JOBNAME: Gibraltar Law Report PAGE: 217 SESS: 233 OUTPUT: Mon Feb 14 11:22:33 2011

[2007–09 Gib LR 217]

ARIAS v. EUROLINX (GIBRALTAR) LIMITED

SUPREME COURT (Pitto, Ag. J.): May 1st, 2008

Limitation of Actions—running of time—start of limitation period—action for economic loss caused by negligent investment advice—time runs from date claimant acts to detriment in reliance on negligent advice—suffers loss at that time, not when investment fails to yield return anticipated

The claimant brought proceedings against the defendant to recover financial loss resulting from his purchase of an endowment policy.

In November 1992, the claimant initially wished to take out a capital repayment mortgage but following the allegedly negligent advice of one of the defendant's agents instead purchased a 20-year endowment policy to repay the mortgage. On November 7th, 2000, the underlying policy provider sent the claimant a letter warning him of the high risk of a shortfall if he took no action to increase the premiums. On November 14th, 2004, a "red letter" was sent to the claimant repeating the warning of the previous letter with a more urgent call for action and a second "red letter" was sent on November 20th, 2005. The claimant surrendered the policy on October 19th, 2007 and received less than one-half of the value predicted when it was taken out. On April 13th, 2007, the claimant filed a claim form to recover the shortfall in his mortgage liability and the defendant sought to have it struck out.

The claimant submitted, *inter alia*, that (a) he had a valid cause of action against the defendant for negligence since, but for the defendant's agent's negligent advice to purchase the endowment policy, he would have, as initially planned, obtained the more reliable capital repayment mortgage which would have enabled him to purchase his house and would not have generated a shortfall, about which he was never warned; (b) the action was not time-barred as he suffered contingent loss when the contingency (the production of insufficient funds to pay off the mortgage) occurred, since it was an event which, as a result of the defendant's negligent advice and through no action upon his part, unpredictably altered his legal position in relation to the level of return on his investment which meant that time ran from the surrender of the policy in October 2007; and (c) the first letter of November 7th, 2000 did not affect the start of the limitation period as it was not so worded as to indicate that the policy would fail, and the earliest date that damage was suffered, and from which time could run from was the date of the first "red letter"—November 7th, 2004.

Columns Design XML Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 1 / Date: 11/2

JOBNAME: Gibraltar Law Report PAGE: 218 SESS: 206 OUTPUT: Mon Feb 14 11:22:33 2011

In reply, the defendant submitted that (a) the advice given on its behalf was not negligent; (b) if it were negligent, the claim was statute-barred since the claimant suffered loss or detriment when he purchased the policy—it was not contingent but immediate loss since it had occurred immediately after he had taken out the policy in November 1992 and its later failure to produce sufficient funds was not a contingent event but merely quantified his prospective loss; and (c) as time began to run in November 1992, the cause of action was time-barred by the expiry of the six-year limitation period for tort actions under s.4 of the Limitation Act—and even the warning of a potential shortfall in the policy, having received the first letter on November 7th, 2000 was too late to stop the expiry of time.

Held, dismissing the application:

(1) The claimant's cause of action was time-barred. The action had accrued in November 1992 since he had suffered "actual damage" at the time he purchased the endowment policy and the limitation period of six years from this date under the Limitation Act, s.4 had expired by the time the claim form was filed in 2007. He acted to his detriment and suffered immediate loss at the time he followed the advice of the defendant's agent by purchasing the riskier endowment policy rather than the capital repayment mortgage he would have purchased if more prudently advised (paras. 25–26).

(2) The claimant had not suffered contingent loss since the shortfall to the mortgage repayments was not a contingent event as it was not unconnected to the claimant or his cause of action. It was neither the shortfall nor the defendant's advice that altered the claimant's legal position but his own choice to take out the policy—he had suffered immediate loss and had a complete cause of action at that time. The worsening of his situation after he had taken out the policy did not mean that the "actual damage" (and therefore the cause of action) accrued at a later date. The worsening of his situation was only relevant to the quantification of his loss—a separate issue which became irrelevant when his claim became time-barred (para. 9; para. 12).

