

Limitation periods – no cause for alarm

On 29 November 2001, Deputy High Court Judge To handed down a potentially alarming decision in the case of *Gimex Development Ltd v Fang Meng Sung, John* (formerly trading as Messrs JFang & Co, Solicitors). That case involved allegations against solicitors arising from a conveyancing transaction which was completed in December 1990. The plaintiff discovered a defect in title when attempting to re-sell the property in 1997. The plaintiff did not commence proceedings until 2001, nearly 11 years after the alleged negligence and four years after the defect in title had been discovered.

In normal circumstances, a cause of action in contract or tort cannot be brought more than six years after the date on which the cause of action accrued which in that case would have been the date of completion. There is a special time limit, however, for negligence actions where facts relevant to the cause of action are not known when the cause of action accrued. In those cases the limitation period can be extended until three years from the date on which the plaintiff had the appropriate knowledge. No action, however, can be brought more than 15 years after the date on which the cause of action accrued.

Deliberate concealment

It was contended on behalf of the defendant's solicitors that the plaintiff's cause of action had become time-barred in April 2000 at the latest, being three years from the date on which the plaintiff had knowledge of the defect in title. The plaintiff, however, relied on provisions contained in s 26 of the Limitation Ordinance which provide that where any fact relevant to the plaintiff's right of action has been 'deliberately concealed' from him by the defendant, the limitation period shall not begin to run until the plaintiff has discovered the concealment or could have discovered it with reasonable diligence. The Ordinance provides that deliberate commission of a breach of duty in

circumstances in which it is unlikely to be discovered for some time amounts to the deliberate concealment of the facts involved in that breach of duty. Further, where there has been deliberate concealment, the 15-year long stop provision does not apply.

There was no evidence in this case to suggest that the defendant solicitors had deliberately hidden anything from the plaintiff. The Deputy Judge, however, relied on a decision of the English Court of Appeal in *Brocklesby v Armitage & Guest* to conclude that relevant facts had been

No action, however, can be brought more than 15 years after the date on which the cause of action accrued.

deliberately concealed from the plaintiff and that the defendant solicitors therefore had no realistic limitation defence. He referred to a comment made by Morritt LJ where he said: '... it is not necessary for the purpose of extending the limitation period... to demonstrate that the fact relevant to the claimant's right of action has been deliberately concealed in any sense greater than that the commission of the act was deliberate in the sense of being intentional and that that act or omission ... did involve a breach of duty whether or not the actor appreciated that legal consequence'.

Unlimited limitation periods

Before the decision in *Brocklesby*, professionals and their insurers generally knew where they stood in relation to the possibility of stale claims being pursued in circumstances where the plaintiff did not discover the relevant facts until some time after the cause of action accrued. Following that case, however, professionals and their insurers were

potentially faced with the prospect of an unlimited limitation period for cases involving mere negligence.

Happily, the House of Lords in the case of *Cave v Robinson, Jarvis & Rolf* decided earlier this year rejected the Court of Appeal's decision in *Brocklesby*. Their Lordships held that a claimant seeking to rely on the deliberate concealment provisions must show that the defendant either knew he was committing a breach of duty, or intended to commit the breach of duty, in circumstances where the claimant was unlikely to discover for some time that the breach had been committed. There was no rational justification for depriving a defendant of a limitation defence where neither his original wrongdoing nor his failure to disclose it to the claimant was deliberate. It is only where the defendant was aware of his own deliberate wrongdoing that it would be appropriate to penalise him by extending the limitation period until after the facts were discovered. Somewhat enigmatically, however, one of their Lordships did say that the defendant's conduct did not need to be unconscionable. He felt that the expressions 'deliberately concealed' and 'deliberate commission of a breach of duty' needed no embellishment.

The purpose of legislation prescribing limitation periods is to bring certainty as to the period of time within which actions can be brought. The decision of the House of Lords in *Cave* therefore is widely regarded as a victory for common sense which is consistent with the purpose of the legislation. While the decision will not be binding on the Courts in Hong Kong, it will no doubt be persuasive especially as the relevant part of the legislation in England is identical to that in Hong Kong. As things stand, the decision of Deputy Judge To in *Gimex* still stands although it is anticipated that any Hong Kong Judge hearing a similar application today will follow the reasoning of the House of Lords so that professionals in Hong Kong can sleep relatively peacefully at night knowing with some certainty the length of time for which they are exposed to potential claims.

DAVID SMYTH IS A PARTNER AT BARLOW LYDE & GILBERT AND A MEMBER OF HKSA PROFESSIONAL RISK MANAGEMENT COMMITTEE