which exposes the plaintiff to only a contingent loss or liability is outside the "actual damage" paradigm, and "the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual".[86]

[41] In his judgment, Brennan J said that:[87]

> A plaintiff may suffer economic loss or damage in a number of ways: by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability. Whether loss or damage is actually suffered when any of those events occurs depends on the value of the benefit, if any, acquired by the plaintiff by paying the money, transferring the property, having the value of the asset diminished or incurring the liability. If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time, the plaintiff's net worth is reduced. And that is so even if the quantification of that loss or damage is not then ascertainable. But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne – that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur. In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is "worse off than if he had not entered into the transaction".

[42] Observations in the speeches of members of the House of Lords in *Law Society v Sephton*[88] provide helpful comment, in the context of a claim by the Law Society to recover payments made by it to clients of a dishonest solicitor from accountants who had certified that the solicitor had complied with accounting rules. Lord Hoffmann categorised cases where various kinds of damage had been established. He placed some in the "benefits and burdens" category, where in a transaction which has benefits as well as burdens loss is suffered only when it is possible to say that on balance the claimant is worse off.[89] Lord Hoffmann also

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86 At p 532.

87 At pp 536 – 537.

88 [2006] 2 AC 543.

89 Lord Hoffmann gave *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) as an example, referring to the House of Lords' discussion of a claimant being "on balance worse off": see *Sephton* at p 551.

analysed cases where the liability is for the difference between what plaintiffs got and what they would have got if the defendants had done what they were supposed to have done, as well as cases where the damage is the difference between the position of claimants after entering into the transaction and what it would have been if they had not done so. In cases of that kind the failure to get what the claimants should have got was "quantifiable damage, even though further damage which might result from the flaw in the transaction was still contingent".[90] Lord Hoffmann distinguished such cases from those in which a purely contingent obligation has been incurred. He thus drew a distinction between two factual situations; those where the loss or liability is entirely contingent, and those where there is immediate, quantifiable loss or damage, either because the claimants did not get what they should have got, or they got, on balance, something worse.

[43] To like effect, Lord Walker distinguished between cases of "a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets" and those "where the claimant suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or was disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages".[91]

[44] The distinction between an immediate loss and a contingent loss is well illustrated by the judgment of the Court of Appeal in *Gilbert v Shanahan*.[92] In holding that a claim in negligence against a solicitor who had acted on the preparation of a lease and a guarantee was statute-barred, the Court concluded:[93]

> Mr Gilbert's obligations under the guarantee were not those of a guarantor simpliciter. They were those of a principal debtor/convenantor. He thereby incurred a present liability for the rent, albeit that liability was dischargeable in the future on the days when rent fell due under the lease. He also assumed a present obligation to perform the other covenants under the lease. There was no contingency in those present obligations.

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90 At p 552.
91 At p 559.
92 [1998] 3 NZLR 529.
93 At p 544 per Tipping J for the Court.

[45] A very recent and equally helpful illustration is provided by the judgment of the Court of Appeal of England in *Spencer v Secretary of State for Work and Pensions* and *Moore v Secretary of State for Transport and Motor Insurers' Bureau.*[94] The appellants claimed damages for personal injury on the ground that the government had failed to implement European Economic Community law which required a remedy to be provided to them. In dismissing appeals against findings that the claims were barred by limitation because the cause of action arose when the appellants were injured, Waller LJ (with whom Carnwath and Stanley Burnton LJJ agreed) said:[95]

> The facts may demonstrate that no measurable damage has been suffered at the date when negligent advice has been given or negligent failure has occurred and, as *Sephton* itself demonstrated, that will be so where damage is totally contingent. But if it can be shown that a claimant is worse off in terms that can be measured financially at the date of receipt of the advice or the negligent failure, the cause of action will accrue on that date, even though accurate measurement of damage would be difficult and some of the damage may still be contingent. In particular, if the allegation is of a failure to provide a term in a contract or a failure to provide an effective insurance policy, the cause of action will accrue on receipt of the negligently drafted contract or receipt of the ineffective policy because, as at that date, the claimant has received something of less value and has thus suffered loss.