Cases cited:

(1) *Baker* v. *Ollard & Bentley* (1982), 126 Sol. Jo. 593, *dicta* of Bingham, L.J. applied and Neill, J. considered.
(2) *Bell* v. *Browne & Co.*, [1990] 2 Q.B. 495; [1990] 3 W.L.R. 510; [1990] 3 All E.R. 124, *dicta* of Nicholls, L.J. considered.
(3) *First Natl. Comm. Bank Plc.* v. *Humberts*, [1995] 2 All E.R. 673; [1996] 5 Bank. L.R. 177; 73 B.L.R. 90; [1995] 1 E.G.L.R. 142, considered.
(4) *Forster* v. *Outred & Co.*, [1982] 1 W.L.R. 86; [1982] 2 All E.R. 753, *dicta* of Dunn and Stephenson, L.JJ. followed.
(5) *Gordon* v. *Wheatley & Co.*, [2000] Lloyd's Rep. P.N. 605; [2000] P.N.L.R. 755, *dicta* of Kennedy, L.J. considered.

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 2 / Date: 18/6

JOBNAME: Gibraltar Law Report PAGE: 219 SESS: 232 OUTPUT: Mon Feb 14 11:22:33 2011

(6) *Law Society* v. *Sephton & Co.*, [2006] 2 A.C. 543; [2006] 2 W.L.R. 1091; [2006] 3 All E.R. 401; [2006] P.N.L.R. 31; [2006] UKHL 22, *dicta* of Lords Hoffmann and Mance distinguished.
(7) *Macaulay* v. *Premium Life Assur. Co. Ltd.*, [2000] W.T.L.R. 261; [1999] All E.R. (D.) 439, *dicta* of Park, J. distinguished.
(8) *Martin* v. *Britannia Life Assur. Co.*, [2000] Lloyd's Rep. P.N. 412, *dicta* of Parker, J. considered.
(9) *Moore (D.W.) & Co. Ltd.* v. *Ferrier,* [1988] 1 W.L.R. 267; [1988] 1 All E.R. 400, referred to.
(10) *Wardley Australia Ltd.* v. *Western Australia* (1992), 175 C.L.R. 514; [1992] 109 A.L.R. 247; [1992] HCA 55, distinguished.

Legislation construed:
Limitation Act 1960, s.4: The relevant terms of this section are set out at para. 1.

Ms. G. Arias for the claimant;
J. Neish, Q.C. and *Ms. G. O'Hagan* for the defendant.

1 **PITTO, Ag. J.:** On November 1st, 1992, the defendant's employee or agent sold the claimant an endowment mortgage. This was to mature in 2012. The policy failed to perform as predicted. On November 7th, 2000 the claimant was informed by letter from the underlying provider, Friends Provident, of a high risk of a shortfall on the policy at its maturity date if no action was taken. On November 14th, 2004 the claimant received a "red letter" from Friends Provident repeating the warning in the letter dated November 7th, 2000 in stronger terms and conveying a greater sense of urgency. A second "red letter" was received on November 20th, 2005. The policy was surrendered on October 19th, 2007 with a value of £21,900.67, less than half the projected value at maturity. A claim form was filed on April 13th, 2007. On May 10th, 2007 a defence was filed. The first defence raised is that the allegation is statute-barred under s.4 of the Limitation Act as the acts complained of occurred more than six years before the claim form was filed. The defendant relies on s.4 of the Limitation Act 1960, which provides that—

> "the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—
>
> (a) actions grounded on simple contract or tort . . ."

2 The claimant alleges he was heavily guided towards the purchase of an endowment policy as opposed to a capital repayment mortgage. He was not informed of the danger of a capital shortfall. Further, the growth projections shown did not refer to the possibility of a shortfall. (The growth projections now used by Friends Provident refer to the possibility of a shortfall.) The claimant's attitude to risk-taking was never discussed.

