

Contingent damage and the limitation acts *continued*

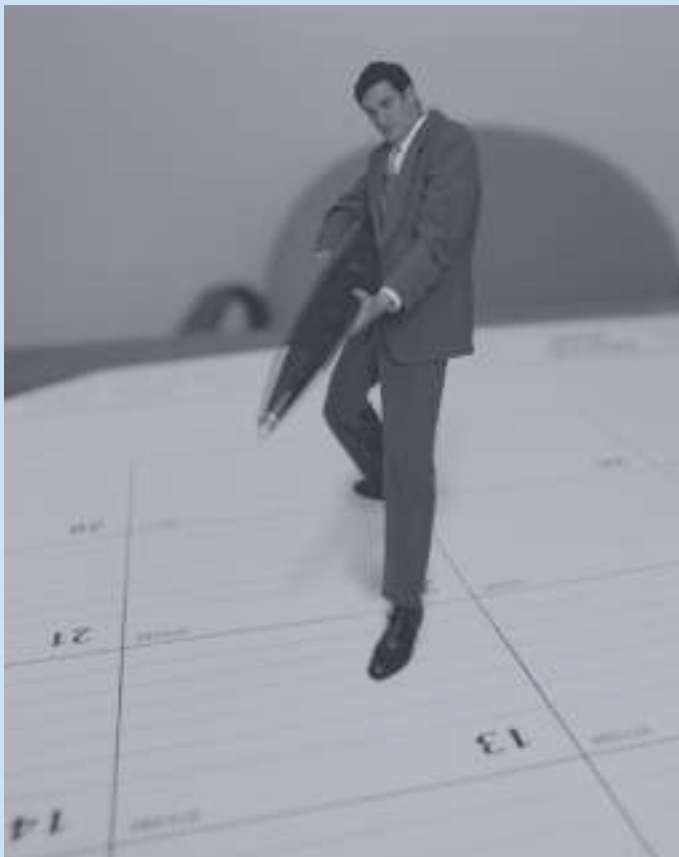
The deputy judge decided that damage had accrued to the Law Society at the date of the first misappropriation after the first report. At that date, more than minimal damage (*Cartledge v Jopling* [1963] AC 758) had occurred; actual damage is any detriment, liability or loss capable of assessment in money terms and includes liability which may arise on a contingency:

that the cause of action did not accrue until the Law Society had decided in the exercise of its discretion to make a payment to a damaged client. The reason underlying both the majority judgments is that the Law Society was not a party to any transaction between the client and the solicitor. The loss to the client was a pre-condition to a loss being suffered

referring to future events other than those which might make the rights of the claimant less valuable or his obligations more onerous than he had been led to believe by reason of the advice. In *Nykredit*, the date of the accrual of the cause of action was relevant to the commencement of the period of statutory interest on damages for negligent valuation. The HL had decided that a lender who lent on a negligent undervaluation of the security had not suffered loss merely by reason of having entered into the loan transaction, as the borrower might have given a covenant of such value that the risk of default is minimal.

In *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 109 ALR 247, a trade indemnity scheme underwritten by the state provided for indemnity against bad debts. The state claimed damages from Wardley on the ground that the state had been induced to enter into an indemnity by reason of Wardley's deceit. The High Court of Australia held that the state's cause of action in tort accrued when event triggering liability under the indemnity occurred, and not when the indemnity was entered into. The High Court did not accept that the English decisions proceeded on the basis that a cause of action accrues merely by reason of the claimant's having entered, in reliance on the defendant's negligent statement, into a contract which exposes him or her to a contingent loss or liability. The principle underlying the English case was, rather, that the claimant's rights or property acquired under the relevant transaction were of lesser value than the claimant believed them to be.

The HL should, it is submitted, regard the reasoning of the High Court of Australia as persuasive: *"It is unjust and unreasonable to expect the plaintiff to commence proceedings before the contingency is fulfilled. If an action is commenced before that date, it will fail if the events so transpire that it becomes clear that no loss is, or will be, incurred. Moreover, the plaintiff will run the risk that damages will be estimated on a contingency basis, in which event the compensation awarded may not fully compensate the plaintiff for the loss ultimately suffered"*. This is completely consistent with the HL decision in *Nykredit*: the accrual of the cause of action, as well as the quantum of damage for which the defendant can be liable, should be conditioned on the scope of the duty which the defendant has undertaken. Where the duty of the defendant to the claimant was to take reasonable steps to secure that the relevant pre-conditions to liability should not arise, in circumstances where the claimant cannot know whether those circumstances exist, the defendant should not be entitled to assert that he is liable at any earlier date than the fulfilment of all the contingencies giving rise to actual financial loss to the claimant. ▲



Forster v Outred [1982] 1 WLR 86 at 94, approved by the HL in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* (No 2) [1997] 1 WLR 1627 at 1630F. The CA was divided on this question. Neuberger LJ agreed with the deputy judge, but Kay LJ and Carnwath LJ held

by the SCF, but only by reason of the independent acts of the Law Society. When the CA and the HL referred to *"liability which may arise on a contingency"*, they were discussing cases where the claimant had entered into a transaction on the advice of the defendant. They were not



Richard de Lacy QC