**KEY POINTS**

- Amendments after the expiry of limitation are often highly contentious.
- The provisions of Civil Procedure Rules (CPR) 17.4(2) are subject to s 35 of the Limitation Act 1980.
- Permission to amend may have to be obtained before any defective claim is struck out or abandoned.

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# Out of time amendments

Dov Ohrenstein reviews how the courts approach applications to amend claims after the end of relevant limitation periods.

## THE RELATION BACK RULE

The Limitation Act 1980 sets out the time limits by which most types of claim must be brought. Once the relevant limitation period has expired it is not usually possible to bring a claim. However, s 35(1) of the Limitation Act provides that new claims (other than third party proceedings) made in the course of any action shall be deemed to have been commenced on the same date as the original action rather than on any later date such as the date of service of the amendment application or the date of the order by which the amendment is permitted. This is known as the "relation back" rule. It therefore allows claimants, in appropriate cases, to pursue claims that would otherwise be time barred and to deprive defendants of limitation defences that would apply if those claims were pursued in separate proceedings. Unsurprisingly, it regularly gives rise to contested court applications.

## THE STATUTORY FRAMEWORK

The powers of the court to permit out of time amendments are limited by both the Limitation Act and by the Civil Procedure Rules (CPR).

Sections 35(4) and (5) of the Limitation Act enable court rules to provide for allowing a claim in respect of what would otherwise be a time barred cause of action where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action".

CPR 17.4(2) has a similar, but importantly not identical provision, which states that:

> "The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

## THE THREE QUESTIONS

Accordingly, the approach that judges usually adopt when faced with an application to amend a claim which may introduce a cause of action which is time barred is to ask the following three questions (see *Ballinger v Mercer Ltd* [2014] EWCA Civ 996; [2014] 1 WLR 3597) to determine whether the court has a discretionary power to allow the amendment or not.

### Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?

On an amendment application, a claimant is, in effect, asking the court to make a summary determination in its favour that a limitation defence is not available. Where such a defence turns on factual issues which are in serious dispute, they need to be determined at a trial rather than summarily at an interlocutory stage. This is why a defendant only has to show that it is *reasonably arguable* that the limitation period for the new claim has expired (see *Ballinger v Mercer Ltd*).

### If so, do they seek to add or substitute a new cause of action?

In this context a new cause of action should be distinguished from, for example, a new head of loss in respect of an already pleaded cause of action or new instances or particulars of causes of action already raised (see *Aldi Stores Ltd v Holmes Buildings Plc* [2003] EWCA Civ 1882; [2005] P.N.L.R. 9).

### If so, does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

This question involves a value judgment by the court based on analysis and is not a matter of discretion. Although some cases will be clear cut, the Court of Appeal has acknowledged that in others "there is more than one answer which could rationally be given on the point, and in relation to which it could not be said of any of those answers on appeal that it is 'wrong' such that an appeal should be allowed" (*Mastercard Inc v Deutsche Bahn AG* [2017] EWCA Civ 272).

## THE MEANING OF THE "SAME OR SUBSTANTIALLY THE SAME FACTS"

The "same or substantially the same" is not synonymous with "similar" (see *Ballinger v Mercer Ltd*). A new claim does not arise out of *the same or substantially the same* facts if it puts a defendant in the position of being obliged to investigate facts and obtain evidence well beyond the ambit of the facts that it would reasonably be assumed to have investigated for the purposes of defending the original claim (see *Akers and others v Samba Financial Group* [2019] EWCA Civ 416).

The test is based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters in issue, already have had to investigate the same or substantially the same facts. In *Akers and others v Samba Financial Group* the original pleading had not put in issue allegations of lack of good faith but this formed part of the proposed amendment introducing a constructive trust claim. Accordingly, the amendment was not allowed.

## WHERE MUST THE "SAME OR SUBSTANTIALLY THE SAME FACTS" BE FOUND?

The Court of Appeal has held that in the majority of cases the question of what was in issue in an existing claim would usually be determined by examination of the pleadings alone (see *Akers and others v Samba Financial Group*).

