LIMITATION UPDATE: HOLT v HOLLEY & STEER [2020] EWCA Civ 851

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Changing Perceptions

Introduction

The Court of Appeal has recently handed down its decision in the case of ***Holt v Holley & Steer [2020] EWCA Civ 851.*** Whilst the decision is fact specific, it has provided welcome guidance on ascertaining when time starts to run in negligence for claims against solicitors based on a failure to obtain a direction to enable a client to rely on valuation evidence. This is specially in the context of a solicitor acting in financial relief proceedings in respect of a client's divorce. However, in our view, it may well have wider implications in relation to similar failures in other civil claims.

We have therefore set out a short update on the decision.

Limitation in Negligence Claims – The Statutory Provision

The applicability of limitation can be a particularly useful weapon in a Defendant's lawyer's armoury. ***Section 2 of the Limitation Act 1980*** ("the Limitation Act") provides that 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. It is trite law that such a cause of action accrues once actionable "*damage*" is suffered. However, what constitutes actionable "*damage*" is not always a straightforward question and the answer to it will depend on the specific facts of any given case.

The Facts

As with any case where limitation is in issue, the chronology of events is critical. In this case it was as follows as referred to by the Court of Appeal.

On 15 February 2011, the Claimant's husband initiated financial relief proceedings upon divorce from the Claimant and the Claimant retained the Defendant firm of solicitors ("the Solicitors") to act on her behalf in those proceedings.

On 1 July 2011, the First Directions Appointment ("the FDA") took place at which directions were given for valuations to be obtained in respect of the family home and some adjoining land but not certain buy-to-let properties or jewellery.

On 11 October 2011, the Financial Dispute Resolution hearing ("the FDR Hearing") took place. At the FDR Hearing, orders were made for the Claimant's husband to provide valuation evidence as to the value of the items of jewellery that he alleged the Claimant had. However, no orders were sought on behalf of the Claimant to enable her to adduce valuation evidence in relation to the jewellery or buy-to-let properties.

In January 2012, the Claimant's husband's solicitors had made clear that they would object to any new valuation evidence being adduced by the Claimant.

Between 16 February and 16 March 2012, over four days, the final hearing took place in the financial relief proceedings.

On 10 April 2012, the Court circulated a drafted judgment.

On 30 May 2012, the judgment was handed down.

On 5 April 2018, in response to a claim by the Solicitors for unpaid fees, the Claimant issued proceedings against the Solicitors alleging professional negligence. Whilst this point was not in issue in this case, it is worth being aware that time for the purpose of the Limitation Act starts to run when an action is "*brought*" rather than when court proceedings are "*issued*". The date when a claim is brought is not necessarily the same as when proceedings in respect of the claim are issued. There can be a disparity between the dates when a claim is "*brought*" and when a Claim Form is "*issued*". For example, if a Claim Form and the correct court fee is left with the court on day one, but is not issued until day two, the relevant date for calculating limitation is the first day as that is when the claim has been brought rather than the second day when the Claim Form was actually issued as explained by the Court of Appeal in ***Barnes v St Helens Metropolitan Borough Council [2006] EWCA Civ 1372.*** As the point is not in issue, in this note we treat the date the Claim Form was issued as the date when the claim was brought for the purpose of the Limitation Act.

The Earlier Decisions

In the first instance, District Judge Watkins held that damage was sustained on 30 May 2012 when judgment in the financial relief proceedings was handed down and the order was made and, therefore, that the claim was in time. However, His Honour Judge Ralton held the claim was out of time because damage was sustained by 16 March 2012, being the last day of the final hearing in the financial relief proceedings as by that point "*the parties would know without doubt on that date that [the judge] would make his mind up on the basis of the values presented*".

When Did Time Start to Run under Section 2 of the Limitation Act? The Competing Arguments

The key issue is when the Claimant suffered actionable "*damage*" as that was the point when the cause of action in tort accrued and, therefore, when time stared to run under section 2 of the Limitation Act.

The Claimant's Position

The case advanced on behalf of the Claimant was that at the earliest damage was suffered (and time would start to run) on 30 May 2012, being the date judgment was handed down in the financial relief proceedings as this was when the Claimant was financially worse off. If that were correct, the claim would be in time given that the Claim Form had been issued within 6 years of that date on 5 April 2018.

The Claimant relied on a passage of the speech of Lord Hoffman in the House of Lords case of ***Nykredit Mortgage Bank plc v Edward Erdman Group Limited [1997] 1 WLR 1627***. This was a case where the House of Lords was considering when damage was suffered by a lender who relied on a negligent valuation. The passage relied on was one which stated:

"*Relevant loss is suffered when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been*" (emphasis added).

