Pure Economic Loss: The Problem of Timing

The Macpherson lecture

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Lord Walker

Occasionally the English Court of Appeal has cited to it a decision of the Supreme Court (or, until recently, the House of Lords) which it finds almost completely incomprehensible. It has a tactful way of signalling this. It does so by taking the unusual course of itself granting permission to appeal, rather than leaving it to the higher court to decide. The clear message is "Try again, and try harder this time."

For present purposes the decision that the Court of Appeal found so much difficulty with was that of the House of Lords in 2006 in the case of *Law Society v Sephton & Co.*[1] The case in which the Court of Appeal said "Try again" was *Axa Insurance Ltd v Akther & Darby*[2]. Both were claims for pure economic loss caused by breach of professional duty. The defendants in the first case were a firm of accountants, and in the second case several firms of solicitors. In each case the essential issue, on appeal, was whether the defendants had a good limitation defence. That depended on when the cause of action arose, and that in turn depended – since the cause of action relied on was negligence – on when the plaintiff sustained damage.

[1] [2006] 2 AC 543
[2] [2010] 1 WLR 1662

These two recent English decisions provide a way into the problems that I want to discuss. I shall be referring mainly to Australian authority, including some Queensland authority, that Dominic O'Sullivan has very kindly drawn to my attention. I hardly need say that my observations on the Australian cases are offered with due deference and an awareness of what may happen where angels fear to tread.

The *Sephton* case was concerned with the part that accountants play in the regulation of the solicitors' profession by the Law Society. Rules made under statutory powers require every solicitor in sole practice to obtain an annual accountants' report certifying that the accountants have examined the solicitor's books and are satisfied that the solicitor has complied with the Solicitors' Accounts Rules. Mr Payne, a solicitor in sole practice, had between 1990 and 1996 misappropriated a total of about £750,000 from his client account. Every year a partner in Sephtons had given the regulatory certificate. Mr Payne staved off discovery of his misdeeds for some time but in May 1996 the Law Society intervened. Mr Payne was struck off the roll, convicted and sentenced to imprisonment.

The Law Society has a statutory compensation fund to meet claims by clients whose money has been misappropriated. Payments from the fund are discretionary, but in practice genuine claimants, unless very much to blame for their own losses, have their claims met in full – in this case, up to a total of over £1.2m, including interest. The Law Society indicated that it had a claim against Sephtons, but matters moved slowly as the issue of duty of care was being litigated in other proceedings, in which

the Law Society was eventually successful.[3] It started proceedings against Sephtons on 16 May 2002. A preliminary issue was heard as to whether the cause of action accrued before 16 May 1996. The judge held that the claim was statute-barred. The Court of Appeal allowed the Law Society's appeal by a majority.[4]

The House of Lords unanimously dismissed the further appeal. The principle of the decision is that the Society suffered no loss, but merely a risk of loss, until it resolved to meet the claims on its compensation fund. Both appeal courts referred at length to the important decision of the High Court of Australia in *Wardley Australia Ltd v State of Western Australia*[5], decided in 1992. I shall come back to that case in more detail but it is worth noting at once a passage in the plurality judgment,[6] quoted in both English appeal courts, which goes to the heart of the problem:

> "If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, 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."

[3] *Law Society v KPMG Peat Marwick* [2000] 1 WLR 1921
[4] [2005] QB 1013

[5] (1992) 175 CLR 514
[6] Mason CJ, Dawson, Gaudron and McHugh JJ, p532

Lord Hoffmann focused on the same point in his discussion of *Forster v Oughtred & Co*[7], which is the earliest of the modern English authorities. Mrs Forster claimed that her solicitors had been negligent in advising her to grant a mortgage (as she did in February 1973) charging her farm as security for her son's business venture. The venture quickly failed. In January 1975 she was called on to pay £70,000, which she paid seven months later in order to prevent the security being enforced against her farm. She issued her writ in March 1980. The Court of Appeal held that she was statute-barred because her cause of action arose as soon as she signed the mortgage. This decision has not been questioned, since there was an immediate reduction in the value of her equity of redemption. But incurring an unsecured contingent liability would not have amounted to an immediate loss.

