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JUNIOR PRACTITIONER GROUP BRIEFING

Unpaid, Underpaid and overpaid: Court Fees, Abuse of Process and Limitation

The case of *Lewis v Ward Hadaway* [2016] 4 WLR 6 has sparked a wave of applications from Defendants where the Claimant has failed to pay the appropriate court fee. This briefing considers the background to that decision, a couple of recently reported cases and a successful application for strike out made by a Defendant represented by 1 Chancery Lane's new junior tenants, Ella Davis (at first instance) and Max Wilson (on appeal).

Background

In *Page v Hewetts* [2012] EWCA Civ 805 the Court of Appeal held that the correct construction of the Limitation Act was based on risk allocation. They referred to the case of *Aly v Aly* (1984) 81 LSG 283 in which the Court of Appeal held that the words "*apply to the Court" means "doing all that is in your power to do to set the wheels of justice in motion."*

Lewison LJ held that therefore *"the claimants establish that the claim form was delivered in due time to the court office accompanied by a request to issue and the appropriate fee, the action would not in my judgment be statute barred"*. On remission Hildyard J held that, although the Claimant's solicitors had innocently miscalculated the fee, they had not done all that was required of them and the claim had not been brought within the limitation period.

Lewis v Ward Hadaway

The Claimants in *Lewis* were found to have deliberately undervalued their claims by substantial sums to reduce the court fee payable. It was held that the Claimants had always intended to amend the claim forms to claim the full higher amount referred to in the letters of claim.

The court held that this conduct was an abuse of process but that to strike the claim out would be too draconian a sanction. However, summary judgment was granted on the basis that whilst the claim form was *received* before expiry of the limitation period, claim was *issued* after limitation had expired. The Claimants had not done all they reasonably could (their conduct having been found to be an abuse) to bring the matter before the court within the limitation period. In his judgment, a Claimant has not paid 'the appropriate fee' in circumstances where the act of payment was an abuse of process.

Recent Reported Cases

Bhatti v Asghar [2016] EWHC 1049

This was another case in which the Defendant made an application for strike out/summary judgment on the basis that the Claimants' solicitors had intentionally underpaid the required court fees on issue, resulting in their claims being statute barred. Both applications were unsuccessful.

Warby J held that the application to strike out for abuse of process had no realistic prospect of success. With regards to the limitation issue, he accepted that the Claimant had not paid the correct fee because a claim for *"other relief"* triggered an obligation to pay a further £480. He also accepted that the relevant limitation periods had expired.

Nevertheless, he declined to grant summary judgment as limitation was inexcusably raised very late and did not feature in the summary

judgment application itself, thus the Claimant did not have a reasonable opportunity to address it. He ordered that the Defendant be permitted to amend its Defence and the Claimants be afforded the opportunity to respond in either or both of two ways. First, they could adduce evidence as to the factual issue of whether they had done all they reasonably could. There was a suggestion that the Claimants had relied upon assistance from the court in calculating the fee. In the court's opinion it would be open to the court to conclude that an error made by the court did not have the effect that the claim was not brought. Secondly the Claimant would be given the opportunity to address the authorities and underlying legal principle.

Dixon v Radley House Partnership [2016] EWHC 2411

This was an application by the Defendants to amend their Defence to plead limitation in circumstances where the Claimant paid the correct fee for the sum claimed in the claim form but then served a Particulars of Claim which included a much higher claim for damages.

Stuart Smith J held:

"The summary answer to the dispute, in a case where it is not alleged that a Claimant's failure to proffer the correct fee is abusive procedural conduct, may be split into two periods:

In the period between (a) when the Claimant submits the claim form and proffers the inadequate fee and (b) when the Court issues proceedings, the failure to proffer the correct fee will prevent the conclusion that the action has been "brought" for the purposes of the Limitation Act 1980 before the moment that the Court issues the proceedings; but once the Court issues the proceedings, the mere fact that the fee proffered by the Claimant and accepted by the Court (a) is less than should have been proffered and accepted for the claim identified in the Claim Form or (b) becomes so because of a subsequent increase in the quantum of the claim advanced in the proceedings does not prevent the action from being "brought" for the purposes of the Limitation Act 1980 when it is issued by the Court."

