BCLP. Client Intelligent

Insights

KINGSTAR AND OTHERS V HASSANS (A LAW FIRM) AND OTHERS: HAS THE TEST FOR LIMITATION BEEN CLOUDED BY THE SUPREME COURT?

Dec 13, 2022

SUMMARY

The Supreme Court of Gibraltar this week found in favour of our clients and dismissed an application by the defendants to strike out our clients' claim against them on all three grounds relied upon by the defendants.

Our clients' claims - which, after this week's success, will now continue against Hassans law firm and two of Hassans' partners - are premised on allegations of dishonest assistance. At trial, the court will ultimately decide whether Hassans and the named partners dishonestly (and with full knowledge of the circumstances) assisted one of our clients' former directors, Joseph Ackerman, unilaterally and fraudulently - without the knowledge and consent of his co-director, Naomi Ackerman – to effect loans on uncommercial terms from their subsidiaries to other entities in which Mr Ackerman had a personal interest in breach of his fiduciary duties to our clients.

In reaching its decision to dismiss the defendants' strike out application, the Supreme Court of Gibraltar grappled with the thorny and very much current issue of when a claim involving allegations of fraud is time-barred.

The judgment is of relevance to English practitioners as the relevant provisions of the Gibraltar legislation mirror section 32(1)(a) of the English Limitation Act 1980: the provision which postpones the limitation period in cases of fraud.

The defendants had sought to strike out our clients' claim on three grounds. Whilst the third ground was fact-specific, the remaining two grounds - (1) limitation; and (2) abuse of process - raised general points of principle. Of most universal interest was the court's finding on the limitation ground.

The limitation period can be extended under section 32 of the Limitation Act 1980 in cases of mistake, fraud or deliberate concealment.

The Supreme Court of Gibraltar accepted that the established position under the Gibraltar equivalent of section 32 of the Limitation Act 1980 is that the limitation does not begin to run until the claimant has discovered the fraud or could with reasonable diligence have done so. But the complicating issue in many cases, including this one, is when is it said that the claimant could with reasonable diligence have discovered the fraud. How much must the claimant know and what steps must the claimant have taken?

It used to be relatively straightforward to answer this question: one applied the "statement of case test". Did the claimant have, or could with reasonable diligence have obtained, such knowledge as would allow it and its professional advisors properly to plead a claim that would not be liable to be struck out as unarguable or lacking a sufficient evidential basis.

The issue of the circumstances in which the limitation period may be postponed under section 32 of the Limitation Act 1980 was however re-visited by the English Supreme Court only relatively recently in the case of *Test Claimants in the FII Group Litigation and others v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47. In the FII case, the Supreme Court addressed postponement of the limitation period on the basis of mistake but the UK Court of Appeal considers that much of the Supreme Court's reasoning in the FII case is expressly and directly applicable to cases of fraud and concealment.

In FII, the Supreme Court held that time runs from the point when the claimant knows, or could with reasonable diligence know, that it has a worthwhile claim. The claimant must know about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence.

It seemed pretty clear that the Supreme Court in FII was introducing a more defendant-friendly test with regard to the postponement of the limitation period, at least with regard to cases of mistake. We were all being more careful – the limitation period could well now start earlier than it would have done under the statement of case test. However, all was not as clear as it was previously. The Gibraltar Supreme Court referred to the FII test in our judgment as only "a possible new approach which may be derived from the UK Supreme Court judgment". The English Court of Appeal has however – perhaps in contrast - subsequently indicated that it considered that the UK Supreme Court must have intended the FII test to apply to fraud and deliberate concealment cases as well as mistake cases.

So far so almost clear? Not really: there is a further complexity. What is evident from our clients' case is that the statement of case test still currently applies on interim applications. The ambit of the Supreme Court's FII decision is therefore currently subject to limits. The defendants in our

clients' case had to accept before the Supreme Court of Gibraltar that it would be inappropriate to apply the FII test in a forum where there would not and could not be a full analysis of the facts or any evidence: in such an instance the appropriate test to apply is the statement of case test. This is of course instructive - care must be taken in circumstances where parties are considering the merits of making a strike out application or defending such an application on limitation grounds.

And more generally? Clarity and certainty perhaps now require early confirmation as to the ambit and extent of the FII test as to when the limitation period may be postponed, particularly in fraud and deliberate concealment cases and on interim applications of any kind.

Case Details

- Court: Supreme Court of Gibraltar
- Judge: Dudley CJ
- Date of judgment: 07/12/2022

RELATED PRACTICE AREAS

- Litigation & Dispute Resolution

MEET THE TEAM

Segun Osuntokun

London

segun.osuntokun@bclplaw.com
+44 (0) 20 3400 4619

Sharon Kennedy

London

sharon.kennedy@bclplaw.com
+44 (0) 20 3400 4798