Put in those simple terms, the proposition seems obvious, and hardly open to argument. But if the detriment (to use a neutral word) is wrapped up in the packet of a legal transaction such as arranging fire insurance[8], or adjusting property interests on divorce[9], or drafting a service agreement containing restrictive covenants[10]) it becomes much more plausible to say that the plaintiff suffered damage as soon as the transaction was effected, because the plaintiff got a defective chose in action, and not a sound one. Indeed in *Moore & Co v Ferrier*[11] (the case of the badly-drafted restrictive covenant) Bingham LJ was in no doubt at all:

> "On the plaintiffs' case, which for purposes of this issue may be assumed to be wholly correct, the covenants against competition

[7] [1982] 1 WLR 86
[8] *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172
[9] *Bell v Peter Browne & Co* [1990] 2 QB 495
[10] *Moore & Co v Ferrier* [1988] 1 WLR 267
[11] at p279

> were intended, and said by the defendants, to be effective but were in truth wholly ineffective. It seems to me clear beyond argument that from the moment of executing each agreement the plaintiffs suffered damage because of instead of receiving a potentially valuable chose in action they received one that was valueless."

This has been given various labels but I shall refer to it as the "damaged goods" analogy.

In *Wardley* [12] the plurality commented on *Forster* and *Moore*:

> "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."

That holds good for *Forster*, but it is hard to see that in *Moore* the plaintiff company (which was in business as an insurance broker) suffered any measurable loss until the director in question decided to leave and set up in competition, taking some of his clients with him. He might have stayed put for the rest of his career.

I come back to *Sephton*. Lord Hoffmann described the plurality judgment in Wardley as a masterly exposition of the law. He concluded, after referring to the practice of accountants in making provisions for contingencies,[13]

[12] (1992) 175 CLR 514, 531
[13] [2006] 2 AC 543, paras 16-18, 29-31

> "A cause of action, however, connotes a legal obligation and its existence must be determined by rules of law.
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> In my opinion, therefore, the question must be decided on principle. A contingent liability is not as such damage until the contingency occurs. . . .
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> No doubt in most cases in which a party incurs a contingent liability as a result of entering into a transaction, that liability will result in damage for the reasons already discussed in relation to bilateral transactions. But I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage."

Lord Mance and I made concurring speeches which I understood to be to much the same effect. Lord Scott and Lord Rodger both agreed with all three substantive speeches. So, fairly unusually, everyone agreed with everyone else.

It was therefore something of a surprise to find how much grief the decision in *Sephton* caused to the Court of Appeal in *Axa.*[14] The Court consisted of Arden LJ, Longmore LJ and Lloyd LJ. As many of you will be aware, Lord Mance and Arden LJ are husband and wife. They never sat together when they were both in the Court of Appeal, and he has

never sat on an appeal from her, or from a court of which she was a member. But in this case Arden LJ had to scrutinise closely Lord Mance's speech in *Sephton*.

The facts of *Axa* were complicated, especially for those unacquainted with recent developments in the funding of litigation in England, including "after the event" (ATE) legal expenses insurance. Axa was the assignee of another insurer which had incurred huge losses, in excess of £60m, though the alleged negligence of several different firms of solicitors. The insurer had run a legal costs insurance scheme under which a panel of solicitors' firms were required to vet applicants to the scheme and to accept only claims which had more than a 50% chance of success and of resulting in damages of at least £1,000. The solicitors also had to conduct the claims with reasonable competence, and to notify the insurer if the qualifying conditions were no longer met.

The insurer's claim was for wholesale breaches of professional duty, and some £19m of the claim related to policies issued and professional activity undertaken more than six years before the commencement of proceedings. On a preliminary point Flaux J held in favour of the solicitors. He rejected Axa's argument that it was a case of "purely contingent liabilities standing alone", as in *Sephton*. The solicitors' duty was to procure that the insurance transactions had a particular feature (50% plus chance of at least £1,000 damages) and the insurer suffered loss when it did not get what it ought to have got.

