

AVOIDING THE PITFALLS OF LIMITATION AND SERVICE

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Issuing the Claim Form

- Limitation Act 1980 section 11: “*An action [for personal injuries] shall not be **brought** after the expiration of...three years from...the date on which the cause of action accrued...*”
- What determines when a claim has been **brought**?
 - When the claim form is **issued** or when the claim form is **filed**?
 - What if the claim form is filed but the claimant mistakenly tenders the wrong fee and the court
 - a) refuses to issue the claim? or
 - b) issues the claim regardless?
 - What if the claimant *deliberately* files the wrong fee?

Issuing the Claim Form

- CPR r.7.2 does not define when a claim has been **brought**:

*“(1) Proceedings are **started** when the court issues a claim form at the request of the claimant.*

*(2) A claim form is **issued** on the date entered on the form by the court.”*

- Practice Direction to CPR r.7.2 para 5.1 does define when a claim is brought (but does not have the same status as primary legislation or the CPR):

*“...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... on that earlier date.”*

Issuing the Claim Form

- Practice Direction CPR r.7.2
 - Para 5.2: “*The date on which the claim form was received by the court will be recorded by a **date stamp** on the claim form or on the letter that accompanied the claim form.*”
 - Para 5.4: “*Parties proposing to start a claim approaching the expiry of the limitation period should recognise the importance of establishing the date the claim form was received by the court and **should themselves make arrangements to record the date.***”

Issuing the Claim Form

- Barnes v St Helens MBC [2006] EWCA Civ 1372
 - Facts: Industrial action delayed issuing of claim form that had been filed
 - Tuckey LJ: To **bring** a claim did not mean the same as to **start** a claim. To **bring** meant requesting the issue of a claim form delivered to the court office during its opening hours.
 - Providing that the claimant took **any necessary steps required** to enable the proceedings to be started he or she did not take the risk that the court might be closed or would not process the claim properly. Different considerations might apply if delivery was made to the wrong place or outside office hours.

Issuing the Claim Form

- Page v Hewetts Solicitors [2013] EWHC 2845, Court of Appeal
 - Facts: Court loses original claim form
 - Lewison LJ: If the claimant established that the claim form had been delivered in time to the court office, **accompanied by a request to issue and the appropriate fee**, the action would not be statute-barred.
 - In reaching this conclusion Lewison LJ cited Eveleigh LJ in Aly v Aly (1984) 81 LSG 283 who considered that to ‘apply to the Court’ meant “*doing all that is in your power to do to set the wheels of justice in motion*”.

Issuing the Claim Form

- Neither Barnes nor Page No.1 concerned incorrect issue fees or abuse of process. There then followed 6 first instance decisions on these more difficult facts:
 - Page No.2 [2013] EWHC 2845, Hildyard J
 - Lewis v Ward Hadaway [2015] EWHC 3503, John Male QC
 - Bhatti v Asghar [2016] 3 Costs LR 493, Warby J
 - Glenluce Fishing Co v Watermota [2016] EWHC 1807, Roger Ter Haar QC
 - Dixon v Radley House Partnership [2016] EWHC 2511, Stuart-Smith J
 - Liddle v Atha & Co Solicitors [2018] EWHC 1751, Turner J

Issuing the Claim Form

- Hayes v Butters [2021] EWCA Civ 252, Court of Appeal
 - Facts: When was a claim **made** for the purposes of s.35 Limitation Act 1980 (i.e. new claims in pending actions)
 - Jackson LJ reviewed the above caselaw and concluded:
 - 1) Page No.1 did not decide or even consider the principle of an incorrect issue fee having been paid. Lewison LJ (who gave the judgment in Page No.1) concurred.
 - 2) If a claim is **issued** by the Court within the limitation period, then it is **brought** within the limitation period, regardless of whether the right fee was paid. The statement in Bhatti to the contrary is not correct.

Issuing the Claim Form

- Hayes v Butters continued...
- 3) More difficult is where a claim has been delivered in time, but not issued in time, and the correct fee was not proffered. There are three possible approaches:
 - i. Page No 2: claim not brought by reason of underpayment alone
 - ii. Lewis: claim not brought because underpayment was abusive
 - iii. Liddle: claim had been brought because the underpayment had not been *materially* abusive, in the sense that it did not impact on the timing of the issuing of the claim.

Issuing the Claim Form

- Hayes v Butters continued...
- 4) The issue was *obiter* before C of A and so they did not resolve it, but Jackson LJ did say: “*my provisional view is that there is force in the concerns expressed in a number of cases about the disallowing of a claim on limitation grounds merely because of an inadvertent miscalculation of a court fee.*”

He also approved of Stuart-Smith’s judgment in Dixon in which it was emphasised that the court had a range of other responses to control abuse of process (including not issuing the claim or making an unless order) other than the ‘nuclear option’ which was unnecessary as well as being unwarranted.

Issuing the Claim Form

- Hayes v Butters continued...
- 5) There remains conflicting authority in Lewis and Liddle about the correct approach where an underpayment has been deliberate and calculated and therefore abusive, but it seems likely that the moderated approach in Dixon and Liddle is more likely to find favour in the C of A.

Basics of Service

- When? Complete the step by midnight 4 months after date of issue (not receipt by Court) – r7.5(1)
- Where? If solicitor nominated must be on solicitor – r6.7(1). Otherwise will need full address on Claim Form to serve unless Court orders otherwise – r6.6(2). If no address provided (and no obligation on Ds to provide one) then r6.9(2) provides a table for understanding where a defendant can be served.