Usually the facts that are relied on for the purposes of an out of time amendment

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are those already pleaded in the original particulars of claim. However, a claimant is also able to rely for the purposes of an out of time amendment on facts asserted in the defence (see *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828). Importantly, it is not the case that a claimant seeking to amend by reliance on facts pleaded in a defence is confined only to the precise facts put in issue in the defence, there is no such restriction – they can be *substantially* the same (see *Martlet Homes Ltd v Mulalley & Co Ltd* [2021] EWHC 296 (TCC) where an amendment was allowed which relied on facts asserted in the defence to assert an additional breach of contract). However, a claimant seeing to amend out of time cannot rely on facts pleaded in its reply to establish that the court has the discretionary power to allow the amendment (see *Mastercard v Deutsche Bahn*).

## CAN AN OUT OF TIME AMENDMENT BE ALLOWED AFTER A STRIKE OUT?

Although the question of whether a claimant should be permitted to amend an existing claim after the expiry of the limitation period arises frequently, it has recently given rise to a novel point: If the court has struck out the entirety of the claimant's original pleading, can it subsequently permit an amendment including new claims for which the limitation period has expired?

In *Libyan Investment Authority v King* [2020] EWCA Civ 1690 the claimants had brought a claim relating to a joint venture for the construction of a hotel and retail complex in Hertfordshire. The claimants' Particulars of Claim, which made allegations of deceit, breach of fiduciary duty and conspiracy against the defendant valuer were struck out by HHJ Barber QC on the grounds that they had no reasonable prospect of success. However, the Claim Form itself was not struck out as the judge considered that the claimants should have the opportunity to redraft their Particulars and to apply to amend.

The claimants then drafted amended Particulars of Claim which pleaded a case that would have been time barred had it been brought as a claim in new proceedings. The claimants said that their amended pleading was based on the same facts as had been in their original (now struck out) particulars and they therefore relied on CPR 17.4. The judge compared the amended claim to the claims that he had struck out and since he held that they did arise out of the same or substantially the same facts as had originally been pleaded he concluded that he had power to allow the amendments, which he proceeded to do.

The defendants appealed to the Court of Appeal contending that in circumstances where the claims sought to be pleaded were all time-barred or arguably time-barred and all of the existing claims had been dismissed and the existing Particulars of Claim struck out, the court had no power to permit an amendment. The Court of Appeal agreed with that submission. It considered the fact that the wording of CPR 17.4(2) does not reflect the precise language of the Limitation Act. The relevant difference is that the Limitation Act refers to "facts as are already in issue" but the CPR merely refers to facts in respect of which the party has "already claimed a remedy".

The Court of Appeal recognised that CPR r 17.4 is a rule of court made in exercise of the power conferred by s 35(4) the Limitation Act and therefore held that the CPR could not permit amendments in a wider range of circumstances than what is permitted under the legislation. Accordingly, it concluded:

- CPR 17.4(2) has to be read as if it contained the words "are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy".
- The court must identify what facts *are* in issue at the time when the application to amend is being made. This means "are already in issue".
- Facts which had been in issue, but are no longer in issue, are not relevant when considering whether to allow an out of time amendment or not.
- Allegations will no longer be in issue if a party has abandoned them or if they have been struck out or been the subject of judgment on a summary basis or after trial.
- Similarly, allegations will no longer be in issue if they were part of a pleading which has been struck out in its entirety.
- A party who wants to introduce an out of time claim therefore needs to obtain permission to amend before any existing claim is abandoned or struck out.

The claimant in the *Libyan Investment Authority* decision was fortunate because a majority of the Court of Appeal concluded that the order of the first instance judge had been drafted incorrectly and should be corrected so that the original pleading rather than being struck out immediately would only be struck out if an amendment application was not made. However, the general effect of the decision is clear, namely that out of time amendments should not be allowed if they postdate the strike out of the entirety of previous pleadings. ■

*Further Reading:*

- What's the limit? (2007) 11 JIBFL 642.
- LexisPSL: Dispute Resolution: What can I do if I want to issue a claim but have missed the limitation period for bringing the claim?