Columns Design XML Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 3 / Date: 11/2

JOBNAME: Gibraltar Law Report PAGE: 220 SESS: 207 OUTPUT: Mon Feb 14 11:22:33 2011

The claimant's personal circumstances were not taken into account, in particular the difficulties he could face after retirement if the policy did not perform as projected. He was never contacted by the defendants to discuss his situation either after his early retirement in 2004 or when the red letters were sent. The claimant's case is that but for the mis-selling of the endowment policy he would have bought a safer vehicle, namely a repayment mortgage, and not suffered the shortfall he now faces.

3 Ms. Arias, for the claimant, submits that (i) damage was only suffered when the policy failed to perform as projected; (ii) before that event Mr. Arias had sought and bought a policy that enabled him to purchase his property; and (iii) that the earliest date on which damage was suffered was when the letter was received, in November 2004.

4 The defendant argues that on his own pleadings the claimant would not, if properly advised, have bought the policy he did. He thus altered his position to his detriment at that stage, suffering a loss quantifiable in money terms. He therefore had a complete cause of action at the time of the mis-selling. Had he sued the defendant then and proved his case, the court would have awarded damages. That is the nub of the defendant's arguments. He argues in the alternative that the claimant could have sued following the letter of November 7th, 2000 which first alerted him to the danger of there being a shortfall on the policy. Ms. Arias submits this letter was not in terms that would have any effect on limitation.

5 For the purposes of this application it is necessary to assume that the claimant has a cause of action. The question for the court is therefore on what date did the claimant's cause of action accrue? If it accrued at the time of the mis-selling, the action is time-barred, the claim form not having been filed until 14 years after the events complained of. Should the court hold that the cause of action did not accrue until, at the earliest, when the first "red letter" was received in November 2004, the defendant's application must fail.

6 A cause of action accrues (subject to remoteness) when, as a consequence of a breach of a duty of care by one party, another party suffers "actual damage." The definition of "actual damage" in cases of negligent advice was first enunciated by Mr. Stuart-Smith, Q.C. (as he then was) in *Forster* v. *Outred & Co.* (4). The facts were that a mother mortgaged her farm to finance her son's purchase of a hotel. The allegation was that the defendant firm of solicitors had behaved negligently before she signed the mortgage. The hotel was a commercial failure and Mrs. Forster's son was declared bankrupt.

7 Did Mrs. Forster suffer actual damage when she mortgaged her property or when, with the bank threatening foreclosure, she paid the lenders the moneys owed? Mr. Stuart-Smith, Q.C. submitted that actual damage was suffered when the mortgage was entered into. In defining

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 4 / Date: 24/8

JOBNAME: Gibraltar Law Report PAGE: 221 SESS: 206 OUTPUT: Mon Feb 14 11:22:33 2011

actual damage, Stephenson L.J., quoting Mr. Stuart-Smith, Q.C. said ([1982] 1 W.L.R. at 94):

> "[Counsel for the defendants says] . . . it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases."

The court adopted this definition.

8 Applying the facts to the definition, the court held that Mrs. Forster suffered actual damage when she signed the mortgage encumbering her interest in the freehold estate, and as Stephenson, L.J. said (*ibid.*, at 98), subjecting—

> ". . . her to a liability, which may, according to matters completely outside her control, mature into financial loss—as indeed it did. It seems to me that the plaintiff did suffer actual damage in those ways: and subject to that liability and with that encumbrance on the mortgage property was then entitled to claim damages . . . In those circumstances her cause of action was complete on February 8th, 1973."

9 Dunn, L.J. stated (*ibid.*, at 99):

> "I approach this case on the basis that it is sufficient that it is financial loss that should be foreseen, and I would hold that in cases of financial or economic loss the damage crystallizes and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment."

What constitutes actual damage is a question of fact. A worsening of a party's situation over time does not, of itself, mean that actual damage (and therefore a cause of action) did not accrue at an earlier date, it is a question of quantification.

10 In *First Natl. Comm. Bank Plc*. v. *Humberts* (3), the Court of Appeal rejected the argument that time started to run when, relying on a negligent valuation, the plaintiffs advanced a loan against insufficient security. The court found no evidence of loss or detriment until the value of the loan exceeded the value of the security. In the absence of any earlier quantifiable loss or detriment, the court held the cause of action accrued when the value of the loan exceeded the security.

