Limitation Act Update

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Helen is a leading barrister practicing in professional negligence, fraud, disciplinary and insurance work. She is due to be appointed QC in March 2022. Helen is ranked by the legal directories as a leading junior in the fields of professional liability, insurance and professional discipline. In 2021 she was named Junior of the Year in the Professional Negligence category by Chambers and Partners. The Legal Directories describe her as *"one of the most highly regarded barristers in the field"*, *"highly sought after for her professional negligence expertise"* and "considered a go-to by solicitors." Helen has been listed as a recommended junior for professional liability work for some years by Legal 500, Chambers and Partners, Who's Who Legal and Legal Experts.

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John's practice encompasses a broad range of professional negligence, commercial and insurance law work. He is also regularly instructed to act in arbitrations under various institutional rules, and to advise on procedural matters. John's recent professional negligence work includes defending high value claims against auditors and accountants, acting in claims brought against solicitors for allegedly negligent advice and representation, and working on cases involving a range of other professionals: including IT consultants and architects.

Limitation Act Update

Helen Evans and John Williams

S. 32 of the Limitation Act 1980

Introduction

1. S. 32 of the Limitation Act 1980, which postpones the commencement of the limitation period in cases of fraud, deliberate concealment, and mistake, has been the subject of a clutch of recent high-profile cases. The section falls into two parts. The first deals with concealment of facts relevant to a claimant's right of action, and the second deals with deliberate commission of a breach of duty in circumstances where the facts are unlikely to be discovered for some time.

2. S. 32 commonly arises in professional liability claims. Some professionals who have taken undisclosed commissions from a transaction- for instance in tax planning cases - find themselves on the receiving end of allegations that they deliberately committed a breach of duty motivated by their earnings, and/or that they failed to disclose their remuneration properly. Other professionals are confronted with the argument that they must have realised that they had made a mistake and owed a duty to their client to inform them about the error. Claimants often chose to frame their allegations against their advisers as breaches of fiduciary duties, in the hope that this will lead a court to find that the adviser ought to have reported the impugned conduct, thereby providing a platform for a s. 32 argument.

3. Before explaining how the recent cases are relevant to professional negligence cases, it is helpful to start with the core parts of s. 32. These provide as follows:

> "*(1) …. where in the case of any action for which a period of limitation is prescribed by this Act, either –*
> *(a) the action is based upon the fraud of the defendant; or*
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
> *(c) the action is for relief from the consequences of a mistake*
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

How should s. 32 be approached?

4. S. 32 has to be construed in a non-partisan way. It is not appropriate to start from the basis that it either affords a narrowly circumscribed derogation to primary limitation periods or that it is there to help Claimants out: *OT Computers v Infineon Technologies AG* [2021] 3 WLR 61.

What disputes over s. 32 have recently arisen?

5. The particular aspects of s. 32 relevant to professional liability claims that have been the subject of recent consideration are:
    a. Whether the court should apply a subjective or objective test when considering what the claimant could with reasonable diligence have discovered;
    b. Whether a defendant has deliberately concealed facts in circumstances where he has not actively done anything, and is under no legal duty to speak out;
    c. What is required to show that a defendant has acted deliberately;
    d. What type of fact needs to have been concealed from the claimant to engage s. 32(1), and what the person accused of concealment has to have realised about that fact.

How does the court assess what the Claimant could have discovered with reasonable diligence?

6. Although the tests for actual and constructive knowledge in s. 14A of the Limitation Act 1980[1] are different, under both s. 14A and s. 32 Claimants are fixed not only with

[1] S. 14A(10) provides that:
"*For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—*
(a)from facts observable or ascertainable by him; or
(b)from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice"

what they knew but what they (or their agents) could have found out if they had applied reasonable diligence. The purpose of this approach is plain: it is there to incentivise Claimants to investigate potential claims rather than allowing matters to become stale.

7. However, the effect of the provision is also to generate arguments by both parties about what a Claimant should have done to investigate a suspicion that something has gone wrong with professional advice. This leads the parties to paint the Claimant in completely different ways - one side suggesting that the Claimant was inexperienced and trusting, and the other suggesting that he was sophisticated and well-equipped to investigate matters.

8. In 2004, the Supreme Court explained that when it comes to assessing a Claimant's constructive knowledge for the purposes of s. 14A, the court considers the situation that the claimant is in but ignores the personal characteristics of the claimant, such as his curiosity, reticence or otherwise: *Adams v Bracknell Forest* [2005] 1 AC 76. This is a mixed subjective/objective test which is better understood by reference to actual facts than in the abstract. So, in the *Adams* case, which concerned a dyslexic who was embarrassed by his inability to read, the correct approach was held to be proceeding by reference to:

> *"Knowledge which a person in the situation of the claimant, i e an adult who knows he is illiterate, could reasonably be expected to acquire. Personal characteristics such as shyness and embarrassment, which may have inhibited the claimant from seeking advice about his illiteracy problems, but which would not be expected to have inhibited others with a like disability, should be left out of the equation. It is the norms of behaviour of persons in the situation of the claimant that should be the test."*