Axa renewed the same argument in the Court of Appeal. The majority (Arden LJ and Longmore LJ) rejected it. Lloyd LJ, dissenting, acceded

[14] [2010] 1 WLR 1662.

to it. The judgments are lengthy and the reasoning intricate. But, at the risk of gross oversimplification, the dissent took *Sephton* as applicable to any case of pure contingent liability, even if it was embodied in a transaction. The majority emphasised that in *Sephton* the Law Society did not enter into any transaction, but was simply required by statute to maintain a compensation fund. The insurer, on the other hand, entered into a very large number of commercial transactions. Arden LJ pointed out[15]:

> ". . . The ATE policies were issued as part of the conduct of an insurance business. The premiums from [the insurer's] perspective were not therefore just ordinary trading receipts but receipts to facilitate the creation of a reserve which (subject to expenses) could be invested for gain and against which claims could be debited. It is therefore not appropriate for the purposes of determining when damage occurred to separate out the premiums from the rest of the transaction of issuing ATE insurance."

As I have told you, the Court of Appeal itself gave Axa permission to appeal to the Supreme Court. The appeal is likely to be heard during the next few months, and I am sure that we will try even harder to clarify the law. I am of course going to say nothing at all about the likely outcome. Instead I want to turn, using these English cases as an introduction, to the Australian jurisprudence.

The facts of *Wardley*[16] are probably well known to most of you. At a time of financial turmoil the state of Western Australia granted an

[15] Para 59
[16] *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514

indemnity to National Australia Bank Ltd against a facility which it granted to Rothwells, a merchant bank. The arrangement was induced by misleading conduct during October 1987 on the part of companies in the Wardley Australia group. After the failure of Rothwells the State eventually agreed (by way of compromise) to pay the Bank $10.5m. The case went to the High Court on a disputed application made in 1991 for leave to amend, which was challenged as outside the three-year time limit for a claim under section 82 of the Trade Practices Act 1974. The Federal Court held that time did not start to run until the Bank's liability was ascertained and quantified and the State was called on to meet its obligation. The High Court unanimously dismissed the Wardley companies' appeal. I have already referred to the High Court's treatment of some of the English authorities. Perhaps the most important general statement of principle is this passage in the plurality judgment:[17]

> "Economic loss may take a variety of forms and, as Gaudron J noted in *Hawkins v Clayton*[18], the answer to the question when a cause of action for negligence accrues may require consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed, and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.
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> When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the

[17] p527
[18] (1988) 164 CLR 539, 600-601)

> plaintiff sustains a detriment in a general sense on entering into the agreement. But . . . detriment in this general sense has not universally been equated with the legal concept of 'loss or damage'."

The passage continues with several policy reasons for preferring a later, rather than an earlier date for the accrual of a cause of action. That is, as it happens, directly opposite to what Lord Nicholls said on this topic in *Nykredit*,[19] which was that "within the bounds of sense and reasonableness the policy of the law should be to advance, rather than to retard, the accrual of a cause of action." *Nykredit* was one of many cases about negligent valuations for mortgage lending purposes that arose out of the British property crash of 1990. Lord Hoffmann's view in *Sephton*[20] was that in *Wardley* the High Court "somewhat overstated" the policy reasons for late accrual.

The plurality judgment also addressed the proposition that there is loss founding a cause of action whenever, through a breach of duty, the subject-matter of a transaction has been made less valuable: "That conclusion is acceptable in cases in which the contract measure of damages is appropriate but it is not acceptable where the contract measure of damages does not apply."[21] I read that as an expression of unease, which I am inclined to share, that the tendency towards the assimilation of concurrent remedies in contract and tort may be in danger of going too far. Sir Anthony Mason has referred[22] to the "question

[19] *Nykredit Mortgage Bank Ltd v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, 1633
[20] [2006] 2 AC 543, para 28
[21] (1992) 175 CLR 514, 531
[22] Torts in the Nineties, ed. Mullany (1997) p30

concerning the appropriate role of the law of negligence in protecting players in the commercial marketplace."

There are also some interesting observations in the concurring judgment of Deane J. In one passage[23] he expressed the view that incurring an isolated contingent liability involving a risk of loss does not in general

found a cause of action. But he added, perhaps prophetically in the light of *Axa*:

> "I would leave until another day consideration of the case where the person incurring the contingent liability incurred it in the ordinary course of carrying on business involving the undertaking of contingent liabilities."

