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Professional Services Newsletter

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LIMITATION - A Second Bite of the Cherry?

The House of Lords' judgment in Horton -v- Sadler (2006) 3 All ER 1177 has reversed their previous decision in Walkley -v- Precision Forgings Ltd that had stood for almost 30 years.

Walkley provided Defendants with an absolute defence to fresh claims brought outside the limitation period, where an earlier Action had been struck out because a procedural requirement had not been met. The decision was widely criticised as restricting the Court's statutory discretion to extend the limitation period under s33 Limitation Act 1980. It resulted in the anomaly that the Claimant who had issued, but failed to serve, a Claim Form within time was in a worse position to one who had failed to issue at all.

In Horton, the Claimant was injured in a road traffic accident involving an uninsured driver, who was wholly responsible. The Claimant's solicitors issued proceedings in time, but failed to give the requisite notice to the MIB. Fresh proceedings were issued, with appropriate notice being given. At first instance, the Judge indicated that he would have applied his discretion to extend time under s33, but was bound by Walkley. The Claimant appealed through to the House of Lords.

In allowing the Appeal, the House of Lords held that where a Claim fails due to a procedural error, fresh Proceedings can be re-issued outside of the limitation period, and a Claimant may seek to rely upon the Court's inherent discretion to extend time under s33.

The practical effect of Horton is that Defendants will no longer have an automatic limitation defence. The test will be the balance of prejudice. This will be welcomed by Professional Indemnity Insurers, although the Solicitors' negligence will be a factor when the Court considers prejudice.

We are handling two such cases where Insurers are indemnifying the Claimants for the cost of re-issuing in reliance upon s33 and Horton; and having limitation tried as a preliminary issue. It remains to be seen whether the Court will exercise its discretion, and allow the Claimants a second bite of the cherry; or leave them to pursue negligence claims against their Solicitors.

Louisa Hill
louisa.hill@hilldickinson.com



Status of a Joint Statement

The judgment in the case of (1) Robert Aird (2) Karen Aird -v- Prime Meridian Ltd (2006) was delivered in the Court of Appeal on 21/12/2006. The decision concerns the status of a joint statement produced by experts. It also underlines the need for litigants to take care to ensure that the two processes of litigation and mediation are kept separate; otherwise there may be disputes over the extent and effect of particular orders of the court.

The dispute originated out of the architectural services necessary for the construction of a house. An order of the court was made which required that the parties' architectural experts meet without prejudice and prepare a statement of the issues upon which they were agreed and disagreed, with a brief statement of the reasons for the disagreement. The Court also ordered that the action be stayed to allow the parties to mediate.

The experts complied with the order, and agreed the common ground between them and listed items where they were not agreed ("the statement"). In December 2005 the mediation failed and the litigation proceedings re-commenced in 2006. The Claimants wanted to amend their Statement of Case in such a way that HHJ Coulson QC stated was apparently inconsistent with the views expressed by their expert in the statement.

The Defendants naturally objected to the amendments. The Claimants claimed the statement had been primarily produced for the mediation and thus it was privileged. The point was made that the order asking for the meeting between the experts would not have been made except for the fact there was a mediation.

The issue raised two potentially competing public policies. HHJ Coulson QC stated:

"On the one hand, the provision by the experts of a statement of the matters on which they agree and disagree is a vital component of effective case and trial management, and it would generally be contrary to the overriding objective (CPR 1.1) if statements which had been signed by both experts were then to be kept secret from the Court. On the other hand, it is a clear rule of public policy that, in order to encourage the parties to settle their differences in a frank and open manner, the documents generated by or for mediation are privileged."

HHJ Coulson QC, having found that the primary function of the statement was for use in the mediation, held it was privileged. The Defendants appealed.

HELD: The Court of Appeal allowed the appeal. The statement was a joint statement made pursuant to Civil Procedure Rule 35.12 and could not be privileged. The subsequent mediation agreement could not convert an open document into a privileged one. Furthermore, the statement did not acquire without prejudice status because it was used in mediation.

It seems that the Court has no jurisdiction to order a joint statement for use solely in mediation.

John Porter (who represented Prime Meridian Ltd)
john.porter@hilldickinson.com

Time, please?

Practitioners may have noticed the recent case of Jessup -v- Wetherell and Norris Bazzard & Co [2006] EWHC 2582 (QB), which involved the vexed question of when a cause of action accrues against a Solicitor who has allowed a claim to be struck out for failing to pursue a claim expeditiously.

The principle is reasonably well known, and was recently addressed in The Law Society -v- Sephton & Co (2006) 3 All ER 401, where The House of Lords was satisfied, on previous authority, that a cause of action in these circumstances accrues when a claim becomes liable to be struck out for want of prosecution, in other words that it became doomed to failure because a striking out application would be bound to succeed. At that point, the value of the claim is obviously eliminated or reduced, and a loss arises.