11 The issue in *Moore (D.W.) & Co. Ltd.* v. *Ferrier* (9) was the negligent drafting, in 1971, of a restraint of trade clause. As a consequence, a Mr. Fenton, a former director of the claimant company was able to set up a rival firm near Moore & Co. and take some of their clients. The court held

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 5 / Date: 18/6

JOBNAME: Gibraltar Law Report PAGE: 222 SESS: 206 OUTPUT: Mon Feb 14 11:22:33 2011

that the plaintiffs had suffered actual damage when they failed to receive what they wanted, namely an enforceable restraint of trade clause. In the present case, to use the language of Templeman, L.J. (as he then was) in *Baker* v. *Ollard & Bentley* (1) the appellants suffered damage ". . . because they did not get what they should have got" (126 Sol. Jo. at 612). In *Baker,* the plaintiff should have received a long lease of her part of a house rather than a shared ownership of the whole property, making her ability to sell conditional on the agreement of her co-owners. Bingham, L.J. (as he then was) expressed himself in similar terms (*ibid.*, at 615):

> "It seems to me clear beyond argument that from the moment of executing each agreement the plaintiffs suffered damage because instead of receiving a potentially valuable chose in action they received one that was valueless."

12 Quantification is a separate issue as Bingham, L.J. stated (*ibid.*):

> "If the quantification of the plaintiffs' damage had fallen to be considered shortly after the execution of either agreement, problems of assessment would undoubtedly have arisen. It might have appeared that Mr. Fenton was unlikely to leave, taking much of the company's business with him to establish a competing business. If so, the plaintiffs' damage would have been assessed at a modest figure. But the risk of his so doing could not have been eliminated altogether, and so long as there was any risk that one of the company's two directors might leave, taking much of the company's business with him, to establish a competing business there must necessarily have been a depressive effect on the value of the company's business and on that of Mr. and Mrs. Moore's derivative interest. In making his assessments the judge would have had to attach a money value to a possible future contingency; but judges do this every day in awarding claimants damages for the risk of epilepsy, the risk of osteoarthritis, the risk of possible future operations, the risk of losing a job and so on. The valuation exercise is of course different, but the difference is one of subject matter not kind."

The accrual of a cause of action is unaffected by the fact that damage may worsen over time.

13 The court came to a similar result in *Bell* v. *Browne & Co*. (2). In 1978, Mr. Bell's solicitor upon the breakdown of Mr. Bell's marriage negligently failed to execute a trust deed or a mortgage to protect Mr. Bell's residual interest in the former matrimonial home. When the former wife decided to sell the property more than six years after the solicitor's failure, Mr. Bell was unable to claim what would have been his share. Nicholls, L.J. (as he then was) divided the defendants' acts into two. The first was the failure to execute a trust deed or a mortgage. That, Nicholls, L.J. held, was clearly suffered in 1978. Mr. Bell would have been

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 6 / Date: 18/6

JOBNAME: Gibraltar Law Report PAGE: 223 SESS: 206 OUTPUT: Mon Feb 14 11:22:33 2011

inconvenienced in having to assert his beneficial interest through a more circuitous route than would have been the case if the proper documents had been executed. The fact that the extent of the damage depended on the former wife's attitude only went to quantum. Nicholls, L.J. referred to *Baker* (1) when he stated ([1990] 2 Q.B. at 502) that—

> "there the plaintiff acquired a share in a property, rather than, as she ought to have received, the security of a long lease of one floor of the property. The amount of her loss depended on the attitude of her co-owners. But even so, the damage was held to be suffered by the plaintiff at the time of the conveyance, when she received her precarious interest."

The second issue was the failure to register a caution at the Land Registry. This could have been put right at any time before his wife sold the property. He would, however, have been put to the expense of consulting other solicitors about it. Had he sued the defendants for their negligence before the sale of the house he would have recovered damages. It was with reluctance that the court held that the action was time-barred.