Wardley was applied by the High Court in a very different factual situation in *Murphy v Overton Investments Pty Ltd.*[24] Overton developed a retirement village at Padstow Heights and sold homes on long leases with an unspecified monthly charge for management and maintenance services. Mr and Mrs Murphy bought their home in 1992 on the strength of a representation that the charge would be little more than fifty dollars a week. This was stated to be an estimate, but it was found as a fact that the estimate was not based on a realistic and comprehensive list of all the outgoings. In 1997 the charge was greatly increased, and further increases were threatened. Many homeowners refused to pay, and there

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[23] pp544-545

was, as the High Court put it, an avalanche of litigation between Overton and its tenants. The Murphys claimed primarily under the Trade Practices Act, and again there was an issue as to the three-year time limit. The Murphys said that they had suffered no loss until the landlord sought to recover the full amount of its outgoings. That argument was successful, but largely on a paradoxical point of pleading: the landlord had not pleaded that if (which was not admitted) there had been a representation, the value of the long lease when granted was less than the Murphys paid for it. The case is also of interest because the High Court stated that "loss or damage" under the Trade Practices Act has a wider meaning than at common law. That may be one reason – though it is not the only reason, and probably not the most important reason – why Australian and English law show some tendency to diverge in this area.

A more significant cause of divergence is, I suspect, Australia's reluctance – shared with some other Commonwealth countries – to accept the injustice revealed by the House of Lords' decision in the leading case of *Cartledge v Jopling & Sons Ltd*[25] in 1963. That was the case in which employees at a steelworks contracted pneumoconiosis from dust which was produced by industrial processes and not removed by proper filters and ventilation. The disease was insidious and (in the state of medical science at that time) could not be diagnosed until it had reached an advanced stage. The plaintiffs were statute-barred before they even knew that they had a cause of action. The United Kingdom promptly enacted remedial legislation, although the first statute was much criticised and was replaced.[26] At first the legislation was limited to personal injury

[24] (2004) 216 CLR 388
[25] [1963] AC 758
[26] Limitation Act 1963 (UK); now Limitation Act 1980 (UK) sections 11 to 14B and 33 and Latent Damage Act 1986.

cases, but it now extends generally to negligence claims for any form of latent damage (but subject, for this wider category, to a fifteen-year cut-off date). For personal injury claims there is in addition a statutory discretion to extend the period.

Other Commonwealth countries were more robust in developing a judge-made rule as to discoverability. Canada did so nearly thirty years ago.[27] New Zealand waited until it had its own Supreme Court for the limits of its common law discoverability rule to be definitively settled in *Murray v Morel & Co Ltd.*[28] In that case Tipping J stated, near the end of his comprehensive judgment,

> "Piecemeal attempts by the Courts to cure the difficulty with the present outdated legislation have already created their own difficulties . . . The surgery now required is beyond the proper province of the Courts."

All the states of Australia now have a statutory discoverability rule, but the rules vary both as to the date when the rule was introduced and as to its scope. I understand that in Queensland, New South Wales and Victoria the rule was introduced primarily to deal with claims for childhood sexual abuse and is limited to personal injury claims (not being, in New South Wales and Victoria, road accident claims). It does not extend to other forms of latent loss. If the running of time for pure economic loss cannot be postponed, or can be postponed only if the Court is persuaded to exercise a statutory discretion in the claimant's favour,

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[27] *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; *Central Trust Co v Rafuse* [1986] SCR 147 (confirming that *Kamloops* is a general rule, not confined to defective structures)
[28] [2007] 3 NZLR 721, para 76.

that is a policy argument in favour of late accrual of such a cause of action.

What, so far, have I been able to extract from *Wardley*? First, a clear distinction in principle (which tends to become less clear the more you look at it) between actual loss and the mere risk of loss. Second, a recognition that even a contingent loss, if embedded in a bundle of property rights, may be found to amount to a sufficient immediate detriment to be recognised as an actual loss.[29] And third, a general inclination towards late rather than early accrual of the cause of action.

I want to spend the rest of my available time in considering how more recent Australian authority has developed and refined these general points. The cases do not fit neatly together. The simple issue: when did actual loss occur? - is complicated in some of the cases by side issues as to discoverability and as to the measure of damages. But I shall suggest that two further factors may be emerging as guides to the court's decision-making. One is the degree to which any contingency of loss was a real contingency, rather than an outside chance of escaping loss. The other is the degree to which the "damaged goods" analogy reflects what a businessman would recognise as a measurable commercial loss (rather than being no more than a bit of abstract legal analysis).

