Caytons
Changing Perceptions

Over the Limit: when proceedings issued out of time can be effective

INTRODUCTION

The Limitation Act 1980 identifies time periods during which various types of claims must be brought. The Civil Procedure Rules accommodate for the court receiving a claim form within the relevant limitation period but issuing it out of time. A recent decision of the Court of Appeal illustrates the operation of this provision, and its boundaries.

This note surveys the position by reference to this case and earlier authorities.

THE SEARCH FOR CERTAINTY

A claimant cannot be expected to write to confirm that it has abandoned its claim. The Defendant is left to work this out by inference. The date on which it might be thought safe to close the file will differ from case to case. There is always a risk that it might have to be re-opened until the claim can be considered time barred.

In a run of the mill professional liability claim founded on contract and tort, the starting point is that the claimant has to bring a claim within six years of the action accruing. That is, a period equivalent to the entire duration of the Second World War.

There might be scope for the claimant to argue that it did not have the knowledge it needed to bring the claim until later. This would potentially give it a further three years from the date of knowledge, subject to a longstop of fifteen years. In the case of fraud or deliberate concealment, time will not start to run until the claimant could with reasonable diligence have discovered the relevant facts.

Even after the date when it can be said with confidence that the applicable limitation period has expired, there is still scope for an unpleasant surprise. Once it issues a claim form, the claimant has four months to serve it on the defendant. This means that it is prudent to add four months to the limitation deadline. This, then, prolongs the uncertainty.

Once this extended period has elapsed, it might be assumed that certainty had finally been achieved. Regrettably not.

THE INHERENT JURISDICTION

In the pre-CPR case of *Riniker v University College London* (1999), *The Times*, 17 April, the plaintiff lodged a writ within the limitation period. The court office rejected it. By the date that it was issued, the claim was out of time. The Court of Appeal found that the rejection of the writ had been misguided.

It held that the court had inherent jurisdiction in a case such as this to direct that the writ was deemed to have been issued on the date on which it should have been issued.

THE PRACTICE DIRECTION

CPR Practice Direction 7A 6.1. ('the Practice Direction') now provides that (emphasis added):

> *Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form **as issued** was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.*

THE AUTHORITIES

In *St Helens MBC v Barnes* [2006] EWCA Civ 1372, it was argued that the Practice Direction was wrong. Tuckey LJ (with whom Arden and Lloyd LJJ agreed) took as his starting point that he would expect the date to be fixed by reference to something which the claimant has to do, rather than something to be done by someone else. He concluded that, as a claimant has no control over the court office, it should not bear the risk that the office will not process the claim form in time. On this foundation, he was satisfied that the Practice Direction was indeed correct. He held that time stopped running for limitation purposes when the claimant delivered the claim form to the court office.

In *Page and anr v Hewetts and anr* [2012] EWCA Civ 805, the evidence of the claimant's solicitor was that the court received a claim form in time but lost it. The claimant filed another, but by then the limitation period had expired. The Master was evidently sceptical about the evidence. He indicated that he was not satisfied on the balance of probabilities that the earlier claim form ever reached the court office.

In the Court of Appeal, Lewison LJ (with whom Dame Janet Smith and Laws LJ agreed) held that the Master had clearly applied the wrong test. The question for him on an application for summary judgment was whether the claimant had a realistic prospect of establishing the point.

He recited that a key battleground before the Master and the Judge was whether "*the claim form as issued*" had to be the same piece of paper as the one received by the court office. Both had accepted that it did, and that this meant that the claimant could not rely on the claim form which had allegedly been lost. Lewison LJ indicated that this was the wrong subject matter to debate but gave no guidance on what "*the claim form as issued*" might mean.

The successful appeal was a Pyrrhic victory for the claimants. The claim was remitted to the High Court. Limitation was tried as a preliminary issue. Hildyard J held that the claim had not been brought in time because the claimant had not paid the right fee[1]. John Male KC (sitting as a Deputy High Court Judge) reached the same conclusion in *Lewis v Ward Hadaway* [2016] 4 WLR 6 where the claimants had deliberately understated the value of their claims to reduce the fees which they had to pay. However, Turner J took a different view on similar facts in *Atha & Co v Liddle* [2018] 1 WLR 4953.

