

Action Stations
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Practitioners must ensure their client holds the right to sue and should act quickly if the limitation expiry date is near, say Antony Smith and Marc Jones

English law demands that a claimant has the right to sue. This is normally straightforward, but with bankruptcies, insolvencies and corporate restructurings soaring during the recession there is an increased risk for the parties to get it wrong.

The mistake can be fatal for a claim, as *Jason Pickthall v (1) Hill Dickinson LLP and (2) Richard Martindale* [2009] EWCA Civ 543 illustrates. The decision in this case shows that the courts take a strict view of the right to sue and of attempts to circumvent limitation periods. It is also a reminder that seemingly simple questions should not be overlooked when embarking on often expensive and lengthy litigation.

The defendants (a firm of solicitors and the relevant partner) acted for the claimant in relation to the sale of a company in which the claimant had a substantial shareholding. The sale agreement was executed on 6 February 2001. The consideration totalled approximately £2.7m and was paid in various ways, including the discharge of certain loans held by the claimant.

A month later the company went into administration and the company administrator commenced proceedings against the claimant challenging certain provisions of the sale agreement. Judgment was entered against the claimant for £642,000 for breach of fiduciary duty, unlawful assistance and participating in transactions at undervalue. The claimant was subsequently adjudged bankrupt in October 2001, but was not discharged until August 2006.

Expired limitation period

In April 2006 the official receiver became the legal owner of the claimant's residual assets, including the right to sue the defendants for negligence in relation to the sale agreement. Recognising a potential claim, the claimant requested an assignment of those causes of action; however, this was not finalised by the sixth anniversary of the sale agreement (6 February 2007) when the limitation period expired.

In an attempt to overcome the limitation problem, the claimant issued a claim on 5 February 2007 for damages or alternatively a declaration that the defendants owed damages to the official receiver (joined as a third party but not as a claimant) with a view to later obtaining an assignment of the cause of action.

The defendants applied to strike out the claim as an abuse of process on the ground that the claimant did not have the right to sue. The defendants successfully appealed after the trial judge refused the application.

While the outcome will not surprise litigators, it is worth noting the Court of Appeal's strict view. The court concluded that where a claimant starts proceedings at a time when he has no cause of action, and knew that he had no cause of action, it is hard to see why those proceedings are not an abuse. In this case, even if the claimant had proved all the facts he wanted to prove and established all the law he wanted to establish, he would still have lost because he did not have the right to sue. Only those

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who actually own the cause of action have any business asserting that action or starting proceedings. Any other use of the court's procedure would be improper.

This should only become an issue where a claimant is coming up against a limitation deadline. However, experience suggests that parties often find themselves racing against the clock, so the situation is, surprisingly, not uncommon. Here, the claimant had started the proceedings to overcome the limitation period and in so doing unilaterally acquire for himself an extension of the limitation period. The fact that the claimant was aware that he did not have the cause of action and commenced the action anyway to extend the limitation period was a critical element in finding that there was an abuse of process.

Had he not been aware that the cause of action was not vested in him the court may have come to a different decision, although he would still have had to overcome the obstacles in amending the claim form, after the expiry of limitation, to plead the assignment.

Title to sue checklist

(a) At the outset of a dispute, pause to consider whether the claiming party actually holds the cause(s) of action. This is more likely to be an issue where there is a complicated ownership structure and/or where assets/companies were recently restructured. It may also be an issue if assets have passed to an official receiver and negotiations are required for an assignment back. The question should really be considered pre-action when writing or receiving the letter of claim. The underlying message is not to overlook simple, but fundamental, issues.

(b) For claimants, if an issue is identified, consider if or how it can be resolved - e.g. by assignment or identifying the group companies which hold the cause(s) of action.

(c) Know how long you have to address any title to sue issues. The key to this is identifying when the limitation period will expire, which should be part of any litigator's standard checklist. If the expiry date is looming, decide whether there is time to rectify the situation and, if so, act quickly. A claimant shouldn't be fooled into thinking the period can be overcome by filing a claim now with a view to rectifying it later.

(d) Bear in mind that the courts take a strict view of title to sue, limitation periods and abuse of process.

Taking time to consider these issues early may spare a party from becoming another cautionary tale.

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