9. It is now plain that the same subjective/objective approach also applies to the question of what knowledge the claimant could with reasonable diligence have discovered for the purpose of s. 32. This has recently been confirmed by *OT Computers.*

10. *OT Computers* concerned the Claimant's discovery that its data storage supplier had been involved in a price fixing cartel. Some information had emerged in the public domain about this more than 6 years prior to issuing the claim form, by which stage

the Claimant had gone into administration. Just less than 6 years prior to the claim being commenced, the European Commission issued a report about the cartel. The Claimant- acting through its administrators- relied on this report as the trigger date for s. 32. The Defendants argued that information had been in the public domain prior to this, and that the fact that the Claimant had been in administration should be disregarded when analysing what knowledge, it should have had. The Defendants sought to persuade the court that "reasonable diligence" should be approached entirely subjectively, by reference to a hypothetical Claimant. This approach had some support in *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400, which referred to the court considering "*how a person carrying on a business of the relevant kind would act if he had an adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency".*

11. Much of the argument centered on the fact that s. 32 refers to information that the Claimant "could" have discovered, rather than "should" have discovered. It was suggested that this choice of word imported the need to consider some aspects of the actual Claimant rather than a hypothetical Claimant. The court agreed. It decided that it should take into account the fact that the Claimant was not carrying on business when information about the cartel first came into the public domain, but that it should ignore other features of the Claimant.

12. At para. 38, Males LJ said as follows:

> *"personal traits or characteristics bearing on the likelihood of a particular claimant discovering facts which a person in his position could be reasonably expected to discover such as whether the claimant is slothful, naïve, shy, nervous, uncurious or ill-informed, are not relevant. But this does not necessarily follow…. that the claimant must be assumed to be something he is not".*

13. He went on to explain at para. 47 that

> *"… although the question what reasonable diligence requires may have to be asked at* two *distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to*

know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

14. The impact of the test seems to be that the court starts on the basis of understanding the situation or position of the Claimant- i.e. was this a trading or insolvent company? Was the Claimant an 18 year old student, or a 45 year old business person? Then, it proceeds on the basis that the personal characteristics of the actual Claimant are irrelevant. It is not always easy to identify the dividing line between these two exercises. For instance, starting on the basis that the Claimant is an 18 year old student rather than a 45 year old business person may imbue the Claimant with less sophistication in the court's mind. As such, and as acknowledged by Males J, predicting the outcome of such a test is far from easy. Further, it is likely to prove impossible to do on a summary basis, cementing the reputation of s. 32 (along with s. 14A) as the type of issue that can only be resolved at trial unless there is very clear evidence to support one party's case.

Deliberate concealment by the Defendant- inactivity and non-disclosure

15. Another area ripe for dispute in s. 32 cases is whether a Defendant actually realised that a client had (or might have) a claim against him, and the circumstances in which he is required to reveal any facts about the same to his client. A variation on this type of case is one where a Defendant's breach of duty was so egregious that it is alleged that it was deliberately committed and covered up. These types of argument have a habit of arising in cases involving professionals breaching regulatory rules during the course of their retainer or preferring their own interests over those of their clients. A classic example is the receipt of large commissions. where claimants then allege that the remuneration structure incentivised the outcome of the advice. This type of argument enables a Claimant to link the non-disclosed pay structure with the content of the professional's advice, and can therefore prove a powerful limitation weapon.

16. *Canada Square Operations Limited v Potter* [2021] EWCA Civ 339 shows how this type of argument can work. It concerned a claim against a lender under s. 140A of the Consumer Credit Act 1974, which permits customers to attack credit agreements based on an "unfair relationship". At first blush, the connection with professional liability cases may be unclear. However, the case concerned the impact of a lender failing to disclose commissions and considered when such non-disclosure can amount to

deliberate concealment. The case is therefore of clear relevance to claims involving professionals who have taken undisclosed remuneration. *Canada Square* also provides helpful insight about other types of cases where it is alleged that a professional had a duty to speak out, e.g. because he had discovered a mistake in his work.

17. At first instance in *Canada Square* the judge had perceived there to be a difference between deliberate concealment on the one hand and non-disclosure on the other. He suggested that s. 32(1)(b) might only apply where a defendant was under a legal duty to speak out.

18. By contrast, Rose LJ found that it was unnecessary to show that a defendant had a legal obligation to disclose a particular fact. It was enough if he had a moral obligation, or some other obligation that the court could regard as "sufficient". At paras. 75 to 77 she observed as follows:

> *"75. Section 32(1)(b) does not refer to a duty to disclose, it refers only to concealment. Inherent in the concept of 'concealing' something is the existence of some obligation to disclose it. To construe section 32(1)(b) as being satisfied only if there is a pre-existing legal duty to disclose seems to me to add an unwarranted and unhelpful gloss on the clear words of the statute. For the purposes of the Act that obligation need only be one arising from a combination of utility and morality…*
>
> *I can see no reason why Parliament should require the court to undertake a detailed analysis of implied contractual terms between the parties or the precise scope of the tortious duties of care owed by the defendant when considering whether section 32(1)(b) is satisfied. The focus should instead be on the conduct which is alleged to amount to the concealment and on an analysis of whether the defendant was, at that point, under a sufficient obligation to disclose for the failure to disclose to amount to concealment as at that date.*