He held that if the Defendants, who were not alleging abusive conduct, were right, then any Claimant who has issued proceedings without paying the fee that may retrospectively be seen to be appropriate for the claim it articulates, has failed to stop time running for the purposes of the Limitation Act. He agreed with the concerns of Mr Ter Haar QC in *Glenluce Fishing Company Ltd v Watermota Ltd* [2016] EWHC 1807 (TCC), as to the *"significant extension of principle and the apparent introduction of a new "hard-edged" principle in the first instance decisions culminating with Bhatti".*

He held that *""the appropriate fee" … is the fee required by the relevant order which is to be determined by reference to the claim or claims articulated in the claim form (and, if issued simultaneously, the Particulars of Claim). In the absence of abusive behaviour, it is not to be determined by reference to claims which are articulated later, whether or not the later claims are ones which the Claimant hoped or even intended to bring later at the time of issuing proceedings."*

What about a Claimant who overpays?

In our case solicitors for the Claimant in a personal injury claim arising out of a road traffic accident posted her claim form along with a cheque for the court fee, two days before the expiry of the limitation period. Unfortunately for the Claimant, her solicitors had made the cheque out for a higher amount than was required by the statement of value. The court therefore returned the cheque and claim form. By the time the error was corrected, the claim was out of time. The Defendant pleaded a limitation defence and applied to strike the claim out.

Before the District Judge, the Defendant relied on what was said by both the Court of Appeal and the High Court in *Page* about the allocation of risk. In particular the judge was referred to the

portions of Hildyards J's judgment in which he expressed concern *"that the fate of a claim should depend upon the miscalculation by such a relatively small amount of a court fee"*. Nonetheless he concluded that the miscalculation "meant that the claimants had not done all that was required of them; and they had left it too late to correct the error, which was a risk they unilaterally undertook."

It was not suggested that an overpayment was of an abuse of process. While the decision in *Lewis* relied upon the fact of such an abuse, it was not in every case a necessary finding to demonstrate that the Claimant had not done all that was required of them.

It was submitted that the fee was not appropriate because there was nothing the court could do with the cheque but return it. The Claimant was entitled to post her claim form so as to arrive two days before the expiry of the limitation period and equally entitled to pay the fee by cheque. However, in doing so, she unilaterally undertook the risk that any error could not be corrected before the expiry of the limitation period. She had therefore not done all she reasonably could so as to transfer the risk.

The District Judge agreed and struck the claim out on the basis that it was out of time. The Claimant appealed on two grounds - first that *"appropriate fee"* does not mean *"correct fee"* in this context and second that the previous line of authority could be distinguished on the basis that the cases dealt with underpayments and/or abuse of process.

As to the first ground, it was submitted that the Claimant did more than was reasonable to issue the claim in time, not less as she had overpaid. Therefore, the fee was an appropriate one. In response the Defendant submitted that *"appropriate fee"* and *"correct fee"* must mean one and the same thing in this context. It was contended that 'appropriate' means that which is suitably fit for purpose; whilst an overpayment to the court would in theory satisfy the balance of the court fee, in practice, this was never the case as the court had a policy of returning all claim forms if the correct fee was not paid. The court fees were publicly available online and it would pose an administrative burden on the courts if they were required to process overpayments and issue refunds.

As to the second ground, the Claimant submitted that *Lewis* and *Page* could be distinguished as they involved abuses of process or underpayments. The Defendant submitted that the underlying test remained whether the Claimant had done all she reasonably could to bring the matter before the court and on these facts she had not.

The Circuit Judge held that, in this context at least, there was no distinction between *"appropriate"* and *"correct"* fee. She agreed that while previous cases could be distinguished factually, applying the underlying test to this case, the Claimant had left no room for error and in submitting an incorrect court fee she had not done everything in her power to set the wheels of justice in motion. The appeal was therefore dismissed.

Ella practices in all areas of Chambers work and is developing a broad civil common law practice, during pupillage she was involved in clinical negligence cases and is keen to develop her own practice in this area as well as in the full range of professional negligence work. She also has experience of, and a particular interest in, civil actions against the police.

Max receives instructions in all areas of Chambers' work and has a busy court practice. He has a broad personal injury practice and has a particular interest in professional negligence law (including clinical negligence), police law and travel law work.

Thomas has a busy practice specialising in all aspects of clinical negligence, professional negligence, personal injury, regulatory / disciplinary law and police law. He is experienced in trial, tribunal, inquest and appellate advocacy in the County Court and High Court as well as ADR.