In Jessup, proceedings were issued in 1992 by beneficiaries of an estate against the executors, claiming breach of trust and maladministration. Nothing much happened, then in January 1999 the First Defendant, who had moved to join the Second Defendant's firm in 1997, applied to set the case down for trial. Unsurprisingly, the executors applied to strike out. The action was struck out on 23 April 1999. Exactly six years after the application was issued, proceedings were commenced by the beneficiaries against Wetherell and Norris Bazzard & Co.

The Court had to decide when the cause of action accrued. The Claimants contended that a loss only arose when the claim against the executors was struck out. The Judge, having reviewed the authorities, including Sephton, was satisfied that by April 1999 the first action was doomed to failure. Directions had been given in 1993 which were not followed, the action was set down late and then removed from the warned list and thereafter nothing happened for some years. The original Claimants had not even completed discovery by the time the underlying claim was struck out. Consequently the claim issued on 23 April 2005 was statute barred.

The Judge did not address the exact date upon which, in his view, the claim became doomed to failure. Obviously, he did not need to, being satisfied that this was at least six years prior to the issue of proceedings.

Notwithstanding the best intentions of the CPR, cases can still go to sleep. It is a difficult question to assess the point in time in which a strike out for delay will necessarily succeed. Indeed, recent decisions have tended to apply less serious sanctions, notwithstanding fairly serious delay, rather than prevent the case continuing. This uncertainty can be an advantage to insurers. Faced with a claim where the underlying proceedings were struck out for delay, it is advisable to look closely at the circumstances that existed prior to the striking out of the underlying claim. It may well be possible to argue that the underlying claim was "*doomed to failure*" more than 6 years prior to the issue of the current proceedings, even if the strike out itself occurred less than six years before the new claim was issued.

The important lesson from Jessup is that proceedings issued within 6 years of an underlying claim being struck out are not necessarily within time.



Design and Build Contracts - Reducing the Risks

Under Design and Build ("D&B") contracts, increasingly construction professionals are directly answerable to sophisticated Contractors, resulting in a marked increase in claims. These often result in Adjudication, with its associated rough and ready justice.

Difficulties arise when Contractors seek to limit the scope of services to be carried out and define such services as vaguely as possible. The intention is to limit the construction professional's fees and keep the costs within the figure agreed with the client. At the same time, the Contractor wants the option of being able to ask the professional to assist on any aspect of the project if required. However, when a problem arises on a project, relating to a matter in which construction professionals are normally involved, the finger of blame is all too easily pointed at them.

There are a number of ways that professionals can seek to reduce the risks of exposure when appointed under a D&B contract. These include:

- Ensuring that the written appointment sets out exactly what they are required to do on that particular project. They should not rely on a standard form written appointment which will not be specific enough.
- Insisting that any requests for additional services are clearly defined and agreed in advance.
- Paying careful attention to the way in which the services are to be provided. They should only guarantee that an event will occur if it is completely within their control, and they are not reliant upon Sub-Consultants/Contractors.
- Advising the Contractor immediately if its expectations are unrealistic, or will not be achievable during the project.
- Keeping accurate records of all communications with the Contractor and other parties on a project, such as contemporaneous telephone notes and minutes of meetings.
- Clearly setting out the basis upon which information is being provided, and qualify it accordingly. The use of caveats/riders is always useful, for example:

"This drawing must be read with and checked against any structural, geotechnical or other specialist documentation provided. This drawing is not intended to show details of foundations, ground conditions or ground contaminants."

Although not exhaustive this guidance aims to provide a useful first step to help stem the flow of claims against construction professionals arising out of the increased use of D&B contracts.

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Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

Hill Dickinson LLP:

Liverpool Office

Pearl Assurance House
2 Derby Square
Liverpool L2 9XL

T: +44 (0)151 236 5400
F: +44 (0)151 236 2175
DX 14129 Liverpool

Manchester Office

50 Fountain Street
Manchester
M2 2AS

T: +44 (0)161 817 7200
F: +44 (0)161 817 7201
DX 14487 Manchester 2

London Office

Irongate House
Duke's Place
London EC3A 7HX

T: +44 (0)20 7283 9033
F: +44 (0)20 7283 1144
DX 550 City of London

Chester Office

34 Cuppin Street
Chester
CH1 2BN

T: +44 (0)1244 896600
F: +44 (0)1244 896601
DX 19991 Chester

Hill Dickinson International:

Greek Office

2 Deferas Merarchias St.
Piraeus, 185 35
Greece

T: +30 210 428 4770
F: +30 210 428 4777

London Office

Irongate House
Duke's Place
London EC3A 7HX

T: +44 (0)20 7283 9033
F: +44 (0)20 7283 1144
DX 550 City of London

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www.hilldickinson.com

For further details please contact:

Paul Walton

Head of Professional Services
0151 471 5215
paul.walton@hilldickinson.com

Tony Wilson

Senior Partner
0151 471 5208
tony.wilson@hilldickinson.com

Ruth Lawrence

Liverpool Office
0151 471 5266
ruth.lawrence@hilldickinson.com

Jamie Monck-Mason

London Office
020 7280 9263
jamie.monck-mason@hilldickinson.com

John Porter

Manchester Office
0161 817 7396
john.porter@hilldickinson.com