

# Examining the time bar for causes of action for the tort of negligent misrepresentation

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**Section 24A of Singapore’s Limitation Act (Cap. 163) provides, amongst other things, that the limitation period for any cause of action for damages for negligent misrepresentation accrues upon proof of damage in reliance of the negligent misrepresentation. The application of this rule appears straightforward but has not been the case. In *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat and another appeal* [2020] SGCA 47, the Singapore Court of Appeal had the opportunity to consider this “vexed area of law”.**

## **Background Facts**

One of the Defendants was IPP Financial Advisers (“IPP”), a financial advisory company. The other Defendants were the managing partner of one of the advisory groups at IPP and a financial service consultant working with this managing partner (the “Employee Defendants”).

The Plaintiff was a client of IPP. Sometime in early 2011, he was advised by the Employee Defendants, amongst other things, to make certain investments through a trading company, SMLG Inc (“SMLG”). The Employee Defendants allegedly represented to the Plaintiff that SMLG would pay him the principal amount

invested along with a profit of 40% within a year from the date of investment (the “Investment Return Representation”).

The Plaintiff claimed that in reliance of the Investment Return Representation, he made three fund transfers to SMLG on 27 April 2011, 17 June 2011 and 3 February 2012. According to the Investment Return Representation, the Plaintiff should have received his investment returns on 27 April 2012, 17 June 2012 and 3 February 2013 respectively.

However, as of September 2012, the Plaintiff did not receive any investment returns. On 17 September 2012, the Plaintiff entered into settlement agreements (the “Settlement Agreements”) with SMLG providing that SMLG would pay him a total of USD 711,000 (the “Settlement Sum”) by 21 September 2012 as full and final settlement of all claims against SMLG in relation to the Plaintiff’s investment.

The Plaintiff did not receive payment of the Settlement Sum. On 21 July 2018, he commenced proceedings for the Settlement Sum against the Employee Defendants for fraudulent or negligent misrepresentation and against IPP for vicarious liability. The Defendants claimed,

amongst other things, that the Plaintiff’s claim was time barred.

## **Trial Judge’s Decision**

The Trial Judge held, amongst other things, that the Plaintiff’s claim was not time barred. The Plaintiff’s cause of action accrued when he was certain that he suffered actual loss due to the Employee Defendants’ negligent misrepresentations. This took place on 21 September 2012 when the Plaintiff did not receive any payment under the Settlement Agreements. The latest date for the Plaintiff to commence legal proceedings was 21 September 2018 and he had done so prior to this latest date by filing the writ of summons on 21 July 2018.

## **Court of Appeal’s Decision**

The Court of Appeal allowed the Defendants’ appeal in holding that the Plaintiff’s claim was time barred. The salient points of the Court of Appeal’s decision may be summarised as follows.

First, the Court of Appeal held that the burden of proof lies on a plaintiff to prove that its claim falls within the limitation period, even though it is a defendant who typically raises a limitation defence.

Second, a plaintiff, in proving that its claim is not time barred, has to prove that its cause of action accrued within the limitation period. It may not be sufficient to simply show that the date of accrual is different from the defendant's pleaded position.

Third, Section 24A(3)(a) of the Limitation Act<sup>1</sup> was the provision relevant to the present case, ie, a tortious cause of action requiring proof of damage accrues when damage occurs. In a situation where a plaintiff did not have knowledge of the damage when the cause of action accrues, Section 24A(3)(b) would extend the limitation period by 3 years from the time the plaintiff did obtain the knowledge.<sup>2</sup>

Fourth, the Court of Appeal disagreed with the Trial Judge's decision as:

- the damage caused to the Plaintiff arose due to the Employee Defendants' negligent representations about the investment into SMLG in early 2011 and not the Settlement Agreements<sup>3</sup>;
- the Employee Defendants had breached their duty of care to the Plaintiff at the time of the negligent misrepresentations in early 2011. Even if there were continuing negligent misrepresentations made after early 2011, they did not cause the damage to the Plaintiff; and
- By linking the date of accrual of damages to the Settlement Agreement, the Trial Judge had in fact "conflated the recovery of any loss with the existence of the loss". The Court of Appeal highlighted the distinction between "the continued existence of damage or its consequences" and "the accrual of damage, which is the coming into existence of damage".<sup>4</sup>

The Court of Appeal held that the Plaintiff's cause of action had accrued on 27 April 2012 and the limitation period lapsed by the time he commenced legal action more than 6 years later on 21 July 2018.

