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Out of time, out of mind - how limitation periods apply to financial mis-selling

The sixth anniversary of the 2008 financial crisis passed last summer. This means that, where financial mis-selling claims arise out of events leading up to and during the crisis, it is inevitable that financial institutions will raise a defence of limitation.

However, mis-selling claimants may be able to take advantage of the extended limitation period for negligence claims set out in section 14A of the Limitation Act 1980 (the LA 1980), which allows claims within three years of the earliest date when the claimant had "the knowledge required for bringing an action for damages in respect of the relevant damage".

This provision was successfully relied upon by the claimant in *Kays Hotels Ltd v Barclays Bank Plc [2014] EWHC 1927 (Comm)*, a case involving the alleged mis-selling of an interest rate hedging product.

What follows is an analysis of a number of the potential difficulties a claimant may encounter in bringing a claim in respect of financial advice or services provided to them several years ago, and an update on recent court developments.

Categorisation

Although it is possible for allegations of the mis-selling of financial services and/or products to arise out of a contractual relationship, in practice they are most likely to result from negligent advice, in which case claims will arise in tort.

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Tort

Section 2 of the LA 1980
Under section 2 of the LA 1980, the general position in respect of a claim in tort is that it must be brought within six years from the date when the cause of action accrued. The claimant's right to sue for negligence only accrues when the alleged negligent act or omission causes loss[1].

The date the damage is suffered, is the date upon which the negligent advice is acted on[2], usually the date an agreement was entered into.

Secondary Limitation under section 14A of the LA 1980 as amended by the Latent Damage Act 1986 (the LDA 1986)

The LDA 1986 added a new section 14A to the LA 1980. This applies only to actions in respect of negligence (including negligent misrepresentation)[3], but can extend the time period in which claims can be made.

Under section 14A, the limitation period for bringing a claim expires at the later of either:
(a) six years from the date on which the cause of action accrued; or
(b) three years from the date of knowledge of the damage.

The date of knowledge of the damage is further explained in the LA 1980 as follows:

"...the starting date for reckoning the period of limitation...is the earliest date on which the plaintiff...had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action."

"the knowledge required for bringing an action for damages in respect of the relevant damage means knowledge...

(a) of the material facts about the damage in respect of which damages are claimed;"

The key hurdle that a potential claimant needs to overcome is proving that it only acquired material facts about the damage within the last three years. "Material facts about the damage" means such facts that would result in a reasonable person considering them to be sufficiently serious to justify instituting proceedings.

This does not mean that one has to be certain that the damage suffered is serious enough to justify court proceedings, merely that there was enough knowledge available to be able to take legal advice, with a view to bringing a claim. The court takes into account both what a claimant knew about the damage and what it reasonably ought to have known. This can include knowledge obtainable by way of expert advice.

In relation to potential causes of action which have been widely publicised in the press and/or where the consequences of the alleged negligence have already begun in the form of payments, such as the mis-selling of certain financial products, this could be a difficult burden to discharge at trial. However, a decision last year, albeit

[1] This section also applies for misrepresentation, as well as negligent misstatement.
[2] Foster v Outred & Co [1982] 1 WLR 86 CA
[3] Laws v Society of Lloyds [2003] EWCA Civ 1887, para 93

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at a preliminary stage rather than at trial, could be helpful to those who allege they have been mis-sold financial products more than six years ago.

Kays Hotels Ltd v Barclays Bank Plc [2014] EWHC 1927 (Comm).

In November 2012, Kays Hotels Ltd brought a claim against Barclays Bank Plc in respect of the alleged mis-selling of an interest rate hedging product in 2005.

The bank applied to strike out the claim on the basis that the product had been sold more than six years before the claim was issued and was therefore time-barred. Kays Hotels Ltd sought to rely on section 14A of the LA 1980.

The bank argued that Kays knew or should have known that it had a claim more than three years before proceedings were issued since, by that date, it had made payments totalling £36,000 under the product, and that the essence of Kays' case was that it was told that interest rates would rise throughout the life of the product and was given no warning about the risk of payment liabilities.

However, as analysed by the Judge, the mere fact that Kays Hotels Ltd knew that some interest payments were being made for a period of about a year did not give rise to an unanswerable case that Kays Hotels Ltd knew or ought to have known sufficient facts to make the requisite investigation for the purposes of section 14A. Consequently, Kays Hotels Ltd did have a real prospect of establishing that it could rely on section 14A and its claim would not be summarily dismissed as bound to fail on limitation grounds.

It should be noted that this was only an application to strike out rather than a trial and that the hurdle for the claimant in these applications is very low[4]. However, the case does provide valuable guidance as to the approach the court might take to limitation periods in cases of mis-selling. It appears that, in cases of the suitability of a product, as opposed to breach of a particular representation, a greater degree of knowledge will be required to trigger the start time running under section 14A.

The fact that the Court determined that a customer may be unaware that they have a claim against their bank for mis-selling, even though they signed the interest rate swap and made payments pursuant to the same, is encouraging news for customers who may wish to bring mis-selling claims in relation to products they signed over six years ago. That said, it is very important that any customer seeks legal advice on their position as soon as possible[5].

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[4] The case settled before trial, so we do not know whether Kays would, in the event, have been permitted to rely on section 14A.
[5] The recent Court of Appeal decision in Chinnock v Veale Wasbrough [2015] EWCA Civ 441 where a claimant was held to have constructive knowledge under section 14A, demonstrates that the section continues to cause uncertainty. It should be noted that this was not a mis-selling case, but it nevertheless reinforces that while case law continues to provide guidance, each case relating to section 14A needs to be carefully examined on its facts.