

Limitation, fraud, concealment, and mistake: how long have you got?

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In this podcast, we look at recent developments in section 32 of the Limitation Act 1980 (the **Act**) that have particular relevance to litigation against financial institutions.

Introduction to limitation

Generally, a claimant has 6 years from the date on which a cause of action accrues to bring a claim. Section 32 of the Act is, however, an exception to this general rule and covers claims based on fraud (a), concealment (b) or mistake (c).

In claims covered by section 32, time does not start to run until the claimant has discovered the fraud, concealment or mistake or could 'with reasonable diligence' have discovered it. So the first questions you need to ask are:

1. Has there been a fraud, concealment or mistake?
2. When did the claimant discover the fraud, concealment or mistake?
3. When could the claimant, with reasonable diligence, have discovered (if earlier?)

Recent case law

In this podcast we will focus on the following key decisions:

- i) the Supreme Court in *Franked Investment*, a case on mistake [Test Claimants in the Franked Investment Income Group Litigation v HMRC \[2021\] UKSC 31](#);
- ii) the Court of Appeal on concealment and deliberate breach of duty in *Canada Square v Potter* [Canada Square Operations Ltd v Potter \[2021\] EWCA Civ 339](#) and *Gemalto v Infineon* [Gemalto Holding BV & Ors v Infineon Technologies Ag & Ors \[2022\] EWCA Civ 782](#) ; and
- iii) in relation to fraud *ECU v HSBC* [ECU Group PLC v HSBC Bank PLC & Ors \[2021\] EWHC 2875](#), *European Real Estate Debt Fund v Treon* [European Real Estate Debt Fund \(Cayman\) Ltd v Treon & Ors \[2021\] EWHC 2866 \(Ch\)](#), *The Libyan Investment Authority v Credit Suisse* [Libyan Investment Authority v Credit Suisse International & Ors \[2021\] EWHC 2684 \(Comm\)](#), and *Bilta v SVS* [Bilta \(UK\) Ltd & Ors v SVS Securities plc & Ors \[2022\] EWHC 723 \(Ch\)](#).

Reasonable diligence

One of the key issues in the recent case law is the construction of the reasonable diligence test. This 'might' be characterised as a 2-stage objective test:

- (1) whether there is anything to put the claimant on notice of a need to investigate (the 'trigger'); and
- (2) what a reasonably diligent investigation would then reveal, with time starting to run from that later date.

However, although some case law suggests reasonable diligence is only required once the 'trigger' has been pressed, the Court of Appeal in *OT Computers*¹ stated *'it is more accurate to say that the requirement of reasonable diligence applies throughout'*. Arguably, reasonable diligence is therefore a constant requirement. What constitutes reasonable diligence differs depending on the context so we'll now look at cases relating to the three separate categories of mistake, concealment and fraud.

Mistake

The key recent decision on this is that of the Supreme Court in *Franked Investment*.

This case related to the legal position on the tax treatment of payments dating back to the 1970s. For our purposes, the key point is that the Supreme Court held that a mistake of law is reasonably discoverable as soon as the claimant realises it has a 'worthwhile claim' (known as the 'worthwhile claim' test). Previous authorities had held that a stricter test, known as the 'statement of claim' test applied. That required the claimant to be able to 'properly plead' a claim – and in the context of mistakes of law was thought to require a relevant and final judicial decision. Instead, the Supreme Court held that the delayed limitation clock starts ticking as soon as the claimant realises they have a 'worthwhile claim' – which was further defined as enough information to 'justify embarking on the preliminaries to a claim'.

Concealment

In *Canada Square v Potter*, *Canada Square* (previously *Egg banking*) failed to disclose the level of commission on a PPI policy to Mrs Potter (which was in fact 95% of the premium). In the context of a limitation defence, the Court of Appeal had to determine what '*deliberate concealment*' under s 32(2) of the Act meant. It held:

1. It includes a '*deliberate*' breach of duty which is unlikely to be discovered '*for some time*';

¹ *OT Computers Ltd v Infineon Technologies & Anor* [2021] EWCA

2. That '*deliberate*' can include '*reckless*', and that '*a breach of duty*' can include '*any legal wrongdoing*', so not necessarily a specific contractual, tortious or fiduciary duty.
3. Finally, it held that '*active*' concealment is not required, it could be a failure to disclose a fact relevant to a potential claim – even if that failure might not of itself constitute an actionable wrong.

In contrast to *Franked Investment*, this decision is viewed as more 'claimant friendly'. However, this decision has been appealed to the Supreme Court, so we await further news.

