SQUIRE PATTON BOGGS

TIME WAITS FOR NO MAN

Many financial advisers are facing claims from customers alleging the "mis-sale" of investment products, which the customer says were "unsuitable" for them.

In reality, many of these products were not "mis-sold" but simply performed poorly because of the global financial crisis, which no financial adviser could reasonably have predicted at the point of sale. That has not however prevented some claims management companies from drumming up business in the media.

A common feature of some of these claims is that the products were sold many years ago. That can make the claims tricky for advisers to defend as sometimes not all the relevant evidence (documentary or witness) is easily available at such long range.

Welcome news then emerged from the Court of Appeal last month with a robust decision, which could sound the death knell for many old "mis-selling" claims.

In *Jacobs v Sesame Ltd* the Court of Appeal held that a Claimant, who alleged the "mis-sale" of an investment product entered into in 2005, had constructive knowledge of the material facts such that she would have been able to bring a claim against the Defendant in 2009. As such, she was unable to take advantage of Section 14A of the Limitation Act 1980 ("**Section 14A**") and consequently, her claim for damages was "time-barred" and could not proceed.

Limitation

The law of limitation of actions is not straightforward. But generally speaking, claimants have six years to bring claims for damages for breach of contract or in tort under the Limitation Act 1980 ("**LA1980**")

However, special rules apply to claims in negligence in respect of latent damage not involving personal injury under Section 14A.

Section 14A applies where, at the time the claimant's cause of action accrues, the claimant does not have knowledge of all material facts. The limitation period is then the later of either 6 years from when the cause of action accrued (that is, the date the damage is caused); or 3 years from the date when the claimant knows or ought to have known about (a) the material facts about the loss suffered; (b) the identity of the defendant; (c) his cause of action (that is, that the loss was attributable in whole or in part to the act or omission that is alleged to constitute negligence). There is then a 15-year "long-stop" date from the date of the defendant's negligence.

Whether a claimant can take advantage of Section 14 A is often of central importance to "mis-selling" claims when the 6 year period from the date of the allegedly negligent advice by the adviser to the customer to enter into the financial product has long since expired.

Background

The Defendant, Sesame, is the well-known network of financial advisors.

In 2005, Ms Jacobs was advised by a Sesame employee to invest £65,000 into a bond invested wholly in commercial property (the "**Bond**"). Ms Jacobs said that she believed that she was guaranteed to receive back the full £65,000 at the end of her proposed 5 year investment.

Ms Jacobs received annual statements for the Bond and for the first two years of her investment, the Bond grew by around 10% each year. However, in 2008, the value of the Bond fell by just over £17,000 and by July 2009 the value had fallen by £18,000 so that it was worth £43,653.

When she received the annual statement for 2009, Ms Jacobs said that she was horrified at the amount of money that was going out of that account. She called Sesame who advised her that it might have been more appropriate for her investment to have been more widely spread (rather than entirely in commercial property). Ms Jacobs was advised to, and did, move her investment to a more balanced portfolio.

The "primary" 6 year period to bring claims under the LA 1980 had expired in 2011 (6 years after she invested in the Bond). Ms Jacobs had not begun her claim until after February 2012 so unless she could rely on Section 14 A, her claim would be time barred. She alleged that she had not suffered any loss until she surrendered the Bond in February 2012 and therefore the 3 year period under Section 14 A did not start to run until then.

The Bath County Court held that Ms Jacobs could rely on Section 14A and pursue her negligence claim against Sesame. Sesame appealed to the Court of Appeal.

The Court of Appeal's decision

The Court of Appeal said that: (i) the damage must be identified before a conclusion could be reached as to whether a claimant could rely upon the 3 year period in Section 14A and (ii) whether a claimant had 'knowledge' under Section 14A required an assessment of whether the claimant had knowledge of the material facts about the damage allegedly suffered.

It was agreed that 'knowledge' could be far from certain – Lord Nicholls said that "*the Claimant must know enough for it to be reasonable to begin to investigate further*". What was important here was that Ms Jacobs had sufficient knowledge in 2009 to suspect that she may have been mis-advised by Sesame and that the advice received in 2005 had led to the losses that she had suffered.

The Court of Appeal held that "*it was beyond sensible argument*" that Ms Jacobs had acquired the relevant constructive knowledge to set the 3 year time period under Section 14A running by (at the very latest) July 2009. Ms Jacobs had realised, upon receipt of the 2009 annual statement, that the Bond had a defect (it was concentrated wholly in the commercial property sector) and was making a loss. The Court concluded that, at this time, Ms Jacobs must have realised that it was a feature of the Bond that she might not receive the entire £65,000 investment back at the end of 5 years. Ms Jacobs could have begun to investigate in one of the following ways: firstly, she could have asked the Sesame employee with whom she spoke to in July 2009 whether she was guaranteed to receive the entirety of her £65,000 back at the surrender of the Bond; secondly, she could have consulted the product literature about the Bond, which she agreed that she had received.

The Court unanimously agreed that Ms Jacobs could not rely upon Section 14A to pursue her negligence claim against Sesame and as such, her entire claim was time-barred and was therefore dismissed.

Garon Anthony
Senior Associate
T +44 121 222 3507
E garon.anthony@squirepb.com

Helen Cain
Associate
T +44 121 222 3309
E helen.cain@squirepb.com

15697/11/14