19. Males LJ made a similar point at para 172, as follows:

> *"As a matter of ordinary language, a conscious decision not to disclose facts which it would be reasonable to expect a defendant to disclose in order to avoid unfairness seems to me, at any rate in the absence of some unusual circumstances, to be properly described as deliberate concealment. If I consciously decide not to tell you something which I know that you would wish to know and will not like, and which it would be reasonable for me to tell you in order that the relationship between us should be fair, I am deliberately concealing it from you. If the fact is relevant to a right of action which*

you have against me, I am still deliberately concealing it from you, whether or not I know anything about your right of action."

20. This approach lays itself open to the criticism that it is uncertain. One judge's view of moral obligations, reasonableness or fairness may not be the same as another. In a section which requires deliberate concealment, it can be argued that a more exacting test should be set to identify what type of conduct by a Defendant offends against the section. The uncertainty is likely to cause particular difficulties in cases where a Defendant had some sort of suspicion that he had got something wrong, but was not under any clear regulatory duty to approach the client. An example might be a professional handling a later case who comes to understand a point of law better than he did before, and has a lurking doubt about a previous settlement. Does that person have a moral duty to go back through the earlier file and think about whether the previous advice was right or wrong?

21. There are observations in earlier cases which suggest that it would be unlikely that a court would expect a professional to go trawling through prior work to notify clients of doubts. In *Williams v Fanshaw Porter & Hazlehurst* [2004] 1 WLR 3185, the Court of Appeal had also considered what kind of duty a Defendant needed to have to speak out, in the following terms;

> *"It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose <u>either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant</u>[2], but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."*

22. It is not an ordinary aspect of a relationship between a professional and client for professionals to owe a duty to reconsider their advice. This can happen during an ongoing relationship, but it is hard for claimants to make out cases based on ongoing duties to deal with a particular point- see further paras 32-36 below. It may therefore

[2] In *Williams,* Mance LJ stated that a solicitor would be under a duty to make the client aware of errors in is work during the course of a retainer. This is often framed as a duty to tell the client of the need to consider getting independent advice.

be that the courts would draw the line at suggesting that a Defendant had a moral duty to dust off earlier work, although the judgments of Rose LJ and Males LJ have made the point one for debate.

What is meant by "deliberate"?

23. The criticism of the approach to disclosure might of course be tempered by the fact that s. 32 requires deliberate concealment. Can it be argued that the inclusion of this word requires an element of knowing or wilful conduct on the part of the Defendant?

24. This point also arose in the *Canada Square* case. In that case, there had been no active decision to conceal the commission from the Claimant; just a failure to do so. Rose LJ considered what mental element was necessary to show that concealment had been deliberate. She identified 4 principal candidates, namely:
    a. Actual awareness by the defendant of his wrongful act that he is concealing;
    b. Wilful blindness about the wrongful act;
    c. Recklessness about the wrongful act, where the defendant is both aware of the risk that a wrongful act has been committed and it is unreasonable for him to act in a certain way based on that risk;
    d. Recklessness about the wrongful act, which lacks the objective aspect of unreasonable conduct.

25. It will be seen that the question of whether the Defendant's conduct was deliberate therefore engaged issues about both subjective knowledge and objective standards of behaviour- which as explained above, is an issue that has arisen in the context of unpicking a claimant's state of knowledge as well.

26. Returning to the list at para. 24 above, the Court of Appeal decided that the relevant test was the third- namely the test for recklessness derived from *R v G and anor* [2003] 1 AC 1034. This test contains both a subjective and an objective element, namely (as depicted at para. 87 of *Canada Square)* that:

> "*a person acts recklessly with respect to a circumstance when he is aware of a risk that it exists or will exist and it is, in the circumstances, known to him, unreasonable to take the risk. A person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk*".

27. The test has similarities with the approach for assessing dishonesty in *Ivey v Genting* [2018] AC 319, in that the starting point is to work out what the defendant knew, and then to consider how a reasonable defendant would have behaved in those circumstances. The point underscores the number of mixed subjective/objective tests now at play in the professional liability sphere.

28. The equating of "deliberate" with "reckless" conduct approach is not without its controversy. There are grounds to suggest that the word "deliberate" requires a sense of the concealment being an intended outcome rather than one that a claimant was indifferent about. However, the broad approach adopted in *Canada Square* is likely to lead Claimants to argue that their task in relying on s. 32 is now easier than it used to be.

<u>What does a Defendant need to have concealed and what does the Claimant need to have discovered?</u>

29. The final area of controversy is what a Claimant needs to have discovered to trigger the running of time. S. 32 states that "*the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake*". In *FII Group Litigation v Revenue & Customers Commissioners* [2020] 3 WLR 1369, in the context of mistake, the Supreme Court suggested that if a Claimant discovered facts that would give him sufficient confidence to embark on the preliminaries to issuing of proceedings (such taking advice, submitting claim, collating evidence), this would be a sufficient trigger. This was an earlier point than had previously been understood to be the case.

