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CHAMBERS

Limitation – an update on recent case law

John Dickinson – St John's Chambers

An update covering recent cases on limitation periods, including consideration of whether a professional was under a continuing duty to advise, when loss was suffered, the date of knowledge under section 14A(10), deliberate concealment of facts and the limitation period for a solicitors' claim for billed costs that had not been assessed.

Geoffrey Boycott v Perrins Guy Williams [2011] EWHC 2969 (Ch) [2012] PNLR 25
Ch.D Vos J, 11.10.11

1. Background: The Defendant solicitors had acted for the Claimant GB and his then girl friend W in the purchase of a property in October 1996 as joint tenants. GB claimed he had informed the defendant solicitors that GB and W had agreed that upon the death of either of them the entire property would pass to the survivor. In May 2007 W served a notice of severance of the joint tenancy on GB. In July 2007, GB informed W that her severance breached their agreement that the entire property would pass to the survivor of them. W died in January 2009 and B was left with only half the property. In March 2009 solicitors advised GB that he had a potential negligence action against the Defendant solicitors. GB began the proceedings in August 2010. GB alleged that the Defendant solicitors had failed to give legal effect to the agreement and that they had failed to advise him that W could unilaterally sever the joint tenancy.
2. Vos J held that GB's cause of action accrued in October 1996, when the transfer of the property was executed.
3. There was a measurable loss from the acquisition of the property because GB had something quite different from what he alleged he should have had. He had a severable joint tenancy, which had a lower value than the unseverable one that he had wanted and thought he had. It did not matter that the damages would have been difficult to assess in 1996, nor that many of the losses depended on future contingencies, see Law Society v Sephton [2006] 2 AC 543.
4. There was no need in law for GB to know that the Defendant solicitors owed him a legal duty to advise him that the joint tenancy was unilaterally severable.

5. The fact that GB did not address his mind to the damage having been attributable to the Defendant solicitors' did not prevent him from having actual knowledge under the Limitation Act 1980 s.14A(8)(a). GB did not need to know that the acts or omissions involved negligence, only that they had occurred.
6. Knowledge of the facts was crucial because the law under s.14A was structured so as to make it an objective test as to whether it was reasonable for a claimant to consider it sufficiently serious to bring a claim. On the facts by July 2007 at the latest GB had acquired actual knowledge of the material facts that he needed to know to make it sufficiently serious to bring proceedings. His claim was statute barred, the 6 year limitation period having expired in October 2002 and the 3 year period under s.14A having expired in July 2010.

Integral Memory Plc v. Haines Watts, [2012] EWHC 342 (Ch) Richard Sheldon QC 22.2.2012

7. Background: The Claimant had retained the Defendant accountants HW to provide tax advice on a bonus scheme. The Claimant asserted that in 2003 HW had failed to advise on a change in the tax law regarding National Insurance Contributions with the effect that the Claimant had not paid enough to HMRC. Letters from the Claimant to HW in 2003 showed that it had been unhappy about HW's initial and ongoing advice and that it had contemplated instructing tax lawyers to bring proceedings against HW. HMRC issued proceedings against the Claimant claiming the unpaid contributions plus interest. In 2009 the Claimant agreed a settlement sum with HMRC. In 2011 the Claimant issued a claim for damages against HW for breach of contract and professional negligence.
8. The contractual duty was breached in 2003 as HW should have then advised that there was a material change in the law and/or that the bonus scheme had failed. Thereafter there was a failure to remedy the existing breach, not the commission of a further breach. HW was not under a continuous contractual duty to advise the Claimant.
9. The breach created the actual liability to pay the National Insurance contributions and interest. The existence of that liability was not contingent on HMRC succeeding or failing in the tax tribunal or court, whose role was to decide whether there was an actual liability. The existence of HMRC's power to waive or remit interest did not prevent there being an actual liability for interest. The power was to reduce what was an actual liability to pay interest. The exercise of that

discretion did not create the liability. It was a discretion which could mitigate or reduce an existing liability.