14 In *Gordon* v. *Wheatley & Co*. (5), the facts were that the claimant operated a private mortgage scheme with the first defendants as legal advisers until early 1992 when the second defendants took over. The first defendants failed to notify the claimant that, as operated, the scheme was in contravention of the Financial Services Act 1986. The scheme was investigated by the Securities and Investment Board and found to contravene the Act. The claimant then accepted advice from the second defendants and undertook to indemnify investors, with the result that he was declared bankrupt.

15 The action was commenced six years and two months after the first defendant ceased acting for the claimant. Kennedy, L.J., after a review of the authorities, held that the claimant had suffered actual damage when each investment was made. Kennedy, L.J. stated ([2000] P.N.L.R. at 767):

> "After the investments were made the plaintiff was exposed to the risk of being required by a court . . . to restore the parties (*i.e.* investors and borrowers) to the position in which they were before the transactions were entered into. That was a liability, albeit a contingent liability, a fetter on his assets, from which on his case he would have been protected if the first defendant had exercised proper care."

16 In *Martin* v. *Britannia Life Assur. Co*. (8) in 1991, a financial adviser (Mr. Sherman) acting for the defendants, recommended a package of transactions to the claimant. The latter acted on his advice with disastrous consequences. On July 29th, 1997 he commenced an action against Britannia Life alleging that the adviser had been negligent. Parker, J. (as

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 7 / Date: 18/6

JOBNAME: Gibraltar Law Report PAGE: 224 SESS: 207 OUTPUT: Mon Feb 14 11:22:33 2011

he then was) held that the test was whether prior to July 29th, 1991 Mr. Martin had acted to his detriment in reliance on Mr. Sherman's advice ([2000] Lloyd's Rep. P.N. 412, at para. 17):

> "On the basis of all the authorities cited earlier, there can in my judgment be only one answer to that question. In my judgment, in applying for the Homeplan Plus policy and the pension policy Mr. Martin acted to his detriment, the detriment occurring when the policies were issued pursuant to his applications (that is to say on July 15th and July 3rd, 1991 respectively), notwithstanding that the first premiums were not paid until later."

The case is very similar on its facts to the one before the court today.

17 There is a line of authority in which the courts have held that damage only occurred when the contingency, on which the existence of the damage depended, occurred. The authorities deal with two factually different situations, and courts have to follow the authorities that apply to the facts of the case in front of them.

18 An example of actual damage accruing on the occurrence of a contingency is found in *Macaulay* v. *Premium Life Assur. Co. Ltd.* (7) Mrs. Macaulay relied on negligent advice when trying to avoid capital transfer tax with the result that her personal representatives had to pay a higher amount of tax than they would otherwise have done. The defendants pleaded that the action was time-barred as Mrs. Macaulay had joined the defendant's tax-avoiding scheme in January 1984. She died in 1991. It was argued that she had suffered actual damage when she joined the scheme as she lost the opportunity to join a better scheme. The court found that the claimants were not suing for a lost opportunity suffered by Mrs. Macaulay in her lifetime, they were suing in respect of the inheritance tax liability which arose on Mrs. Macaulay's death and which did not exist until she died. This finding was crucial to the decision finally reached as stated by Park, J. ([2000] W.T.L.R. at 266):

> "Thus the damage relied on as a central ingredient of the cause of action is the amount of IHT [inheritance tax] payable by Mrs Macaulay's estate. In my judgement, it is of some relevance that the IHT payable on death is imposed directly on the personal representatives as such. It is not imposed on the deceased (here Mrs Macaulay), and it is not the case that it only falls to be paid by the personal representatives in right of the deceased. Under s.200(1)(a) of the Inheritance Tax Act 1984 the persons liable for the IHT on a deceased person's estate are the deceased's personal representatives.
>
> Therefore the claimants here are suing for an alleged loss or damage, which consists or derives from their own liability under the Act. That liability did not exist until Mrs Macaulay died. The cause

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 8 / Date: 24/8

JOBNAME: Gibraltar Law Report PAGE: 225 SESS: 207 OUTPUT: Mon Feb 14 11:22:33 2011

of action sued for was not complete until the loss or damage arose. The loss or damage arose on 4 March 1991. The writ was issued just within six years of that date and the action is not statute barred."