30. In *ECU Group plc v HSBC Bank plc* [2021] EWHC 2875 (Ch) Moulder J did not adopt this test in the content of discovering deliberate concealment or fraud. Instead, she referred to the exacting rules required before counsel can plead fraud- namely that counsel must have material before him that he has judged to be reasonably credible and which appears to justify such an allegation: *Medcalf v Mardell* [2002] UKHL 27. She suggested that the relevant test was as follows:

"the approach adopted in these cases of fraud, like that proposed by Lord Brown for cases of mistake, treats the relevant date, for the purposes of the commencement of the limitation period, not as the date when the Claimant knows or can establish the truth, but as the date when he can recognise that a worthwhile claim arises, in Lord Brown's formulation, or can plead a statement of claim, in the formulation preferred in the fraud cases" .

31. This formulation suggests that there may be more latitude afforded to Claimants in cases where they will have to formulate allegations amounting to dishonesty or fraud.

Damage both within and outside the 6 year period

32. A common limitation dispute between professionals and their clients relates to the issue of continuing duties and continuing losses. Claimants faced with limitation problems often argue that an adviser owed a duty to keep his advice under review and to correct it. Defendants sometimes seek to defeat claims by arguing that some of the Claimant's loss is statute barred, and that this defeats the whole claim.

33. In *Sciortino v Beaumont* [2021] 3 WLR 343, a barrister advised a client on two occasions. In April/May 2011, he advised that the client had a possible ground of appeal against orders for possession and sale of his house. He suggested that the bankrupt seek permission to appeal and thereafter try to settle. The tactic proved impossible to pursue because the court ordered a "rolled up" permission and appeal hearing. In October 2011, the barrister advised that the client had a 55-60% prospect of success on the appeal. The appeal failed and the client sued, more than 6 years after April/May 2011 but less than 6 years after October 2011. The barrister sought to rely on limitation, arguing that as some loss had accrued more than 6 years before the claim form was issued, the whole claim was time barred.

34. The barrister relied on para 23 of *Khan v Falvey* [2002] PNLR 28, which states that:

"a claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period if he has suffered damage from the same wrongful acts outside that period".

35. The Court of Appeal held that where there are two separate breaches of duty- one which causes loss that is time barred and the other which causes loss that occurred less than 6 years ago, a Claimant can sue for the latter. The fact that the subject matter of each breach was the same did not mean there was only one cause of action.

36. This case is likely to encourage Claimants to cast around for continuing or fresh duties to revisit earlier advice, although the courts have generally discouraged such arguments, and the Court of Appeal was careful to do so again at paras. 47-48 of *Sciortino*.

The running of time – *Matthews v Sedman* [2021] UKSC 19

<u>The facts of *Matthews*</u>

37. Missing a limitation deadline is the stuff of nightmares. But in practice, it is not uncommon to see claims for professional negligence being brought on the cusp of being statute barred. Such claims commonly involve factually complex and technical allegations relating to multiple parties, and the involvement of multiple insurers. The need to take instructions, gather evidence, explore settlement and comply with the pre-action protocol, can all result in substantial delays to the commencement of claims. This poses an obvious trap for Claimants, particularly when coupled with uncertain limitation rules, or simply a lack of awareness on the part of practitioners of how limitation operates.

38. Some welcome clarity has been provided by the Supreme Court, which recently considered the fundamental question of how and when time starts to run for the purposes of limitation. In *Matthews v Sedman*, the Supreme Court had to decide whether a Claimant had brought its claim in the nick of time, or a day late. Everything turned on how a "*midnight deadline*" operated to trigger the start of the applicable six-year limitation period.

39. The claim was brought by current trustees (the Appellants) against former trustees (the Respondents) who, it was said, had acted in breach of duty by themselves not bringing a timely claim under a scheme of arrangement ("**the Welcome Scheme**"). The Welcome Scheme rules stated that: "*in order to be entitled to any Scheme Payment, Scheme Creditors must, on or prior to the Bar Date, submit a Claim Form*". The "Bar Date" was 2 June 2011. Thus, as the Supreme Court held: "*a valid claim in the Welcome Scheme could have been made up to midnight (at the end of the day) on Thursday 2 June 2011*" [11].

40. The Respondents failed to bring a claim under the Welcome Scheme rules, on or before 2 June 2011, and the Appellants issued a claim relating to that failure on Monday 5 June 2017. The Respondents then applied to strike out the claim, on the basis that it had been brought after the expiry of any potentially relevant six-year limitation periods under the Limitation Act 1980:
    a. In section 2 (actions in tort): "*An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued*".
    b. In section 5 (actions on simple contract): "*An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued*".
    c. In section 21, providing for time limits in respect of trust property, the relevant time limit was agreed to be that under subsection (3) which states "*an action by a beneficiary … in respect of any breach of trust, …, shall not be brought after the expiration of six years from the date on which the right of action accrued*".