Basics of Service

- How? First class post, DX, fax or email the most common under r6.3(1) but are a range of other ways can serve Claim Form including personal service or leaving it at a place specified in rules. To use fax or email D needs to have indicated willing to accept service that way in writing – PD6 §4.1(1)
- What? Original sealed claim form – *Hills Contractors and Construction Ltd v Struth* [2013] EWHC 1693 (TCC). Need a response pack – r7.8

Basics of Service

- Out of the jurisdiction:
 - Have six months rather than four – r7.5(2) but needs to be served by six months rather than step taken
 - CPR Part 6 IV deals with service of the Claim Form out of the jurisdiction, will either need to apply for permission under r6.37 or where don't need permission will need to complete and file Form N510
 - Methods: is there a Convention or Treaty? otherwise can be by a method permitted by law of country where being served or through foreign governments etc – r6.40(3)
 - Needs to be translated properly – r6.45

When service goes wrong

- Is there still time to simply try it again?
- Under r6.15(2) Court may order that steps already taken are good service
 - Is there a good reason? *Abela v Baadarani* [2013] UKSC 44
 - Limitation expiring is a factor against validating service: *Barton v Wright Hassall* [2018] UKSC 12
- Dispensation of service – r6.16: only in exceptional circumstances

When service goes wrong

- Is it an error of form and not substance that could be rectified under r3.10?
 - *Dory Acquisitions Designated Activity Co v Frangos* [2020] EWHC 240 (Comm)
 - c.f. *Ideal Shopping Direct Ltd v Visa Europe Ltd* [2020] EWHC 3399 (Ch)
- Has a Defence been filed anyway submitting to the jurisdiction – Part 11 application needs to be made to take the point

Extensions for service

- Under r7.6(1) can apply to extend the time for service of the claim form:
 - Must either be made in time or Court can only make such an order if C has taken all reasonable steps to serve but been unable to do so and acted promptly – r7.6(3)
 - Must have a valid reason even if prospective:
Hashtroodi v Hancock [2004] EWCA Civ 652
 - Can be by agreement – but needs to be to a specific date and an agreement in writing: *Thomas v Home Office* [2006] EWCA Civ 1355

Extensions for service

- What are ‘all reasonable steps’ under r7.6(3)?
 - Need to be steps taken during the four months
 - Commentary in White Book is full of examples of what didn’t constitute ‘all reasonable steps’ including:
 - Difficulty preparing SOL: *Kaur v CTP Coil Ltd* [2001] CP Rep 34, CA
 - Sending to D when solicitors had been nominated, but where C realised mistake with enough time to fax it to sols: *Nangleman v Royal Free Hampstead NHS Trust* [2001] EWCA Civ 127.
 - Send to D by DX where D not a member of DX: *Chaudri v Post Office*, 26 April 2001, unrep.

Agreements to extend time

- Parties can agree to extend or waive the limitation period, for example because there are ongoing negotiations. Take care to define the precise terms. Resort to estoppel more hazardous:
- *Seechurn v Ace Insurance SA-NV* [2002] 2 Lloyd's Rep 390, C of A
 - a) there had to be an unequivocal promise not to enforce a party's legal rights for there to be an effective estoppel;
 - b) this representation had to be construed objectively; and
 - c) there had to be additional reliance on the representation, whereby a party had altered its position to its detriment.
- Whilst the insurers had agreed to 'keep the door open' to future negotiations, that did not satisfy (a) and (b) above.

Agreements to extend time

You can also agree to extend time for service of the claim form:

- Thomas v Home Office [2006] Court of Appeal, Neuberger LJ
CPR r.2.11: “*Unless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by **the written agreement of the parties.***”

Agreements to extend time

- What constitutes a **written agreement**?
 - A single document signed by both parties – yes
 - An exchange of letters between solicitors agreeing extension of time - yes
 - An oral agreement confirmed in writing by both sides – yes
 - An oral agreement recorded by each in attendance notes - no
 - An oral agreement confirmed in writing by one side and subsequently (4 weeks later) referred to in correspondence with an expert – no
- Should be “*document or exchange of documents which is intended to constitute the agreement or to confirm or record the agreement.*”
- Jacob LJ cautioned against vague agreements to extend by a week or a month as it could cause confusion as to the start and therefore the end of the period. Say instead the last day for service is “*on or before the [blank] day of [blank]*”.

Bringing a Second Claim

- Aktas v Adapta; Dixie v British Polythene Industries Plc, Court of Appeal [2010] EWCA Civ 1170 (Rix LJ)
- Can a PI claim issued towards the end of the limitation period and not served in time and struck out be resurrected in a second action commenced outside the limitation period and invoking the discretionary provisions of s.33?
- The answer is that it can. S.33 represents the will of parliament. Further, mere negligent failure to serve a claim form in time was not an abuse of process. Something more than a simple single negligent oversight was required: inordinate and inexcusable delay, intentional and contumelious default, wholesale disregard of the rules.

Bringing a Second Claim

- The facts in Aktas and Dixie were benign. No other breaches of rules or orders. Liability had been admitted. What about a case of real abuse?
- In an appropriate case the second action could be struck out for abuse without entering on the s.33 discretion. It may be that some special reason has to be identified to justify a second action being allowed to proceed despite abuse. Inevitably this will engage the court's discretion, which cannot be considered in the abstract. So s.33 circumstances may still come into it.
- The Court of Appeal was invited to express a view as to how the s.33 discretion should be exercised in such circumstances, but declined to do so.

Defendant's requests for service

- Under r7.7(1) D can serve notice on C requiring them to either serve the Claim Form or discontinue within a specified period (over 14 days)
- Failure to comply can result in the claim being dismissed – r7.7(3)(a)

Thank You!

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