The second (more recent) case on concealment is *Gemalto v Infineon*. Here, the Court of Appeal ruled that time starts to run in deliberate concealment cases at the same time as it does for mistake, that is the *Franked Investment* 'worthwhile claim' test as opposed to the 'statement of claim' test. The Court of Appeal did not directly address whether the 'statement of claim' test still applies to fraud cases, suggesting fraud might be distinguished.

Fraud

In recent cases, the court has considered what '*reasonable diligence*' means and the strong message is that claimants must be proactive in investigating any suspicion of fraud or concealment, whether through routine due diligence, issuing proceedings, or making an application for pre-action disclosure. We highlight, briefly, the key points from four recent decisions:

1. *ECU Group Plc v HSBC Bank Plc & Ors*

In this case, the court dismissed ECU's claims against HSBC for fraud and breach of confidence as out of time, finding that it could, with reasonable diligence, have brought its claim earlier. In particular, the court held:

- '*Sufficient knowledge*' to plead dishonesty does not require evidence in '*admissible form*'. It just needs to be sufficient for responsible counsel to plead the allegation.
- If ECU had been '*reasonably attentive*' at the requisite time, it would have pursued some of its claims within the primary limitation period. Sufficient information to bring the other claims would have become available through disclosure in those initial claims. The exercise of reasonable diligence can encompass issuing substantive proceedings.
- Further, the court held reasonable diligence could also encompass making an application for pre-action disclosure, which ECU had failed to do.

2. *European Real Estate Debt Fund v Treon & Ors*

Here, the court found for the claimant on liability in both deceit and conspiracy but concluded that the claim was out of time because, again, the claimant could, with reasonable diligence, have discovered the fraud earlier.

The claimant had invested in a business and the court concluded further financial information could, and should, have been sought prior to the investment. While s32(1) of the Act only applies once a cause of action is complete, this does not mean that the claimant has *carte blanche* to ignore events prior to that date. In this case, the court held the claimant's knowledge arose from a sequence of events, some of which occurred well before the cause of action was complete.

The court also considered what a 'reasonable investor' in the position of the claimant could or should have discovered prior to investing. It found that the reasonable investor would have asked more questions and obtained further financial data, which would have led to the discovery of sufficient facts to enable it to plead its claims.

3. *Libyan Investment Authority v Credit Suisse & Ors*

The basic question for the court to decide here, was whether, with reasonable diligence, the Libyan Investment Authority (LIA) could have discovered an alleged fraud earlier.

In this case, the court found that time should not start to run until the alleged fraud could be pleaded in a statement of case. The 'worthwhile claim' test from *Franked Investment* was distinguished. Where fraud is an issue, the stricter 'statement of claim' test is appropriate to prevent: a) fraud victims potentially losing claims due to the passage of time too easily; and b) pleading fraud on a speculative basis becoming too common.

On the question of diligence, the court confirmed (again) that this is to be judged objectively, although '*in the context in which the claimant finds itself.*' Further, the court held that once the LIA had the requisite knowledge, it remained with it, even if the relevant individual subsequently forgot or left the organisation.

4. *Bilta v SVS*

The final case also relates to the meaning of reasonable diligence in the context of fraud and concealment – and also considers the *Franked Investment* 'worthwhile claim' test. Here, while recognising there was an argument that time should start to run as soon as the claimant realises they have a worthwhile claim, the court held this was '*redolent with difficulty*', particularly in cases involving allegations of fraud or dishonesty – and that the '*statement of claim*' test was more appropriate.

Conclusion

There are four key points to remember on s32 limitation issues:

1. The 'worthwhile claim' test (from *Franked Investment*) may be confined only to cases of mistake of law and concealment. It may not apply in cases of fraud.
2. In a concealment case, (pending any decision from the Supreme Court), there does not need to be active concealment, any form of 'reckless' legal wrongdoing may suffice.
3. While the limitation clock will not begin to run until a cause of action is complete, the knowledge necessary to bring the claim may be acquired **prior** to the completion of the cause of action.
4. Finally, reasonable diligence in relation to mistake, fraud or concealment is an objective test based on the actual claimant, not a hypothetical claimant. However, claimants should be aware that it includes a wide spectrum of activities. It may, for example, involve issuing proceedings or seeking disclosure through legal means, for example a Norwich Pharmacal application.

Whatever the future holds for the reasonable diligence test, the recent decisions highlight the draconian consequences of leaving it too late to issue your claim.