41. The question for the Court was simple: did the limitation period for bringing a claim against the former trustees expire at the end of Friday 2 June 2017 (making the action statute barred), or did it expire at the end of Saturday 3 June 2017 (so that the action was brought in time on the following Monday)?[3]

<u>The arguments</u>

42. Both the High Court and the Court of Appeal found for the Respondents, holding that the claim was statute barred, and that the claim should be struck out. The Supreme Court then granted leave for a further and final appeal.

43. The Appellants argued that the cause of action accrued on 3 June 2011, which should therefore be excluded from the reckoning of time for the purposes of limitation. Relying on the wording of the relevant sections of the Limitation Act, the Appellants further submitted that:
    a. The "date" on which the cause of action accrued could only have been 3 June 2011 – rather than some "*metaphysical point in time*" between 2/3 June 2011. The

[3] As noted by the Supreme Court at [3] "*Since the necessary act on the part of the appellants was the issue of the claim form in the legal action, something which can only be done when the court office is open, and the office is shut at the weekend, then it is common ground, following Pritam Kaur v S Russell & Sons Ltd [1973] QB 336, that the final day for issue would be Monday 5 June 2017*."

expiry of the deadline for bringing a claim and the consequent loss suffered by the trust can only have happened sequentially rather than simultaneously – pushing the point of accrual of the cause of action into 3 June 2011 (of significance, given points (b) and (c) below).

b. On the basis of long-standing authority, the six years "from" that date (i.e. 3 June 2011) for a cause of action to be brought, excludes the date of the event itself from the reckoning of time.
c. That the cause of action only "accrued" on a particular date – and that as an indivisible unit of time, the entire day must be excluded from the calculation in all cases.

44. The Respondents' position was rather more pragmatic. As the claim was based on negligence by omission (the failure to submit a claim form under the Welcome Scheme rules) the expiry of time for submitting a claim and the cause of action occurred at precisely the same time, and were "*inextricably linked*". Whether the precise moment was right at the end of 2 June or at the first moment of 3 June 2011 did not, in reality, matter. In practice, the Appellants had the entirety of 3 June 2011 in which to bring a claim. The case was therefore distinct from those relied on by the Appellant, where causes of action accrued part way through a day – requiring that day to be omitted from the limitation calculation.

45. A number of cases were advanced by the Appellant to support its position.[4] But in examining each of these, the Supreme Court found that no consideration was given to "*the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day*" [26]-[29]. The Supreme Court also defended the authority of *Gelmini v Moriggia* [1913] 2 KB 549, a midnight deadline case which (despite some obscure reasoning) was found to support the essential point that an action could in practice be brought throughout the course of the day following the midnight deadline.

[4] *Mercer v Ogilvy* (1796) 3 Pat App 434 (see [26]), *Lester v Garland* (1808) 15 Ves Jun 248 (33 ER 748) (see [27]), *The Goldsmiths' Co v The West Metropolitan Railway Co* [1904] 1 KB 1 (see [28]), *Stewart v Chapman* [1951] 2 KB 792 (see [29]).

46. In the end, the Supreme Court reached the same conclusion as the Courts below – the action was statute barred. In the judgment of Lord Stephens (with whom the five other justices agreed):

> [46]…*For my own part I would prefer the approach of Underhill LJ that "the cause of action arises at, not after, midnight". However, it is not necessary to endorse any of the competing answers to that issue and I do not do so, because, as in Gelmini, whether the cause of action accrued at the expiry of 2 June 2011 or at the very start of 3 June 2011 there is no significant difference, in that 3 June 2011 was for practical purposes a complete undivided day.*
>
> [47] *I consider that the reason for the general rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day. The justification for that rule is straightforward; it is intended to prevent part of a day being counted as a whole day for the purposes of limitation, thereby prejudicing the claimant and interfering with the time periods stipulated in the Limitation Act 1980. However, in this case it was, in my opinion correctly, submitted that in a midnight deadline case even if the cause of action accrued at the very start of the day following midnight, that day was a complete undivided day. I consider that it would impermissibly transcend practical reality if the stroke of midnight or some infinitesimal division of a second after midnight, led to the conclusion that the concept of an undivided day was no longer appropriate. In that sense this would not only be impermissible metaphysics but also, in this context, such a minimum period of time does not cross the threshold as capable of being recognised by the law. Whether the issue is framed in terms of metaphysics, which the common law eschews, or of the principle that the law does not concern itself with trifling matters, the conclusion is the same: realistically, there is no fraction of a day… I prefer to consider the impact of holding that a full undivided day in a midnight deadline case is to be excluded from the reckoning of time. If that day were excluded from the computation of time then the limitation period would be six years and one complete day. I consider that would unduly distort the six-year limitation period laid down by Parliament and would prejudice the defendant by lengthening the statutory limitation period by a complete day.*
>
> [48] *I also consider that the impact of excluding 3 June 2011 can be seen by applying the criteria suggested in Radcliffe of imagining a limitation period of one day. If in this case 3 June 2011 were excluded from the computation and if the limitation period were a single day, then the impact would be to allow two complete days within which to commence an action…*

<u>Metaphysics – or common sense?</u>

47. When dealing with a breach of duty arising out of a missed midnight deadline, the "following" day <u>will count</u> towards the calculation of limitation. It was on that basis that the strike out application succeeded.

