Neutral Citation Number: [2022] EWHC 1684 (QB)

QB-2019-002530

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Date: 1 July 2022

Before:

Judge: Victoria McCloud
A Master of the Senior Courts Queen's Bench Division

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Ms Anna Christie

Claimant

v

(1) The Mary Ward Legal Centre
(2) Mr Andrew Dymond

Defendants

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Ms Christie the Claimant, representing herself.
Mr Wood, counsel for the First Defendant, instructed by Anthony Gold Solicitors LLP
Mr Maxwell, counsel for the Second Defendant, instructed by Messrs. Browne Jacobson LLP

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JUDGMENT

1. This is my judgment on one issue in this professional negligence case which is whether this claim should be struck out on the basis that it cannot succeed due to having been brought outside the applicable Limitation Period.

2. The Defendants argue that time runs from the earliest date at which damage was caused to the Claimant. The Claimant, appearing for herself, argues that the time should run from the date when the consequence of the alleged (and for present purposes presumed) negligence alleged against the Defendants became irremediable.

3. The underlying case is I think quite a sad one. The Claimant incurred unpaid service charges on her long leasehold property at 28 Pallant House, Tabard Street, SE1. which were owed to the landlord, her local council. She could not afford to pay those and proceedings for forfeiture began. She sought legal advice from the Mary Ward Centre and they obtained specialist advice on long leasehold forfeiture from counsel who is their co-defendant. The advice was to the effect that it would be a disaster for the lease to be forfeit since the Claimant would lose the lease and its value and that it was best to find a way to ensure that she was able to sell the property, realise the value and pay off the arrears.

4. Ms Christie ideally wanted, on her case, not to lose the property. She was unaware (and here I repeat I am effectively presuming her case for present purposes) that the County Court had the power to grant relief and to attach the arrears of service charge as a charge or loan against the property. She pleads the Service Charge (Loan) Regulations 1992, Employment Allowance and Support Regulations 2008 and s.138(2) County Courts Act 1984.

5. By the time she found that out, not having been advised that that was an option, it was too late because the sale had been agreed, and all that remained was technical relief from forfeiture so as to enable the lease to be transferred to the purchasers. Leading up to this point there had been court hearings and orders along the way, not of a very substantial nature but more a matter of delaying so that a buyer could be

found. Specifics of the chronology where useful will be mentioned below. It is as will have been inferred, a claim in respect of professional negligence.

6. The Council issued an arrears claim against Claimant seeing forfeiture engaged D1 who instructed D2 to advise. The advice is at p230. Arrears had to be paid, and there was a right to relief if the sum was paid. However if the lease was forfeit then the council would get a large windfall, and that it was 'difficult' to see an alternative to selling, the arrears being around £14,000, possibly inclusive of interest. There was no substantive defence.

7. That was the course which was as counsel put it 'navigated' throughout the litigation, and I have at a previous hearing held that the claim against the solicitors be struck out on the basis they take the benefit of the defence which solicitors can claim where they have relied entirely on counsel's advice, in what is a fairly unusual area of work where typical council claims relate to rent arrears and not long lease forfeiture.

8. On 6 November 2012 at the first hearing of the possession claim, before DJ Worthington, Counsel for both sides appeared. The order recites that it appeared to the court that the Claimant (landlord) had a right to forfeiture of the lease and there was an adjournment on terms that Ms Christie would serve a statement to address the prospects of a sale or other ways to pay off the arrears. Costs were in the claim.

9. On 30 January 2013 there was a consent order which provided for settlement of the claim for forfeiture on terms that she would pay the sum due, on the understanding she would be selling the flat, and she would pay the costs of the proceedings. Liberty to restore for enforcement.

10. On 19 April 2013 there was due to be a further hearing to reconsider because time had passed and the flat had not been sold and the arrears had not been paid. It was coming back under the 'right to apply' within the previous order. Again however that was dealt with by consent, again on the terms that Ms Christie would pay the arrears (as now larger than before) plus costs.

11. On 28 June 2013 the property was again not sold nor were the arrears paid off and it came back before the court for a possession hearing at which Ms Christie represented herself. At that hearing the court ordered possession to be given by 9 August 2013, but the order made provision for an application for relief to be made and allowed a further 6 weeks for that. Permission to appeal refused. Costs Reserved. The Second Defendant argues that at this stage at the latest the claimant was 'worse off' because she would need relief from forfeiture or to set aside or appeal the possession order and hence that this is the latest date for the commencement of time for Limitation purposes.