I said that I would look at more recent Australian authority but I want to start by going back four years before the High Court's decision in *Wardley*, to its decision in *Hawkins v Clayton*.[30] The defendants were a

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[29] Principally by reference to *Jobbins v Capel Court Corporation Ltd* (1989) 25 Fed 228 and the English authorities. *Jobbins* was doubted in *Wardley* but on the facts rather than the principle.
[30] (1988) 164 CLR 539

firm of solicitors whose senior partner made a will in 1970 for a long-standing client, Mrs Brasier. It made Mr Hawkins executor and residuary beneficiary. Mr Hawkins and his family had lived at the testatrix's house in a suburb of Sydney (why and on what terms is not clear from the report) until 1973, when there was a quarrel and Mr Hawkins was told to go. Mrs Brasier phoned her solicitor to say she had "kicked him out" and did not want "ever to see him again." Her solicitor told her that she must make a new will. She agreed, but she never got round to doing so.

She died in 1975. The solicitors still held her will. They performed various administrative acts but did not take any steps to locate Mr Hawkins or tell him about the will. In the meantime the empty house deteriorated, and penalties for unpaid death duties accrued. It was 1981 before Mr Hawkins was contacted and informed of the position. He sued the solicitors in 1982. The High Court was split (as the Court of Appeal of New South Wales had been) as to whether the solicitors owed Mr Hawkins a duty of care. The majority of the High Court, holding that there was a duty, had to address the limitation defence. Deane J fashioned a judge-made rule (the concurring judgments of Brennan and Gaudron JJ considered that time did not run until Mr Hawkins assumed the office of executor). He put the point in these powerful terms:[31]

> "If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is

> doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first."

That seems to be the highwatermark of any Australian judge-made rule as to discoverability in cases of pure economic loss. I do not include cases about defective buildings, which are only arguably cases of pure economic loss. The defective building cases are interesting and difficult but would call for a whole lecture to themselves.[32] There are some cases about defective title to land, which I shall come to.

1988 also saw a first-instance decision in Queensland, *Deputy Commissioner of Taxation v Zimmerlie*[33], which fits fairly comfortably into the "damaged goods" category. A solicitor prepared documentation for the sale of a partnership share but omitted the necessary tax indemnity, which led to a tax liability against which the ex-partner was not protected. After discussing *Forster* and other authorities, Derrington J stated,

> "However, that the loss to be covered by the indemnity is not intended to arise until a later date does not mean that the defendant did not suffer her damage at the time of the conclusion of the agreement whereby she contracted away and lost the right to claim indemnity. The damage must be identified as the loss of the right to indemnity, and not the liability to pay the tax."

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[31] p590
[32] The position down to 1991 is considered in a scholarly article by Nicholas Mullany, Limitation of Actions and Latent Damage – an Australian Perspective (1991) 54 MLR 216.
[33] [1988] 2 Qd R500, 503

So the claim was held to be statute-barred. It is not clear how far the tax liability was in any realistic sense contingent. The first post-*Wardley* case to be mentioned is also from Queensland, *Francis v Whatson*[34]. Mr Francis bought a 25-foot cruiser after being told by a broker, the defendant, that the seller had a clean title. In fact he had no title at all. Mr Francis resold the boat in good faith at a profit of $3,000, but had to repay the whole purchase price when the boat was seized on behalf of its rightful owner. He sued the broker more than three years after the misrepresentation. The Court of Appeal upheld the limitation defence, citing the explanation of *Forster* by the High Court in *Wardley*:

> "When the advice is shown to have caused the diminution of the value of a piece of property that is enough . . . it is difficult to understand the assertion that [at the stage of the sale] he suffered no loss; he had paid in full for ownership of the boat, but had not acquired it."

The Court of Appeal laid down two rules which seem sound, although they may need some explanation and expansion:

> "(1) Merely entering into a contract as a result of the tort, however disadvantageous the contract may be, does not give rise to a cause of action.
> (2) Transfer or diminution of the value of property, or the expenditure of money, is an 'actual' loss which may be sued for."

The Court's conclusion about the sale of a boat is much easier to accept, I suggest, than cases about flawed contractual arrangements such as the

[34] [1994] 2 Qd R584, 589, 591

service contract flawed by a useless restrictive covenant in *Moore*. The commercial reality was plain. With a good title the boat was worth about $30,000 in the market, but a stolen boat is worthless to an honest man.