Although Mr Spencer had a claim, because of the alleged failure of the Government his claim "was not as valuable as the claim he would say that he should have had".[96] To like effect, the claim which Mr Moore did have "was of less value to him than he would assert it should have been".[97]

[46] In summary, a cause of action in tort for negligence does not exist and hence time does not start running for the purposes of the Limitation Act unless and until the plaintiff has suffered some actual and quantifiable loss, harm or damage as a result of the breach of duty involved. Damage will be contingent, and hence not actual for limitation purposes, if the plaintiff will suffer no damage at all unless and until a contingency is fulfilled. That will be so if the damage results from the plaintiff being exposed to a liability which is contingent on the occurrence of a future uncertain

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94 [2008] EWCA Civ 750. The two appeals were heard together and judgment was delivered on 1 July 2008.

95 At para [24].

96 At para [25].

97 At para [29].

event. A good example is where the liability is that of a guarantor and is contingent on a default by the principal debtor, in contrast to the undertaking (as in *Gilbert*) of a direct and present liability which falls due in the future. The distinction may well be thought to be a fine one, but in any regime of limitation apparently similar cases may fall on opposite sides of the line which divides those which are barred from those which are not. A reduction in the value of an asset, whether tangible or intangible, constitutes actual damage and exists as soon as the asset becomes less valuable.

This case

[47] Applying these principles to the present facts, Mr Thom relied on Davys Burton to obtain a legally enforceable prenuptial agreement which would ensure that Ms Lawrence had no claim on the house as matrimonial property. Instead he got a less valuable asset, an agreement that was not legally enforceable. Mr Thom thereby suffered an immediate loss, even though the extent of the resultant damage would not become apparent until some time later. If Mr Thom and Ms Lawrence had not moved into his house, or if they had remained married, significant damage would not have resulted. That does not however detract from the proposition that Mr Thom suffered some loss upon the signing of the agreement. Nicholls LJ's example in *Bell*[98] illustrates the point; if Mr Thom had discovered the problem in (say) 1993, he would have incurred legal costs in obtaining a valid agreement, if indeed his new wife would have co-operated.

[48] As Mr Walker submitted, Mr Thom's own pleadings and evidence proved the case against him on the limitation point. The statement of claim on which he went to trial alleged that, under their contract of retainer with him, Davys Burton advised him about protecting his Rotorua house "to guard against" a matrimonial property claim. And in evidence Mr Thom stated that the "whole purpose" of the agreement

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[98] See para [38] above.

from his perspective was to "protect" the house as his separate property.[99] Mr Thom cannot dispute therefore that the purpose of the agreement was to ensure that the house remained his separate property. The agreement failed to achieve this outcome because Ms Lawrence was not independently advised when she signed it, and loss therefore resulted to Mr Thom at that time.

[49] This is therefore a damaged asset case, not one of exposure to a contingent liability. The asset in question is the prenuptial agreement under which the plaintiff was supposed to obtain full protection against claims by his future wife for a share in the matrimonial home. The asset which the plaintiff acquired was, as a result of the combined negligence of his solicitors and himself, defective in that it did not give him the protection which it was his purpose to obtain. The product which he instructed his solicitors to procure for him was created with an inherent flaw. That flaw represented actual damage or harm which was suffered by the plaintiff from the moment the defective prenuptial agreement came into existence. The damage was quantifiable at that stage, either on the straightforward basis of what it would have cost the plaintiff to obtain or attempt to obtain a valid agreement or on the more difficult basis of the difference in value between a defective agreement and one which was not defective.

[50] That valuation exercise would not have been easy but was conceptually possible. It would have involved an assessment of the likelihood of the marriage failing and the likelihood in that event of the court validating the agreement. But that type of contingency is not of the same kind as a contingency which results in the plaintiff not suffering any loss at all until the contingency is fulfilled. There is a material difference between contingencies relevant to existence of damage and contingencies relevant to valuation of damage. In short, if the defendant's negligence damages an asset of the plaintiff, that damage is immediate and actual. If the negligence exposes the plaintiff to a contingent liability, there is no actual damage until the contingency is fulfilled.

[51] Accordingly, the limitation period commenced to run when Ms Lawrence signed the agreement on 29 March 1990. Mr Thom's claim in negligence was

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[99] Para [21] of Mr Thom's Statement of Evidence, dated 20 May 2004.

therefore statute-barred when he filed his proceedings against Davys Thom on 25 July 2002.

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