In arriving at this conclusion, the Court of Appeal reiterated that the key inquiry was when the Plaintiff suffered actual loss, ie, whether upon his investment into SMLG, upon non-payment of the investment returns or upon default of the Settlement Agreements. It held that "purely contingent loss is not in itself damage until, and not before, the contingency occurred" – in other words, the mere likelihood of a loss entering into a transaction was not actual or present loss.<sup>5</sup>

In the present case, the Plaintiff's loss when he made the investments into SMLG (ie, by way of the three fund transfers on 27 April 2011, 17 June 2011 and 3 February 2012) was contingent. The Plaintiff only suffered actual loss on 27 April 2012 (ie, one year after the first fund transfer), when SMLG did not pay him the first tranche of investment returns as promised.<sup>6</sup>

## Conclusion

This decision by the Court of Appeal provides two key distinctions which are germane to the calculation of the relevant limitation period for a tortious claim:

First, the existence (or actual accrual) of the plaintiff's loss suffered must be distinguished from the recovery (or continued existence) of the loss. Where a debtor proposes to repay a debt which is already due, the creditor's loss has already accrued. Subsequent events simply relate to whether the creditor will recover any part of that loss.

Second, a purely contingent loss must be distinguished from actual damage, until the contingency has occurred. The mere likelihood that there would be loss from entering into a transaction does not equate to actual loss accrued at the time the transaction was entered into. Indeed, in the present case, the Plaintiff had stood a chance to profit from his investments before the materialisation of SMLG's breach of its covenant for repayment. These are factors that future litigants ought to bear in mind in determining when and whether a tortious cause of action has accrued, and the expiration of the limitation period for the same.

Finally, the Court of Appeal's decision is also a timely reminder on the importance of the parties' pleaded positions. The Plaintiff's claim was time barred as his pleaded cause of action arose out of the investment into SMLG. The outcome may have been different if his pleaded cause of action arose out of the Settlement Agreements instead.

## Notes

1. Section 24A(1) of the Limitation Act provides that Section 24A “shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).”  
Section 24A(3) provides that:  
“An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of:
  - (a) 6 years from the date on which the cause of action accrued; or
  - (b) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (a).”
2. The Court of Appeal held that Section 24A(3)(b) did not assist the Plaintiff’s case. This was because the Plaintiff had discovered that his investment was not repaid on the first anniversary of the first tranche of payment on 27 April 2012, which was more than 3 years prior to the commencement of the present action on 21 July 2018.
3. The Court of Appeal did note that the Plaintiff’s pleaded case was that he had suffered loss due to the Employee Defendants’ negligent misrepresentations about the investment into SMLG. The Court would therefore have to determine whether there was a time bar with reference to the pleaded cause of action.
4. The Court of Appeal endorsed this distinction which was explained by *Gibson LJ in London Congregational Union Inc v Harriss & Harriss (a firm)* [1988] 1 All ER 15
5. The Court of Appeal agreed with a decision by the High Court of Australia that the mere likelihood of a loss entering into a transaction was not actual or present loss.
6. The Court of Appeal rejected the argument that 3 separate causes of action had accrued for the 3 fund transfers on 27 April 2012, 17 June 2012 and 3 February 2012 separately, as there was only one negligent act in question (ie, the Employee Defendants’ negligent misrepresentations) and 27 April 2012 was when this act first became actionable.

## CONTACTS



**Yuankai Lin**

Partner

t: +65 6422 3022

[yuankai.lin@rpc.com.sg](mailto:yuankai.lin@rpc.com.sg)



**Selina Toh**

Senior Associate

t: +65 6422 3023

[selina.toh@rpc.com.sg](mailto:selina.toh@rpc.com.sg)



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