In 1996 and 2000 the Court of Appeal of New South Wales heard two appeals in which limitation issues were raised in claims arising out of problems with private rights of way. In *Christopoulos v Angelos*[35] an official error in registration resulted in the plaintiff in 1979 buying a property subject to an undisclosed right of way. The error was corrected in 1983 and the writ was issued in 1987. Handley JA (with whom Cole JA agreed) treated it as a latent defect analogous to a latent structural defect, and held that no cause of action arose until the error was corrected in 1983. The claim was therefore not statute-barred. Powell JA, dissenting, regarded the analogy with defective structures as unsound, and held that the cause of action arose in 1979 and was statute-barred.

In *Scarcella v Lettice*[36] the plaintiffs bought twenty-five acres of land in 1982 for a hobby farm. The land was divided by a steep, densely-wooded escarpment. The purchasers thought that they had a vehicular right of way to the upper land over a track on neighbouring land, but in 1993 (when they wished to subdivide the property) they discovered that they had no right of way, and their permissive use of the track was terminated. Handley JA held (distinguishing *Christopoulos*) that this was not a case of a latent defect, but something that should have been apparent to the purchasers' solicitor on investigating the title. The loss was therefore sustained on the purchase in 1982. Powell JA agreed, repeating that he

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[35] (1996) 41 NSW LR 700
[36] (2000) 51 NSW LR 302

thought that *Christopoulos* was wrongly decided. Whether or not *Christopoulos* was correct, we can note that these cases are concerned with ordinary property market transactions, and that the property market can readily set a value on matters such as the presence of an adverse right of way, or the absence of a beneficial right of way. The recent case of *Sullavan v Teare*[37] in the Queensland Court of Appeal illustrates the same point, in the context of the failure of an undercapitalised corporate tenant.

Kenny & Good,[38] a decision of the High Court in 1999, was about the measure of damage for a negligent valuation of property in a falling property market. There was no limitation point, since the events moved very quickly: valuation in April 1990 at $5.5m (actual value then about $4m), loan of $3.575m in May 1990, default in June 1991, security realised for $2.65m in January 1992, leaving the mortgage insurer with a claim for about $2m, including interest, which it had to pay to the mortgagee bank. The High Court considered, but did not follow, the decision of the House of Lords in the *SAAMCo* case (alias *Banque Bruxelles*).[39] I do not want to visit that controversy. But in *Kenny & Good* several of the judgments discuss *Wardley*. In particular Gummow J treated market movements as a contingency, stating,

> "the 'loss' which is recoverable was sustained at the time of default and not at the time of entering into the transaction."

He referred to the New Zealand case of *Rabadan v Gale.*[40] In that case the owner of two flats instructed her solicitor in 1988 to draft leases of the

[37] [2011] 1 Qd R 292
[38] *Kenny & Good Pty Ltd v MGICA* (1999) 199 CLR 413
[39] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191
[40] [1996] 3 NZ LR 220

flats in such a way that she could alter and refurbish flat two without the consent of the tenant of flat one. Years later an arbitration established that the solicitor had failed to achieve this, and he was sued in 1995. Salmon J held that the cause of action did not arise until the tenant of flat one refused consent to the work – the very thing that the owner had instructed her solicitor to avoid. I find that decision surprising, and I am not quite sure, with great respect, exactly what use Gummow J was making of it in *Kenny & Good* – that is, whether he was referring to the accrual of the cause of action or the measurement of the loss.

Another valuation case, an appeal to the High Court from Queensland, is *HTW Valuers*.[41] In April 1997 Astroland paid $485,000 for a number of retail units on the strength of advice from HTW that its rental value would not be affected by the opening of a nearby shopping centre then under construction. The new centre opened in mid-1998 and by March 2000 Astroland's annual rental income had dropped from $60,000 to $15,000, with many vacancies and arrears of rent due from other tenants. The High Court criticised the Supreme Court's reasoning while reaching essentially the same result. Astroland's loss was not (as the High Court held in a single judgment) contingent on the opening of the new shopping centre. *Wardley* and *Murphy* were distinguished. Astroland had sustained an actual loss when it paid $485,000, which was already more than the retail units were worth:[42]

> "The impact of the Beach Road Shopping Centre, unlike the contingency in *Murphy*, was not hidden and did not rest on any discretionary decision by anyone."