12. The sale of the flat was completed on 30 July 2013, and it seems contracts were exchanged virtually at that date also. The case for Ms Christie is that costs and so forth owed to the Council were paid on or about 31 July 2013.

13. 2 May 2014 sale had been agreed with purchasers in principle, and an order was made which regularised the position after the sale had been agreed so as to grant relief, recording that the arrears had been paid. Hence the purchasers would get clear title.

14. The claim is pleaded on the footing that the defendants negligently failed to avoid the sale of the property (which was in effect a forced sale), such as by seeking relief from forfeiture, failure to advise on matters such as waiver, failure to advise about alleged defects in the s.146 notice which would have prevented forfeiture, and other matters. It was common ground that I should assume negligence is made out for the purposes of this Limitation issue. Essentially it is said the Defendants failed properly to defend the action which triggered sale. The nature of the alleged loss is the lost value of the lease, she having assigned it on sale when she need not have done and of course the property has risen in value since, and she is unable to afford a new flat. Also costs of sale etc. There was no mortgage on the property so virtually all of the equity was Ms Christie's. The location of the flat was Tabard Street, near the 'Shard' building in London.

15. The relevant provisions relating to strike out and summary judgment were uncontroversial. Section 2 of the Limitation Act is the applicable section for Limitation, and it states:

“Time limit for actions founded on tort.

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

16. It was uncontroversial that that was the applicable section and the issue is ‘when did the cause of action accrue’? The period of 6 years prior to the date of issue of the claim is 15 July 2013. It is self-evident that the sale of the flat, irreversibly, took place at the end of July 2013 and that this claim was brought within 6 years of that date. At that stage she could do nothing to escape the sale, or perhaps nothing remotely feasible. The Defendants however argue that time, for the Act, runs from an earlier date which would be the date when any form of loss however slight, was suffered by Ms Christie due to the (presumed) negligence.

The authorities

17. Counsel for Mr Maxwell for D2 took me through the relevant authorities including those from the Claimant (who also made her own submissions).

18. Berney v Saul [2013] PNLR 26 was cited by both sides, and D2 accepted that *Berney* contains a helpful summary of the applicable principles. There, C was injured through the negligence of D, on 20 April 1999 (a personal injury claim). With the aid of solicitors a claim was issued on 12 April 2002 but against the wring defendant. 8 August 2002 proceedings were issued against the correct Defendant and therefore out of time but no point was taken on limitation. Nothing very much happened, no Particulars of Claim were provided, and the action was vulnerable to being struck out (as counsel advised on 2 June 2004). 13 June 2005 the Claimant had by then changed solicitors and they sought agreement to an extended date for Particulars to be served, but this was not agreed. The claim then settled for £25,000 which it was said to be an undervalue.

19. Professional negligence proceedings started against the first set of solicitors on 10 January 2011. The Solicitor-Defendants argued the claim was statute-barred and argued that the latest damage date was 2 June 2004, which was the date when the Claimant had been advised the claim was liable to be struck out and, presumably therefore the latest date at which the Claimant might be said to have been unaware that things had gone awry. The Claimant argued that the limitation period should run from 1 November 2005 which was the point at which the claim had settled for a (presumed) undervalue, and therefore no better outcome could be obtained in line with the true value of the case and the loss could be quantified. The Defendants in effect argued that once the case was liable to strike out it would have been inevitable that steps needed to be taken to salvage matters and hence the Claimant had been worse off well prior to the date of settlement of the case. In short the claim was at least to some extent prejudiced.

20. It was held on appeal that the claim was within time. It was said that damage was suffered when the claimant was worse off for the first time. A claimant could not limit their claim only to damage after a certain date so as to avoid the limitation period. However in this case the Claimant had not been in serious risk of having her case struck out before the settlement had been entered into. It was not necessary to determine, in the case of a claim which had been struck out, whether loss was suffered at the time of the strike-out or whether it might be suffered at an earlier time when the value of the chose in action represented by the claim in question had suffered serious diminution.

    At 58 Gloster LJ stated:

    > "… at is clear is that determination of the issue is critically dependent on the circumstances arising in any particular case. Thus, although there appears to be a tension between certain statements made in some cases, when compared to what is said in others, I am not persuaded that it is either necessary, or appropriate, for this Court in this case to reconcile what may be differently nuanced approaches to what, at the end of the day, is essentially a

factual question: namely, when did the claimant first suffer actual damage as a result of the professional negligence."