The meaning of "*the claim form as issued*" was considered in *Chelfat v Hutchinson 3G* [2022] EWCA Civ 455. The claimant was a litigant in person. A few days before the expiry of the limitation period, she filed a claim form via the County Court Money Claim Centre in Salford. In it, she identified an address in Scotland for service on the defendant. The CCMC rejected it. This was because the claimant had failed to complete a Form N510 for service out of the jurisdiction. She filed a further claim form out of time. On this occasion, she gave an English address for service on the defendant. The defendant applied to strike out the claim form. It succeeded before the District Judge. The claimant's appeal to a Circuit Judge failed. She tried again in the Court of Appeal.

Coulson LJ (with whom Stuart-Smith and Peter Jackson LJJ agreed) held that CCMC was not entitled to reject the claim form. He dismissed the argument that the change of the address for service meant that the

[1] [2013] EWHC 2845 (Ch)

document received by the court office was not the claim form as issued. He held that it was sufficient that the substantive content was precisely the same.

The limits of this were explored in *Guo v Kinder and ors* [2024] EWCA Civ 762 in which judgment was handed down earlier this month. This was a solicitors' liability dispute. The claimant was again a litigant in person. She made various complaints surrounding the grant of a lease. The latest of the events complained of happened on 21 August 2015.

In the first iteration of the claim form, the Claimant named the law firm and two individual fee-earners as defendants. She identified the court as "*the High Court of Justice, Queen's Bench Division, Commercial Court, Financial List, Royal Courts of Justice*". She submitted the claim form through the CE-File electronic portal on 4 August 2021. Later the same day, she sent an email to the court enquiries account. She said that she had received no acknowledgement from CE-File and asked if she could file by email instead. She attached a copy of the claim form.

In its reply, the court advised that she needed to clarify which court she wanted proceedings to be issued in. The message contained boilerplate text which identified an email address which could be used for filing but made clear that it should only be used if remission of fees was being sought. An email from CE-File followed to advise that the filing had been rejected because of various defects.

The claimant filed another claim form through CE-File on 25 August 2021. It was sealed by the court two days later. The action was transferred to the County Court. The defendants applied for summary judgment. The Deputy District Judge granted the order sought. On appeal to the High Court, Dodd J held that the claim form as issued bore the date of 25 August 2021 and that any earlier version would necessarily have been dated differently. He dismissed the appeal.

In the Court of Appeal, the claimant prayed in aid both the Practice Direction and the inherent jurisdiction. She was unsuccessful. The court was satisfied that the original claim form was neither received by the court nor 'as issued'.

In this case, it could not be said that the substantive content of the two claim forms was identical. In the claim form as issued, the claimant had added another fee-earner as a defendant. She claimed a different sum of money. She had dropped some particulars of alleged negligence and added some new ones. The matter of the date focussed on by the Judge might seem the least of it.

Asplin LJ (with whom Nugee and Peter Jackson LJJ agreed) expressed reservations about whether the inherent jurisdiction survived the implementation of the Practice Direction but did not consider it necessary to decide the point. The County Court did not have the jurisdiction in any event. She was unimpressed with arguments that the case originated in the High Court or that the Court of Appeal itself could exercise the jurisdiction.

She added *obiter* that, even if the inherent jurisdiction still existed, this would not be a case for invoking it. The court had not wrongly rejected the original claim form. To the extent that the claimant sought to rely on her email to the enquiries account, this could not be considered receipt by the court office. As Nugee LJ put it in oral argument, that was the equivalent of handing a document to a member of the court staff in the corridor and saying that it had been filed.

DISCUSSION

The Practice Direction has the potential to rescue proceedings issued outside the limitation period, provided that the claim form was received by the court office in time. As *Guo* clearly illustrates, there are two hurdles for the claimant to surmount: can the claim form properly be said to have been received by the court office, and, if so, was it the claim form as issued,

The answer to the first question might differ according to whether the claim form was validly rejected. It will not be enough to establish that the claim form was in the possession of the Court Service within the limitation period. It will need to have been filed in a prescribed way. The second would seem to be a matter of degree.

The Court of Appeal in *Guo* did not say that the Judge was wrong to hold that redating the claim form would be fatal but identified this as but one of a number of changes. It is not immediately obvious why this should be considered a substantive change conceptually distinct from a change in an address for service. But however that may be, it is likely that any one of the changes to the parties, allegations made and amount claimed would have been enough.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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