19 Had Mrs. Macaulay tried to sue the defendants in her lifetime after six years had elapsed from the date she joined the scheme then the position would have been different. The argument that she had lost an opportunity to join a better scheme would have succeeded and the action would have been time-barred. It is an example of a cause of action accruing on a contingency.

20 Another example of damage only becoming actionable on the occurrence of a contingency is the House of Lords' decision in *Law Society* v. *Sephton & Co.* (6) on which Ms. Arias relies. The facts of that case were that Mr. Payne (a solicitor) misappropriated clients' funds over a period of six years ending March 1996. A Mr. Mascord, a partner in the defendant firm of accountants negligently certified the accounts as being correct. These reports were sent to the Law Society. Relying on the negligent reports, the Law Society failed to investigate the solicitor's accounts. A complaint was received by the Law Society in April 1996 from one of Mr. Payne's clients. An investigation of the solicitor's accounts (ordered by the Law Society) discovered the irregularities. A claim was made against the compensation fund that the Law Society is required to maintain by virtue of the Solicitors Act 1974. Negotiations followed between the Society and the defendants. A claim form was issued on May 16th, 2002. Sephton argued that the Society had suffered damage whenever Mr. Payne misappropriated funds after a negligent report had been prepared as the fund was then exposed to the danger of a claim being made. The Law Society argued that the misappropriated funds might have been repaid or no claim made. They could not therefore have commenced proceedings at that stage.

21 In *Sephton*, Lord Hoffmann quoted with approval ([2006] 2 A.C. 543, at para. 17) the Australian High Court (Mason C.J., Dawson, Gaudron and McHugh, JJ.) in *Wardley Australia Ltd.* v. *Western Australia* (10) ([1992] 109 A.L.R. at 257):

> "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 . . . If . . . the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred."

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 9 / Date: 24/8

22 Lord Hoffmann went on to state ([2006] 2 A.C. 543, at para. 18):

> "I say at once that I am in complete agreement with this analysis, which provides the answer to this appeal. By virtue of the terms of the Solicitors' Compensation Fund Rules 1995, Mr. Payne's misappropriations gave rise to the possibility of a liability to pay a grant out of the fund, contingent upon the misappropriation not being otherwise made good and a claim in proper form being made. Such a liability would be enforceable only in public law, by judicial review, but would still in my opinion count as damage. But until a claim was actually made, no loss or damage was sustained by the fund."

And then (*ibid.,* at para. 30):

> "In my opinion, therefore, the question must be decided on principle. A contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of a property, as in *Forster* v. *Outred* [1982] 1 W.L.R. 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage."

23 Lord Mance reached the same conclusion (*ibid.,* at para. 76):

> "Whether or not that is, however, accepted, no English authority indicates and I do not consider that the society's present cause of action should be regarded as accruing before any change in its legal position occurred and it received any claim on the fund. First and foremost, the society's legal position remained unchanged, even in public law, at least until after it received a claim. Second, it was not possible until after a claim was received for anyone to know which client(s) of Payne & Co. might suffer what loss, whether any of them might be able, and choose, to assert that they had, as a result, suffered hardship justifying a grant out of the fund, and what the circumstances were in which the society would have to exercise its discretion to make or refuse a grant. Third, in this situation, it is not appropriate to talk of the fund or any other specific asset of the society as having suffered any loss at least until after a hardship claim was made on the society."

And later (*ibid.,* at para. 78):

> "Looking at the matter more generally, I also see no particular reason to accelerate the accrual of a cause of action where there has been no transaction changing the claimant's legal position and no diminution in value of any particular asset. Where such factors are present the English authorities . . . take a clear-cut, though perhaps strict, view.

JOBNAME: Gibraltar Law Report PAGE: 227 SESS: 207 OUTPUT: Mon Feb 14 11:22:33 2011

> The House has not been asked to review such authorities, nor would I think it appropriate to do so in the light of the way that they and the English legislation have developed. But where such factors are not present, I see attraction in the approach taken by the Australian High Court in the *Wardley* case, the effect of which is that unless and until a remote contingency eventuates the claimant is not expected to issue proceedings which he would not normally issue or wish to issue unless and until that point arrives."