21. She noted that a passage from Forster v Outred [1982]1 W.L.R. 86 at 94, which I quote below, had been approved by the House of Lords in Nykredit Plc v Edward Erdman Group Ltd (No 2) [1997] 1 W.L.R. 1627.

> "What is meant by actual damage? Mr Stuart-Smith says it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has not control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage."

22. She further notes at 62 referring to the speech of Lord Hoffman also in Nykredit (at 1639B-B):

> "Lord Hoffmann's formulation of the test by reference to the question: "when is the claimant worse off financially by reason of a breach of the duty of care than he would otherwise have been", is a simple and attractive one. It necessarily involves a factual inquiry in every case. It may, for example, be that the claimant is worse off financially at the time when, relying on the negligent advice of the defendant, he actually enters into the relevant transaction; see cases such as D W Moore & Co Ltd v Ferrier [1988]1 W.L.R. 267; alternatively, a claimant may not suffer actual financial loss at the time that the transaction entered is into in reliance upon the defendant's negligent advice, but only some time later; for example, when the amount which the lender/claimant has paid out under the transaction, plus its carrying costs, exceeds the value of the negligently under-valued security: see such cases as UBAF Ltd v European Banking Corporation [1984] QB 713 and First National Commercial Bank v Humberts [1995] 2 All E.R. 673."

23. At 64 Gloster LJ quotes from Hopkins v MacKenzie [1994] P.I.Q.R.43 per Saville LJ as he then was at 45-46:

> “An action at risk of being struck out without the possibility of revival may well diminish the value of the claim being pursued in the action, since, apart from anything else, the settlement value of the claim is likely to be reduced. To my mind, however, the overwhelming difficulty with this submission is that it simply ignores the fact that the plaintiff is not suing for any earlier diminution in the value of his claim, but for the loss of his cause of action, through his solicitors negligence”

24. I was taken by D2 to para 67 of *Berney v Saul* again per Gloster LJ who quoted from a decision of Clarke LJ in *Hatton v Chafes*. I shall partially quote that quotation without of course overlooking that it contains other matters:

> “At 492, Clarke L.J. (as he then was) described the relevant principles as follows:
>
> “11 The appellants' case is that the respondent's cause of action accrued before
> 13 October 1994. They say that the alleged breaches of duty (which I shall describe as negligence for short) and the respondent's relevant loss occurred before that date. The negligence was essentially the failure to progress the action against the accountants.
>
> 12 The following principles are not in dispute and may be summarised in these propositions:
> i) A cause of action in negligence does not arise until the claimant suffers damage as a result of the defendant's negligent act or omission.
>
> ii) The damage must be ‘real’ as distinct from minimal: *Cartledge v Jopling* [1963] A.C. 758 per Lord Reid at 771 and Lord Evershed MR at 773–774.

iii) Actual damage is any detriment, liability or loss capable of assessment in money terms and includes liability which may arise on a contingency: *Forster v Outred* [1982] 1 W.L.R. 86 per Stephenson L.J. at 94, approved by the House of Lords in *Nykredit* per Lord Nicholls (with whom the other members of the appellate committee agreed) at 630F.

iv) The loss must be relevant in the sense that it falls within the measure of damages applicable to the wrong in question: Nykredit at 1630F.

[…]"

25. I was taken to Vision Golf Ltd v Weightmans [2005] EWHC 1675, cited by Ms Christie which in my judgment does not assist either way, not being a case about limitation.

26. Ms Christie also relied on Pegasus Management Holdings v Ernst & Young [2008] EWHC 2720 (Ch) which concerned allegations that the negligent advice caused the claimants to enter disadvantageous commercial transactions. Lewison J concluded at [107] that:

> "In a case in which the purpose of engaging the professional is to secure some right or benefit for the client in connection with a contemplated transaction, and because of a failure to exercise reasonable skill and care the client does not secure that right or benefit, the cases consistently hold that the client sustains damage when the transaction takes place."

27. D2's argument was that C's claim is not such a case. It was said that engaged D1 to assist her in defending the Claim, not to secure a benefit in connection with a contemplated transaction. I accept that this case, is somewhat removed from this case on the facts of course but I do see more of a parallel with the instant case than D2 accepts.

28. Whilst defending the claim (and avoiding forfeiture) was indeed the objective, it may be said to be implicit in that that what was required was to advise on and secure the necessary transaction to stop that, which in this instance would have been the use of a charge against the property to cover the arrears, which I understand from Ms

Christie is a fairly standard order which the County Court makes in such cases to avoid the sort of disaster suffered by a flat owner in the form of a lost long lease, or a forced sale.

