

## Feature

### KEY POINTS

- Time limits on claims depend upon the type of cause of action raised.
- Difficulties in distinguishing actual loss from mere risk of loss results in uncertainty as to the date upon which tortious causes of action arise.
- It is possible to bring claims for specific performance of a contract even when a damages claim is time barred.

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# What's the limit?

## THE GENERAL RULES

### Tort and contract

The basic rule is that a claim in tort or in simple contract cannot be brought after six years from the date of the cause of action (see Limitation Act 1980 ('LA 1980') ss 2 and 5). In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.

### Fraud and recovery of trust property

For actions by a beneficiary in respect of any fraud or fraudulent breach of trust to which the trustee was a party, or to recover from the trustee trust property (or its proceeds) in the possession of the trustee no limitation period applies (LA 1980 s 21). However, undue delay coupled with sufficient prejudice will result in a laches defence succeeding.

### Equitable claims not involving fraud or trust property

A six-year limitation period generally applies for equitable claims other than those concerning fraud or retention by a trustee of trust property. Examples of such claims include where a trustee has innocently or negligently parted with trust property, invested on insufficient security, disobeyed a direction in the trust instrument to realise assets, or acted in breach of the 'self dealing' rules by purchasing a beneficiary's interest. Similarly, claims against directors for non-fraudulent breaches of their duty cannot be commenced after a delay of over six years. If the equitable claim concerns trust property which is land, the relevant period is generally 12 years. Time runs from the date on which the breach of trust accrued, not from that on which a beneficiary suffered a loss.

Dov Ohrenstein reviews the law on limitation and finds that judges continue to struggle to apply the law in a clear and consistent manner.

### Actions to recover sums payable by virtue of a statutory provision

Section 9 of the Limitation Act 1980 provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after six years from the date of the cause of action. So, for example, this period applies to a wrongful trading claim against a director brought under s 214 of the Insolvency Act 1986 (*Moore v Gadd* [1997] 1BCLC 589). Section 9 only refers to money claims. Most other statutory claims are treated as claims under a specialty (12-year limitation period).

Some classes of statutory remedy have no limitation period, for example, shareholder petitions alleging unfair prejudice. (Companies Act 1985 s 459, now duplicated in Companies Act 2006 s 994). However, as was pointed out in *DR Chemicals* [1989] BCLC 383 laches may still bar relief in such cases.

### USE OF STATUTORY EXTENSIONS TO EXTEND TORT AND CONTRACT TIME LIMITS

#### Tort claims

There is a special time limit of three years from the date of knowledge for claims in tort where facts relevant to the cause of action are not known at the date of accrual of the cause of action. This is subject to an overriding time limit of 15 years (LA 1980 ss 14A, 14B).

In *John Hedley Howard & Ors v Fawcetts* [2006] UKHL 9, a case concerning investments made in reliance upon the advice of defendant accountants, the House of Lords has recently considered the question of what knowledge is needed to trigger the start of the three-year period. The date for the start of the three years was not when the claimant first knew that he might have

a claim for damages but rather earlier. Key parts of the decision were:

- The relevant date was when the claimant first knew enough to justify setting about investigating the possibility that the defendant's advice was defective.
- Knowledge of the facts constituting the essence of the complaint of negligence was sufficient for time to run.
- The claimant did not need to have a detailed knowledge of how and why the defendant had failed in its duty of care.
- Further, time started to run when the claimant knew that the investments had been intrinsically unsound rather than when he knew that the investments had been lost.

#### Contract claims

There is no general statutory provision for the extension of time in contract cases when the breach is not immediately discoverable. This is subject to only limited exceptions for cases of deliberate concealment, personal injury cases, claims by persons under a disability, and insolvency.

For provable debts in both personal and corporate insolvency, time will cease to run for limitation purposes on the making of the relevant order, or in the case of a voluntary liquidation, on the passing of the resolution to wind up. It was held in *Re Cases of Taffs Wells Ltd* [1992] Ch 179 that for a petitioning creditor only, time ceased to run from the date of the presentation of the petition but that time did not stop running against other creditors until the making of the winding-up order.