48. However, the journey taken by the Supreme Court in *Matthews* is just as interesting as its final conclusion. What the case shows is that even in a highly technical area such as limitation, there is limit to how much logic-chopping and "*metaphysics*" the Court will tolerate – particularly where this seems to conflict with the practical reality of the situation. The Court's conclusion ultimately reflected not only its agreement with the Respondents' preferred outcome, but also the practicality of the arguments they advanced.

49. That being said, the Court did not reject any kind of philosophical analysis. Following the case of *Radcliffe v Bartholomew* [1892] 1 QB 161, Lord Stephens deployed a thought experiment in support of the Court's conclusion, in the form of a "*one-day limitation period*" test (see [48], extracted just above). But the utility of this cross-check is doubtful, and the reasoning appears to be circular. Justifying the Court's conclusion by stating that "*two complete days*" would be available to commence an action if the 3 June 2011 were excluded appears to assume the point the Court was trying to prove (namely, that there is a "*complete*" day to bring a claim following the midnight deadline). The test simply begs the question of precisely when the cause of action accrued, whether there is indeed a "complete day" if it accrued a moment after midnight, and if it did, what amount of time is sufficiently "de minimis" so as not to affect the conclusion that a "complete day" was available for the bringing of the claim.

50. A better explanation for the outcome is found in the preceding paragraph of the judgment (see [47], extracted above), and the underlying pragmatism of the judgment as a whole. At the crux of the Supreme Court's substantive conclusion was the view that the law "*does not concern itself with trifling matters*": which include squabbles over the "*infinitesimal division of a second after midnight*". Where a midnight deadline is at stake, there is "*realistically…no fraction of a day*" to be worrying about in the first place – whatever the philosophers might say. It would, in the words of Lord Stephens "*impermissibly transcend practical reality*" if the Appellants' subtle metaphysics were to win the day.

Amendments after the expiry of a limitation period

51. Limitation is not only important when bringing and defending claims. It is also relevant in the event that a claim needs to be amended following the expiry of an applicable limitation period. Amendments to pleadings are of course common in claims for professional negligence, and commonly arise following disclosure, the receipt of new expert input, or as a response to points taken by the other side. It is crucial that practitioners acting for both Claimants and Defendants are alive to the rules applicable to amendments after the expiry of a relevant limitation period, which are not always as straightforward as they seem.

52. Section 35 of the Limitation Act 1980 addresses the introduction of "*new claims*" into existing proceedings, and it is carried over into procedural rules by CPR 17.4 which reads:

> *"(1) This rule applies where –*
> *(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and*
> *(b) a period of limitation has expired under –*
> *(i) the Limitation Act 1980…*
> *(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."*

53. Following *Hyde v Nygate* [2019] EWHC 1516 (Ch), there are four key questions to be asked when considering the application of CPR 17.4:
    a. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
    b. Do the proposed amendments seek to add or substitute a new cause of action?
    c. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?
    d. Should the court exercise its discretion to allow the amendment?

54. In two very recent cases, the Court of Appeal has considered the first three of these tests. In *Cameron Taylor Consulting*, the question was whether the amendments

proposed could reasonably be said to fall outside the applicable limitation period. In *Mulalley*, a case involving combustible cladding, the issue was whether the proposed amendments sought to add a new cause of action and, if so, whether this arose out of the same or substantially the same facts already in issue.

Are the proposed amendments outside the applicable limitation period?

55. In *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] EWCA Civ 31, a claim was originally brought by BDW against engineers in respect of alleged structural problems at the "Capital East" development. On 17 and 18 March 2020, the claim form was amended and re-amended in quick succession to add additional defendants (including CTC), and to bring claims against CT1/CTC in respect of a number of further housing blocks at Feltham. BDW's claims (including the Feltham claims) were pleaded out in a Particulars of Claim dated 29 May 2020.

56. BDW subsequently accepted that any of its new claims which fell outside the 15-year longstop in s.14B of the Limitation Act 1980 would be statute barred. BDW therefore agreed to limit any claim in respect of the Feltham development to structural drawings issued after 18 March 2005 – the date 15 years prior to the date of the re-amended claim form (18 March 2020). The Claimant's counsel labelled this the "*constrained case*". The constrained case was not, however, set out in BDW's Particulars of Claim.

57. At first instance, following CTC's application to disallow the amendments, the judge gave a "*lengthy* ex tempore *judgment*" allowing the amendments, and finding that there was no issue with limitation.[5] The judge held that the limitation period under section 14B ran from the "*acts or omissions*" which were alleged to constitute negligence, and that on the constrained case, BDW only sought to rely on acts and omissions falling within the applicable limitation period. He rejected CTC's submission that BDW's failure to prove that any damage had resulted from the breaches alleged in the constrained case made it arguable that the claim was statute barred.