10. The Claimant had the necessary knowledge for the purposes of the Limitation Act 1980 s.14A. In respect of knowledge under the Limitation Act 1980 the burden of proof was on the Claimant to show that it did not have such knowledge more than three years before the issue of the claim form, see *Haward v Fawcetts (A Firm)* [2006] 1 WLR 682. The correspondence showed that from 2003 the Claimant considered that it had cause to complain of unsoundness in the initial and ongoing advice given on the scheme's viability. The Claimant knew with sufficient confidence to justify embarking on the preliminaries to the issue of a claim, or knew enough for it to be reasonable to investigate further. The Claimant also knew that there was a real possibility of the damage having been caused by some flaw or inadequacy in HW's advice. The Claimant had actual knowledge of the material facts relevant to the action, or that was knowledge that the claimant might reasonably have been expected to acquire. Given that the Claimant was considering consulting with his tax lawyers and the need to take tax counsel's advice about the continued viability of the scheme, it was clear that the formulations of knowledge required and/or the test set out in s.14A(10) were clearly satisfied more than three years before the claim was issued.

AB v Ministry of Defence [2012] UKSC 9 [2013] 1 AC 78, Supreme Court 14.3.12

11. The background: A group action made claims for breach of duty by the MoD in exposing army personnel to radiation in the period 1952 to 1958. The majority of the claims were commenced in 2004. For many years many of these servicemen had believed that the exposure to radiation had caused their illnesses. A scientific study in 2007 for the first time showed an objective basis for that strongly held belief. Additional claimants joined the group action by fresh claim forms issued in 2007 and 2008. A group of ten test cases were directed to be tried on the preliminary issue as to whether the claims were statute barred under sections 11 and 14 of the Limitation Act 1980.
12. The statutory framework:

Section 11 Special time limit for actions in respect of personal injuries ...

(4) Except where subsection (5) below applies, the period applicable is three years from—

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.

Section 14 Definition of date of knowledge for purposes of sections 11 and 12

(1) ... In sections 11 ... of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—

(a) that the injury in question was significant; and

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

13. The Supreme Court (by a 4:3 majority) held that a claimant was likely to have acquired knowledge of the facts specified in section 14(1) of the Limitation Act 1980 when he first came reasonably to believe them. Knowledge did not mean knowing for certain and beyond possibility of contradiction, but mere suspicion was not enough. In order to amount to knowledge a belief had to be held with sufficient confidence to justify embarking on the preliminaries to issuing proceedings, which would involve investigating, probably with the assistance of lawyers, whether the claimant had a valid claim in law and, if so, how it could be established in court and that might include a search for evidence.
14. The date on which the claimant first consulted a lawyer or expert was not, in itself, likely to assist the court in determining whether he had by then acquired the requisite knowledge. It was a legal impossibility for a claimant to lack knowledge that the damage being attributable to the alleged breach for the purposes of section 14(1) at a time after he had issued his claim.

Warring-Davies v Ford & Warren [2012] EWHC 3523 (QB) Coulson J 12.12.2012

15. Background: In 1999 the Claimant retained the Defendant solicitors to assist him in bringing his heart monitoring invention to the commercial market. A company L negotiated to develop the invention but withdrew from the negotiations in January 2004. The Claimant brought a claim more than six years later alleging that the Defendant solicitors had failed to follow his instructions and were responsible for L not proceeding with the venture.

16. The Court held that the claim for breach of contract and breach of duty accrued in January 2004. It was irrelevant that the Claimant had not known until January 2009 the Defendant solicitors' motive for breaching the duty. The Defendant had not finalised the agreement because it had not provided for the payment of the Defendant solicitors' fees.
17. The Claimant alleged a deliberate concealment of facts under section 32 of the Limitation Act 1980. Even if there was such a concealment time would only be extended for one month, as at that point in time the Claimant could with reasonable diligence have found out the relevant information.

Phillips & Co (a firm) v Bath Housing Co-operative Ltd [2012] EWCA Civ 1591, [2013] 1 EG 48 (CS) CA 11.12.2012

18. The Claimant firm of solicitors had acted for the Defendant housing association in a possession claim. The Claimant solicitors sent a bill of costs which the Defendant objected to by a letter of 20th September 2004. The Claimant firm of solicitors issued their claim for the untaxed bill of costs on 8th September 2010.
19. A solicitor's claim for fees was a claim in debt, as opposed to damages, in the nature of a quantum meruit, but it was not quantified until it was either assessed by the court under section 66 of the Solicitors Act 1974, agreed by the client, or was the subject of a judgment.
20. Section 29(5) of the Limitation Act 1980 for the acknowledgement of a "debt or other liquidated pecuniary claim" included such a solicitors' quantum meruit claim for fees that had not been assessed.
21. The Defendant housing association's letter had taken issue with the amount claimed but not the principle that something was payable. By that letter the claim had been acknowledged and was not statute barred.

John Dickinson
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john.dickinson@stjohnschambers.co.uk
St John's Chambers