#### WHEN IS LOSS SUFFERED?

It is important to determine when the cause of action accrued, and in tort cases this requires determination of the date when loss was suffered. The date of loss is often hard to determine.

### Economic loss

In cases of economic loss where someone acquires fewer valuable rights than intended, actionable damage normally occurs at the time of the acquisition of those rights rather than at the moment when those rights are exercised. For example, when the former drummer in the band Oasis was allegedly inadequately advised on the drafting of the terms of his contract the cause of action arose upon execution of the contract rather than when he was expelled from the band without compensation (*McCarroll v Statham Gill Davis* [2005] EWCA Civ 198). If at the time the contract was signed the drummer had fewer rights than he would have had if properly advised, the damage occurred then. The fact that financial loss depended upon a contingency being fulfilled did not postpone the cause of action.

A recurring difficulty is that 'There is a fine distinction, therefore, between a situation where no actual loss is suffered, notwithstanding a risk of potential loss, and one where there is an actual loss which can only be measured by assessing the present value of future risks' (*Havenledge Ltd v Graeme John & Partners* [2001] PNLR 419 CA).

Generally, where a purchaser buys a property in reliance upon a survey which fails to identify material defects the loss arises when the claimant has irrevocably committed himself to buying the property – in a residential property context this would be the date of exchange not completion (*Byrne v Hall Pain & Foster* [1999] 1 WLR 1849 CA). However, it is not difficult to find examples of exceptional cases.

In *Havenledge* solicitors were alleged to have been negligent in failing to advise their client to obtain a mining survey report but the property at the time of purchase was worth what the client paid. Substantial refurbishment took place for the purpose of developing the property. Cracks caused by mining subsidence then appeared. British Coal, in accordance with its statutory liability, paid for repairs but there was disruption to the clients' business. The difficulties of establishing the date of loss

are illustrated by the fact that the three members of the Court of Appeal each gave conflicting decisions:

- Buxton LJ held that the cause of action arose when the client bought the property.
- Sir Anthony Evans held that the cause of action arose when cracks first appeared in the building.
- Pill LJ held that neither did the cause of action have to wait until the cracks appeared nor was it complete upon purchase. Instead he decided that relevant loss first occurred when the client had taken action to its detriment by the expenditure of money on the redevelopment and conversion of the property.

In the case of a negligent valuer a mortgagee usually suffers loss when it agrees to lend money against the inadequate security. Different considerations apply though in marginal cases where the value of the security, although lower than stated in the negligent valuation, equals or exceeds the sum loaned.

### "A mortgagee usually suffers loss when it agrees to lend money against the inadequate security."

The House of Lords considered this in *Nykredit Plc v Edward Erdman Ltd* [1997] 1 WLR 1627. There the lender contended that loss would occur immediately upon the loan being advanced against inadequate security. The valuer's contention was that loss arose only when the property was sold. Lord Hoffmann held:

'[L]oss will be suffered when the lender can show that he is worse off than he would have been if the security had been worth the sum advised by the valuer ... The lender may be able to show that the rights which he has acquired as lender are worth less in the open market than they would have been if the security had not been overvalued. But I think that this would be difficult to prove in a case

in which the lender's personal covenant still appears good and interest payments are being duly made. On the other hand, loss will easily be demonstrable if the borrower has defaulted, so that the lender's recovery has become dependent upon the realisation of his security and that security is inadequate. On the other hand, I do not accept [the] submission that no loss can be shown until the security has actually been realised.'

Following Lord Hoffmann's approach it may be thought necessary to examine how high the risk of future prejudice needs to be before there can be a determination that a loss has occurred. The courts have not given clear guidelines on the level of the threshold.

The House of Lords revisited these issues in *Law Society v Sephton & Co* [2006] UKHL 22. The defendant accountants had failed to identify that a solicitor for whom it had certified accounts had misappropriated client funds. The Law Society acted upon complaints from the solicitors' clients and made payments to them. Professional

negligence proceedings were issued against the accountants. It was held that the cause of action did not accrue until the clients actually made claims for compensation out of the Law Society fund. The solicitor's misappropriations had given rise only to the possibility of a liability on the Society to pay compensation out, contingent on the misappropriation not being otherwise made good and a claim in proper form being made. However, until such a claim was actually made, no loss or damage had been sustained by the Law Society. The mere possibility of an obligation to pay money in the future is not itself damage. There was no reason to accelerate the accrual of a cause of action where there had been no transaction changing the claimant's legal position and no diminution in value of any particular asset.