58. The same arguments were played out before the Court of Appeal. BDW again taking the position that as the only drawings relied on in the constrained case were issued

[5] It was accepted that the amendments would not otherwise have been permitted, given that they related to new claims which did not arise out of the same/substantially the same facts as the originally pleaded case.

after the 18 March 2005 cut-off date, then the longstop in section 14B could not apply to bar the claim. Coulson LJ, though critical of BDW's failure to plead-out the constrained case in full, was reluctantly prepared to consider the appeal on that basis [42]. Thus, on the Claimant's case:

> *"the amendment issue becomes simplicity itself: there can be no limitation defence (reasonably arguable or otherwise) because the only claims that will be made concern drawings issued after 18 March 2005, which are self-evidently within the limitation period. On the face of Mr Hargreaves' typically beguiling submissions, that appears to be a neat and complete solution to the problem"*. [43]

59. The solution was not, however, accepted by the Court of Appeal, which considered BDW's argument to be "fundamentally flawed" in two important respects:
    a. The Court found that it was in fact "*reasonably arguable*" on the facts that the relevant drawings relied on in the constrained case were issued to the contractor *before* 18 March 2005. Therefore, the Defendant did have a reasonably arguable case on the facts that the new claims introduced by the amendments were statute barred.
    b. BDW's position conflicted with the terms of section 14B, which provides that the longstop period will run from the date of the act or omission alleged to constitute negligence and "*to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part)*". BDW had sought to get around this rule by only relying on drawings which were issued after 18 March 2005. But it simply asserted "*without more*" that the overall damages claim was unaffected. On the Court's view, it was at least reasonably arguable that the drawings relied on in the constrained case gave rise to no damage whatsoever and therefore, that the amendments did not escape the clutches of s.14B being "*new claims made after the limitation period identified in s.14B had expired*."

60. The amendments were therefore rejected, and a further amendment seeking to join CTC as a party to the claim also failed.

61. The Court of Appeal's judgment in *Cameron Taylor Consulting* gives helpful guidance on a range of points relating to amendments and the effect of limitation. But reflecting on the judgment, there are three practical tips for practitioners to keep in mind:

a. Consider protective proceedings, and bring them promptly. Following the guidance of Jackson LJ in *Chandra v Brooke North (A Firm) and Anr* [2013] EWCA Civ 1559, if the Defendant has a reasonably arguable case on limitation, the Claimant's application to amend will be refused. Evidently, this test is more generous to Defendants than that applied at trial or at a preliminary issues hearing, where the defence would need to be made out on the balance of probabilities in the ordinary way. If a Claimant wishes to advance new claims, and to have the limitation issue heard "in full", it is advisable to bring a separate claim at the same time as seeking permission to amend in existing proceedings. If the application in the existing proceedings fails, the separate action will nevertheless proceed, and limitation can be dealt with at trial. If the application succeeds, the redundant claim can be stayed or discontinued. Any delay in bringing those protective proceedings will, of course, prejudice the Claimant's arguments on limitation, in the event that the issue needs to be raised in respect of the claims in those proceedings.

b. Carefully consider how the relevant limitation period runs. As noted above in relation to *Matthews v Sedman*, Limitation periods can accrue at different points, and run in different ways. If a Claimant wishes to argue that there is no "*reasonably arguable*" case on limitation, it should ensure that this really is the position based on a close reading of the Limitation Act and given the content of the amendments in question.

c. Draft proposed amendments carefully and thoroughly. This point follows on from the last. Not only will a carefully drafted amendment be of assistance to the Court, it is a good way of focusing minds on how best to avoid any limitation issues which may be raised.

New causes of action

62. Another source of difficulty in applying CPR 17.4 has been determining what counts as a "*new cause of action*" for the purposes of the rule. The question is often highly fact specific, but the position was summarised by Tomlinson LJ in *Co-Operative Group Limited v Birse Developments Limited & Anr.* [2013] EWCA Civ 474; [2013] BLR 383 as follows:

"20. In the quest for what constitutes a "new" cause of action, i.e. a cause of action different from that already asserted, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. Thus "the pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action" – see Paragon Finance v Thakerar [1999] 1 All ER 400 at 405 per Millett LJ. "So in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading " - see per Robert Walker LJ in Smith v Henniker-Major [2003] Ch 182 at 210.
21. The court is therefore concerned with the comparison of "the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed" – see per David Richards J in HMRC v Begum [2010] EWHC 1799 (Ch) at paragraph 32. "A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action" – ibid, paragraph 30."

63. Further guidance has also been given in respect of specific difficult cases. For example, if different facts are alleged to constitute a breach of an *already* pleaded duty, does this count as a "new claim"? On this point, Tomlinson endorsed the view of Jackson J (as he then was) in *Secretary of State for Transport v Pell Frischmann Consultants Limited* [2006] EWHC 2009 (TCC), where he indicated that in such circumstances "*it would be a question of fact and degree whether that constitutes a new claim*".