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[41] *HTW Valuers (Central Queensland) Ltd v Astonland Pty Ltd* (2004) 217 CLR 640.

Winnote Pty Ltd v Page[43] is a split decision of the Court of Appeal of New South Wales in 2006. It contains a full and interesting discussion of the Australian and English authorities. In 1988 the plaintiff company's solicitor failed to advise that if it was to take a lease for extracting peat it needed a licence under the Mineral Resources Development Act 1990 (Vic). The company took and renewed a lease but in 1993 another company obtained a licence for the area. The company sued the solicitor in 1995 and a limitation issue arose. The majority (Mason P and Tobias JA) applied the defective goods approach, regarding the plaintiff's rights under the extraction lease as an immediate loss on the principle in what it referred to as the "transaction" cases.

Basten JA gave a vigorous dissenting judgment. The solicitor's case, he said, was that the plaintiff company had obtained a lease "which was worthless in legal terms and was derisively characterised by counsel as a 'lemon', or, in the metaphor adopted in English authority, 'damaged goods'". He continued, "Metaphors can be misleading because they may conceal significant distinctions", with a reference to a paragraph in *Sefton*[44] which he attributed to Lord Mance but is in fact in my opinion. Basten JA concluded:

> "The mere entering into an agreement providing benefits less valuable than those which should have been obtained, absent negligence, does not demonstrate financial loss."

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[42] At p655
[43] (2006) 68 NSWLR 531
[44] [2006] 2 AC 543, para 51

That is in line with what the High Court said in *Murphy* and what the Court of Appeal of Queensland said in *Francis*. On the other hand the Supreme Court of New Zealand has recently, in *Davys Burton v Thom*[45], treated a solicitor's inadequate advice on matrimonial property as a "damaged goods" case, although there was no more than a risk of loss so long as the marriage lasted.

Finally I come to the decision of the High Court in *Commonwealth of Australia v Cornwell*.[46] The facts are well known. Mr Cornwell was employed for many years as a spray painter at a Commonwealth bus depot at Kingston. From 1962 until 1987 his position was classified as temporary; then it became permanent. While his position was temporary he had no right to become a member of the Commonwealth Superannuation Fund (then regulated by a 1922 statute) but he could apply for discretionary admission, and it was found as a fact that he would have been admitted, had he applied. But his line manager negligently misinformed him that he was not eligible at all. He was admitted, but not retroactively, in 1987. In 1976 the 1922 scheme was replaced and Mr Cornwell lost any chance of buying extra years under that scheme. In 1990 another new scheme was introduced. Mr Cornwell retired in 1994 and sued the Commonwealth in 1999.

The majority, after referring to *Wardley*, *Sefton* and *Murphy*, held that his lost benefits (that is, those referable to 25 years' lost pensionable service) were contingent until his retirement, because only then was it finally established that he was entitled to retirement benefits. Until then loss had not been necessarily and irretrievably sustained. Callinan J delivered a

[45] [2009] 1 NZLR 437
[46] [2007] 229 CLR 519

powerful dissenting judgment. He cited from the judgment of Deane J in *Wardley*, part of which I have already quoted. This was in the context of the general ability of the Court to evaluate chances. He observed:[47]

> "All this is entirely conventional. It shows that, by reference to established law, and well understood methodology of assessment of damages the respondent did in fact have a measurable valuable interest which he lost by 1977 . . . the so-called 'statutory contingencies', of incapacity or early death, or retirement, . . . are no different in kind from the contingencies with which the courts necessarily deal all the time. Indeed, practically nothing is certain or can be guaranteed in life or human affairs."

I am certainly not going to be so bold as to criticise the High Court of Australia, but I do see a lot of force in Callinan J's dissent in *Cornwell,* as I do in Basten JA's dissent in *Winnote*. This area of the law has room for further development, both in Australia and in England. I tentatively express the hope that that development will include recognising that postponement of accrual of a cause of action should depend on there being a real contingency, rather than a slim chance of some unexpected outcome. But at the same time I suggest that the damaged goods analogy should be limited to cases where it is commercially realistic, and there is at once some measureable loss. Cases of poor advice leading to poor bargains, which may nevertheless eventually result in no financial loss, should not be forced into the ill-fitting mould of the analogy of damaged goods.

[47] At pp539-540