## Feature

### Biog box

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The relevant principles when determining the date when economic loss occurred can be summarised as follows:

- The negligent creation of a risk of future harm does not give rise to an immediate loss.
- The mere fact of entering into a contract as a result of negligent advice does not amount to a loss.
- The mere entry into the transaction under which financial loss is possible, but not certain, is not sufficient detriment to amount to immediate loss.
- Where breach of duty causes a party to acquire fewer rights or to be exposed to

identical to that where there is a contractual duty to account. Similarly, where an allegation of breach of fiduciary duty was based on the same facts as a common law claim of fraud:

'One could scarcely imagine a more correspondent set of remedies as damages for fraudulent breach of contract and equitable compensation for breach of fiduciary duty in relation to the same factual situation, namely, the deliberate withholding of money due by a manager to his artist. It would have been a blot on our jurisprudence if those

not apply. This was because, although most claims for specific performance arise in response to a breach of contract, a claim for such relief may be made as soon as the contract has been entered into and does not rely upon an accrued cause of action.

### Laches within the limitation period

A defence of laches could arise long before any limitation period would have expired so long as the laches defence is based on more than mere delay, ie some element of prejudice is proven. The Court of Appeal in *P&O Nedlloyd* expressly left undecided the question of whether mere delay could ever be sufficient to give rise to a laches defence but made clear that mere delay would certainly be an insufficient basis for a defence within the limitation period.

The current state of the law on time limits relating to equitable claims can therefore be summarised as follows:

- Where a claim in equity mirrors a legal claim, the legal limitation period applies by analogy.
- A specific performance claim does not amount to a mirror of a legal claim, accordingly no limitation period applies even by analogy.
- In cases where specific performance is claimed (and in other cases where there is no limitation period) and there has been undue delay in bringing the claim then a defendant needs to rely on the laches rules.
- Where there is a limitation period laches can still be a defence to equitable claims (including specific performance) before the expiry of any limitation period but only if prejudice is shown.

"The time limit for the taking of an equitable account will be identical to that where there is a contractual duty to account."

an additional liability then that amounts to a detriment and is an immediate loss whether the value of the loss is immediately quantifiable or not.

selfsame facts gave rise to a time bar in the common law courts but none in a court of equity,' *Coulthard v Disco Mix Club Ltd* [2000] 1WLR 707.

### TIME LIMITS FOR SPECIFIC PERFORMANCE CLAIMS

Section 36 of the Limitation Act 1980 disapplies the Act's various time limits for claims for equitable relief such as for specific performance or injunctions 'except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1 July 1940'.

### Where the equitable claim mirrors a legal claim

In cases where the facts giving rise to a claim are sufficient to found an action at law and an action in equity and in which substantially identical relief is available in each case, equity takes the view (as it did prior to 1940) that the limitation period applicable to a claim at law should apply by analogy to a claim in equity.

Accordingly, the time limit for the taking of an equitable account will be

### Specific performance claims are distinct

The Court of Appeal in *P&O Nedlloyd v Arab Metals* [2006] EWCA Civ 1717 has recently reviewed the authorities concerning the interaction of limitation periods, laches and claims for specific performance.

The facts in *P&O Nedlloyd* concerned a contract for the delivery of a cargo which turned out to be radioactive. The shipper was trying to compel the buyer to accept delivery. A damages claim had also been made. Here, although the claim for specific performance was clearly a form of remedy for the buyer's breach, it was held not to be time barred.

A key part of the Court of Appeal decision was the conclusion that a claim for specific performance of a contract is sufficiently different to a claim for damages that the six-year limitation period set out in s 5 of the Limitation Act 1980 should

### CONCLUSIONS

Despite the fact that the Limitation Act 1980 has been on the statute books for nearly three decades and that key elements of the Act date back over 300 years, the cases show that even on those limitation questions that are not meant to be matters of discretion, judges continue to struggle to apply the law in a clear and consistent manner. ■