24 The principle that emerges from *Sephton* (6) is that a contingent liability that stands alone, or is remote, does not, in the absence of other actionable damage, give rise to a cause of action unless and until the contingency "eventuates." Ms. Arias quotes Lord Hoffmann, who says in his speech (*ibid.*, at para. 19), "a transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck." Counsel argues that this describes her client's situation as up until the point when there was a capital shortfall her client had suffered no damage. Ms. Arias argues that this is a similar situation to the claimant's who did not suffer any loss until the policy failed to perform as predicted. He sought and bought a mortgage, which enabled him to buy his house. He got what he wanted. He only suffered damage when an "adverse balance was struck." Unlike the plaintiffs in the first line of authorities cited above, the claimant, she submits, did not suffer any damage or loss, or act to his detriment. Any early payments of premiums could easily be recouped through changing to a repayment mortgage.

25 Applying the authorities to the facts, this argument cannot succeed. The claimant bought a riskier policy than he would have done had he been properly advised. In so doing, he altered his position and was precluded thereby from entering into the safer, and preferred, repayment mortgage. In so doing he acted to his detriment, acquiring something he did not want and failing to get that which he wanted, namely a risk free method of buying his house. He would have been exposed at the very least to administrative charges were he to have attempted to change to a repayment mortgage. He paid premiums on it. Had he sued the defendants in 1992, the court would have awarded him damages. The fact that his position worsened over time does not mean that actual damage was not suffered earlier. Quantification is a separate issue.

26 This is not a case of a free-standing or remote contingency as in *Sephton* (6) or *Macaulay* (7). No event unconnected to the defendant triggers the damage. In *Macaulay* it was Mrs. Macaulay's death which exposed the executors to the higher inheritance tax liability. In *Sephton* it was a properly made claim on the Solicitors' Compensation Fund. Prior to those events, the claimants had suffered no loss or detriment. They had at best been exposed to a potential or prospective loss. But such exposure is not actionable damage. Their position is completely different from that of

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 11 / Date: 24/8

JOBNAME: Gibraltar Law Report PAGE: 228 SESS: 206 OUTPUT: Mon Feb 14 11:22:33 2011

the claimants in what I shall refer to as the *Forster* (4) line of cases. In each one of those (as Ms. Arias concedes) the claimants had suffered a quantifiable loss or detriment the moment they acted on the negligent advice. So did the claimant in these proceedings.

27 Ms. Arias reminds the court that there is no equivalent in Gibraltar of the Latent Damage Act 1986, which enacted s.14(A) of the Limitation Act 1980 in England and Wales. The limitation period under s.14(A) is six years from the cause of action accruing or three years from the "starting date" (that is, three years from when the plaintiff had knowledge of the damage and that it was caused by the defendant's negligence). As a consequence of the enactment of s.14(A), recent English authorities do not deal with the type of limitation problem the claimant faces. The court should compensate for this by dealing with the limitation question as a whole. This argument is misconceived.

28 Limitation defences are creatures of statute. Whatever unfairness may result, it is for Parliament to amend the law so as to strike a balance between the competing rights of claimants and defendants. So far, Parliament has deemed it fit not to amend the law on limitation. This court must apply the law as it stands. Equally, sympathy for the inexperienced house-buyer or investor does not change the law, an important feature of which is certainty—allowing people to regulate their affairs with some confidence as to what their rights and obligations are or would be. These comments apply equally to the references by Ms. Arias to the creation (in England) of the Financial Services Authority.

29 Having held that the cause of action accrued in 1992, I do not have to consider the importance of the letters sent by Friends Provident to the claimant.

30 For the reasons appearing herein, in my judgment, Mr. Arias's cause of action accrued on November 1st, 1992. His claim is therefore time-barred.

Application dismissed.

Columns Design Ltd / Job: Gibraltar_2007_09 / Division: 06_text /Pg. Position: 12 / Date: 18/6