29. Mr Wood for D1 adopted Mr Maxwell's submissions word for word, and simply amplified some points on the limitation point. I was taken to a letter which demonstrated that solicitors were involved in the preparatory steps to deal with sale of the flat as at 24 January 2013 and hence she had incurred some solicitors' fees on that even if unpaid at that stage. Hence it could be said that that date for example was also a date of loss – some loss at least – by Ms Christie.

30. I was taken by him to *Capita (Banstead 2011) Ltd v. RFIB Group Limited* [2016] QB 835 Longmore LJ at 847A-B to the effect that there is no duty on a professional to correct previous negligent advice so that the fact that the advice at the start was negligent was the relevant point for that part of the tort of negligence and once could not infer a duty to correct it later, hence date of loss would be the date at which the tort was complete, and the date of the wrong advice would be the date of the other ingredient of the tort.

31. I was taken to a letter of 15 June 2013 by which D1 was disinstructed. This was relied on to show there is no possible contract claim after that date. I agree, and of course that does not affect any claim in tort. As to the reserved costs order when the possession order was made, over which there had been some disagreement as to the court's intention, I was shown the transcript of the hearing before DDJ Couch and comment on that more below.

Conclusions

32. I have firmly in mind the observations of the Court of Appeal in *Berney v Saul* which I have quoted above that limitation issues in the context of the running of time in professional negligence actions are very fact sensitive. I am also allowing some latitude in terms of the niceties of pleading since Ms Christie is not a lawyer and I am therefore considering the substance of her arguments rather than the formalities of drafting.

33. In my judgment, as in *Hopkins v MacKenzie* cited in *Berney v Saul*, just as the case there was a risk of a strike out and hence possible diminution in value of chose in action there (which was the majority approach, Gloster LJ in *Berney v Saul*, she not seeing the case as concerning diminution of the chose in action at all), in this case the following can be said. The two or three rather trivial court hearings, resulting in some delay and awards of costs against Ms Christie and indeed a possession order but with a very extended period allowing her (if she so wished) to seek relief against forfeiture, keeping that right alive in its entirety), and some inevitably minor conveyancers costs preparatory to sale, may well have impacted her funds out of pocket, and her and the court's time but, it seems to me that the difficulty which the Defendants face is akin to that in Hopkins namely that what Ms Christie is complaining about here is the loss of her right to seek relief by way of loan or charge against the property. It is the inability to obtain relief which caused her loss due to the forced sale. The possession order did not even arguably cause the sale: it was the loss of the right to seek relief. She could have opted out of a sale and obtained a charge for the arrears and the loss of the right to relief would then not have taken place.

34. She had been given until 9 August 2013 to seek relief and if she did so the date for possession would be suspended until that was dealt with. She thus had a complete right to suspend the possession if she applied for relief, and her right to apply was unaffected by the possession order. It was argued that the possession order diminished the value of the flat, were it to be sold at that point, but I have no specific evidence and that is fact sensitive, and in my judgment it does not affect the basic point that the full rights to relief had been preserved by the judge including the right to suspend possession automatically if relief was applied for, until the question of relief had been dealt with.

35. That ceased to be possible once the contracts for the sale of the flat had been exchanged, which effectively coincided with completion of the sale, on 30 or 31 July 2013. (For the avoidance of doubt the lease was technically forfeit in 2012 when the proceedings began in the county court, hence the relevant matter here is when the

right to seek relief from that forfeiture was lost, rather than the date of forfeiture which was not of course caused by any negligence by these defendants).

36. It was at that point, July 2013, in my judgment that time began to run. Her cause of action was not lost until then and the six year period began to run. The fact that some probably minimal expense and inconvenience was caused by some adjournments and even the possession order (but with the right to seek relief being preserved) in the claim does not necessarily establish that those adjournments and costs were caused by the Defendants' negligence rather than, for example the fact that at that stage Ms Christie was considering selling, relying on counsel's advice, despite wanting to keep the flat if possible.

37. It was Ms Christie's case that when the possession order was made (with costs reserved) the Judge at that stage had made the order which he did with the intention that the costs of the whole case were to be reserved and that the intention had been to include also the previous adverse costs order. It is debatable whether the order for reserved costs has that effect in law but if the party proposing the order consented to that effect that such may be the case. The transcript to which I was referred indicated that the council's representative rather than the court proposed that the costs of the proceedings including that, "*Costs of proceedings are reserved to any application for relief from forfeiture*". The judge then asked by way of clarification "*Costs of proceedings including today?*", to which counsel agreed.