The Claimant also relied on a passage from the judgment of the House of Lords in ***Law Society v Stephton & others (2006) 2 AC 543*** where Lord Walker held:

"*…. It is a commonplace of negligence actions of all sorts that a cause of action may arise long before it is possible to quantify precisely the damages eventually recoverable. But there are other situations in which the correct legal analysis is that, however great may be the prospect (or risk) of economic loss, actionable damage has not yet occurred…..*"

Stephton were a firm of accountants who audited a firm of solicitors to ensure compliance with the SRA Accounts Rules. They failed to notice that client monies had been misappropriated between about 1989 and 1996. From July 1996, clients of the solicitors brought claims the Solicitors Compensation Fund. In 2002, the Law Society brought proceedings against the accountants for negligence to recover monies paid by the fund. The Court of Appeal held that a contingent liability, such as the possibility of an obligation to make a future payment, was **not** damage until the continency accrued. The House of Lords agreed.

The Claimant's position was her situation was of the kind specified in the second sentence of Lord Walker's passage in ***Stephton***. The starting point for the Claimant's argument was that financial relief proceedings in divorce were a very particular type of litigation where the court had a very wide discretion to produce a fair result and the family judge is not necessarily confined, as in other civil action, by the parties approach to what evidence is material (such as valuations) and what is not. As such, it was argued that the court had a very wide discretion and could call for any evidence it wished such that the outcome of the case was contingent on a judgment that may never occur. To illustrate this point, in light of the submissions about the wide discretion of the court in such financial relief proceedings, it was argued that the failure of the Claimant to adduce valuation evidence ***may potentially*** have made no difference to the outcome of the case such that it could only have been when judgment was actually handed down on 30 May 2012 that damage was suffered and time started to run for the purpose of section 2 of the Limitation Act.

The Defendant's Position

The case advanced on behalf of the Solicitors was that the issue of what constituted damage must be decided on the basis of the facts, which had given rise to the Claimant's cause of action as had been set out in the Claimant's Particulars of Claim. The Claimant's pleaded case against the Solicitors insofar as is relevant was that:

a. The Solicitors, in breach of duty, failed to obtain expert valuations of the buy-to-let property portfolio and jewellery and failed to secure permission to adduce that evidence in the financial relief proceedings.

b. In relation to causation, it was said that the alleged breach of duty caused the Claimant's husband to have a cogent objection to the late introduction of such evidence and, ultimately, to the judge not considering such evidence.

c. In relation to loss, it was specifically pleaded what valuations the judge would have had before him and as such it was alleged that would have resulted in the judge giving the Claimant a more favourable judgment to the tune of about £76,000.

It was submitted on behalf of the Solicitors that the Claimant had suffered damage on the basis that the Claimant had lost the chance to rely on the valuations that she alleged she should have been advised to obtain. The logic of that is that loss of chance claims can be valued in financial terms. It seems that at the very latest this was alleged to be on 16 March 2012, which was the last day of the final hearing in the financial relief proceedings. If the Court of Appeal agreed with this, then the Claim Form had been issued out of time.

The Court of Appeal's Decision

The question for the Court of Appeal was which of Lord Walker's categories as explained in ***Stephton*** did this case fit. That is to say, the question was whether this was a case where:

a. The Claimant had suffered actual damage before the final judgment was handed down in which case the claim was out of time; or

b. Whilst the Claimant was at risk of suffering a loss, it was not capable of arising until the final judgment was handed down in which case the claim was in time.

The Court of Appeal held that that the core question was at which point the Claimant was "*financially worse off*" / had suffered "*measurable damage*". It was at this point time started to run under section 2 of the Limitation Act.

The Court of Appeal had referred to another passage in ***Nykredit*** where Lord Nicholls agreed that actual damage included:

"*... any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases....*" (emphasis added)

The Court of Appeal found that, on the basis of the pleaded case, "*there was no difficulty in measuring a loss at a time when the chance of introducing further valuation evidence became in reality impossible*" because at that point the Claimant "*had lost the opportunity*" or chance to invite the court to assess her case based on what she alleged were proper valuations. The Court of Appeal explained that they agreed with the Claimant's submissions that there is more than one way in which a court can achieve final distribution of matrimonial assets on divorce but stated "*the building blocks of that eventual distribution are set when the values of the parties' assets are computed*" and that in many cases "*the potential consequences of a negligent approach to valuation can be seen and, to some extent, it can be assessed before any judgment is delivered*".

The Court of Appeal found that the Claimant's Particulars of Claim, which explained in financial terms how, but for the Solicitors alleged negligence, she would have obtained a more favourable judgment, was evidence that the Claimant had suffered "*well measurable, if not precisely quantifiable*" loss / damage before the judgment was handed down. The Court of Appeal found that had occurred by 16 March 2012 (being the last day of the final hearing) at the latest but "*in all probability*" much earlier than that. As such, the Claimant's claim was brought out of time having been issued after more than 6 years on 5 April 2018.

The Claimant has sought permission to appeal to the Supreme Court and it will be interesting to see whether this decision is upheld. However, for the time being at least, whilst limitation cases are fact specific, this is a useful decision for those defending allegedly negligent solicitors where the alleged negligence is a failure to obtain directions to rely on valuation evidence and potentially other evidence if that failure diminishes the quality of a client's claim or, indeed, defence.

Further Information

caytonslaw.com

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Sam Moore
Partner
E: moore@caytonslaw.com

Jonathan Battat
Trainee Solicitor
E: battat@caytonslaw.com