64. The point came before the Court of Appeal again in the recent case of *Mulalley & Co. Limited v Martlet Homes Ltd* [2022] EWCA Civ 32. In that case, Martlet brought claims against Mulalley in respect of refurbishment work carried out at a number of towers owned by Martlet between 2005 and 2008. Following the Grenfell fire, major fire safety defects were discovered, and Martlet sought to claim against Mulalley in respect of alleged deficiencies in the STO fire protection system it installed.

65. Mulalley argued that the system complied with the relevant Building Regulations in force at the time. Further, it was said that the cause of Martlet's loss was the need to comply with new Government advice and requirements in 2017 relating to the presence of combustible insulation, rather than any breach of contract on the part of Mulalley. Having originally pleaded various allegations of inadequate design and workmanship, and after receiving Mulalley's defence, Martlet sought to amend its Particulars of Claim to state expressly that the EPS insulation installed did not comply with the Building Regulations at the time, and that the causation defence arose out of

Mulalley's wrongful choice of the STO system, which included the use of combustible cladding ("**the selection of combustible insulation claim**"). Mulalley objected, on the grounds that these amendments introduced new causes of action, which did not arise out of the same or substantially the same facts as pleaded in the original Particulars of Claim, and which were statute barred.

66. The facts which weighed in favour of the selection of combustible insulation claim *not* being a "new claim" were said to be (amongst other things) that it "*does not rely on any duty or obligation that had not previously been pleaded by Martlet. In particular, precisely the same requirements of the Building Regulations are relied on, and the same loss and damage is claimed*." However, for three reasons, the Court of Appeal concluded that the amendments did give rise to a new claim within the meaning of the rule:
    a. The combustible insulation claim was pleaded as a contingency, which only arose if (1) Martlet's original claims succeeded, and (2) Mulalley then showed that as a matter of causation, the replacement of the system was always going to be required because of the use of EPS insulation. The amendments added a "*further act of the drama*" by inserting an additional allegation that even if this is correct, Mulalley remained responsible for choosing the insulation in the first place. Accordingly, Mulalley may be deprived of a previously viable defence.
    b. Whereas the substance of the original claim was based on workmanship, the combustible insulation claim was concerned with design choices. Originally no claim was made that a component part of the STO system was itself inadequate or not fit for purpose – but this formed the essence of the combustible insulation claim.
    c. A consideration of the "*nature, scope and extent*" of the original and amended claims also led to the same result.

<u>The same or substantially the same facts</u>

67. Returning to the guidance in *Hyde v Nygate* set out at paragraph 53 above, a further question then arises: does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

68. On this point, the Court in *Mulllaley* considered *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 WLR 1828 where the Claimant sought permission to amend to rely on the

Defendant's own pleaded case, which the Claimant sought to turn against the Defendant, in order to establish liability. Giving permission to amend in such circumstances has been said to be justified as there is "*no unfairness and no subversion*" of the limitation rules in allowing a claimant to turn the Defendant's own case against them.[6]

69. In considering the ratio of *Goode*, the Court of Appeal disagreed with Mulalley's interpretation that *Goode* could only assist a Claimant where no new facts or matters *at all* were relied on, beyond what was pleaded in the Defence. Amongst other things, the wording of rule 17.4 ("*…or substantially the same*") indicated that there was some flexibility in respect of the pleading of further facts as part of an amended case, and the Court in *Mulalley* considered that whether the amendments were compared against the original particulars of claim, or those facts put in issue by the defence, this element of flexibility should remain. "*The principle in Goode v Martin, as set out in the ratio, is that any proposed amendment has to be considered by reference to the same or substantially the same facts as are already in issue, including those set out in the defence. Beyond that, it is a question of fact and degree*."

70. At first instance, the judge had found that the new causes of action *did* arise out of the same or substantially the same facts as were already in issue. The Court of Appeal[7] agreed.
    a. Many of the features relied on by Martlet in support of its own (albeit unsuccessful) case on the "new cause of action" point, supported its case at this stage of the analysis. Even without considering the Defence, the nature of the combustible insulation claim shows that it arose out of the same or substantially the same facts as were contained in the original Particulars of Claim. It merely identified a further reason for the replacement of the STO system – albeit one which required a further element of factual investigation going beyond that envisaged in the original Particulars.
    b. The combustible insulation claim also, however, arose out of the same or substantially the same facts as are already in issue having regard to the Defence advanced by Mulalley. It *"flows naturally"* from the way in which the Defence

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[6] *Mastercard Inc 7 others v Deutsche Bahn AG & Others* [2017] EWCA Civ 272 at [41].
[7] Considering the issue "*de novo*", despite the evaluative nature of the original decision [83].

was put, and may not in fact introduce any further investigation not already triggered by the terms of Mulalley's Defence [90], given that Mulalley expressly put in issue the adequacy of the STO system – including the EPS insulation – as a matter going to both liability and causation.

71. The Court noted that despite the guidance offered in previous cases, the question would always remain "*a matter of fact and degree in each case*". Nevertheless, the Court of Appeal's reasoning will no doubt assist practitioners in clarifying the effect of previous authorities (including *Goode v Martin*), and in providing a structure for how to approach the test for "*new causes of action*" under CPR 17.4.

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