38. Importantly the order of 19 April 2013 had already ordered Ms Christie to pay the costs of the proceedings, yet counsel for the council was it seems asking that the costs of the proceedings be reserved, not merely the costs of that day. Whether the understood agreement of the Council implicit in their proposal was indeed that the costs of the action would be returned to 'reserved' status, as is Ms Christie's understanding, or perhaps misunderstanding, would be a fact sensitive matter for a trial and could if it were relevant involve evidence of what may have been discussed outside the courtroom if anything. I doubt the legal effect of the order would be to achieve that unless it was a matter of concession or effective agreement by the

council, since the conventional interpretation is that prior concluded orders for costs are not included within later ones absent something clear.

39. That aside, I do not think the costs orders are relevant. Ms Christie had not lost, or in my judgment suffered material diminution to her chose in action in the form of right to seek relief on the terms she ultimately would have wanted: along the lines of *Berney v Saul* and *Hopkins v Mackenzie*, her chose in action namely the right to seek relief on the terms she ultimately wanted was not lost or in my judgment materially impaired until the end of July 2013. *Per contra*, the court had expressly extended and preserved that right until 9 August very much as in *Berney v Saul* there had been an agreed extension of time, which was relied on by Moses and Rimer LJJ at para 92 of the majority judgment, and hence no real risk that the claim would have been struck out in that case during the period of the extension.

40. I note also that in *Khan v Falvey*, cited also in the *Berney v Saul* case, it was said that (and I note the word 'real' in relation to risk, which in my view imports a notion of 'substantially' rather than trivially:

> It "might be said that in theory the value of the chose in action will deteriorate over a period of time prior to the date when an application to strike out would have succeeded, and therefore once the decline starts, damage is sustained. But in the words of Lord Evershed in Cartledge v Jopling at p.774 there must be 'real damage as distinct from purely minimal damage'. It seems to me that a claimant does not suffer real damage in the form of diminution of the value of his chose in action until there is a serious risk that the original action could be dismissed for want of prosecution"

41. By analogy here it seems to me that if the 'harm' done in the form of adjournments and some legal cost is properly to be taken into account (and I am not satisfied that it is, it not being established absent an close examination of facts at trial) as clearly caused by the negligence in question, then the minimal and indeed, relative to the claim, trivial, nature of that harm does not amount to real damage for the purposes of for example the quotation from *Hatton v Chafes* above. Her chose in action in relation to relief was expressly protected by the possession order and was not in my

judgment diminished in its value. Indeed I doubt that costs would fall within the 'measure of damages applicable to the wrong in question' either for the purposes of that quotation, but I do not need to go further than to refer to the minimal or trivial nature of the costs relative to this claim in any event even if they are relevant.

42. I acknowledge of course that the Judgment of Moses LJ in the *Berney* case indicate that a party cannot limit his or her claim to a period after the limitation date so as to escape the effect of Limitation, so that if the value of her right to relief from forfeiture had been diminished materially prior to the sale of the flat she may well be out of time, but that does not seem to be the case here: the right to relief which I am perforce assuming for the present case, was lost – all or nothing – on sale of the property, and a couple of adjournments and some modest legal costs did not impact upon the right to relief (and indeed when the possession order was made which gave an extended date for seeking relief, the costs were reserved and not awarded against Ms Christie). This analysis on my part appears consistent both with the approach of Gloster LJ and with the somewhat more cautious approach of Moses and Rimer LJJ in *Berney v Saul* to the running of time.

43. I do not find Capita (Banstead 2011) Ltd v. RFIB Group Limited [2016] QB 835 of assistance, since the claim here as understood through the lens of an appreciation that I am following the argument of a non-lawyer acting for herself, is that negligent advice was given, early on, and repeated, wholly omitting to mention that a charge would be a way to avoid losing the property, it was followed, and the ultimate loss of the right to seek relief on those terms was as at the sale date.

44. Accordingly I agree with Ms Christie in this part of the Summary judgment application and that it is not fanciful to argue that the claim was commenced less than six years from limitation start date (the claim having been issued 15 July 2019) and would be in time if so. If it is clear that the value of the chose in action (the right to relief) has been substantially, materially, diminished before the limitation date, an action will be statute barred but that there is a reasonable prospect of showing that that is not the case here.

Handed down 30/6/22