

TIME LIMITS IN THE AGE OF COVID-19

Limitation & Applications for relief from sanctions



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LIMITATION

- ▶ There is no help forthcoming from the Coronavirus Act 2020 nor the Civil Procedure Rules amendments in Practice Directions 51Y, 51Z and 51ZA
- ▶ Claimants are still expected to comply with the relevant limitation period
- ▶ So, what can be done to overcome inevitable problems?
- ▶ There are four possible approaches

Limitation Amnesty

- ▶ The first approach is to seek to agree a limitation amnesty
- ▶ Such agreement has to be prospective- you need to identify potential issues early
- ▶ Potential danger areas:
 - ▶ It should be clear and in writing
 - ▶ The extension period needs to be clear and precise
 - ▶ Make sure the amnesty is agreed with *all* potential defendants
 - ▶ If the agreement allows the Defendant to revoke the amnesty upon giving notice, consider carefully what that notice period needs to be and how it is to be communicated

Extend the time for service of the claim form

- ▶ The second approach is to issue, then apply for an extension of time to serve the claim form
- ▶ Dangerous, given the amount of time it may take to get such an application heard
- ▶ Defendants can apply to set aside such an order
- ▶ Courts frequently do set aside such orders unless there is a good reason for the inability to serve in time

Agreement to extend time for service of the claim form

- ▶ Thirdly you can seek an agreement to extend the time for service rather than applying to the court
- ▶ Similar points apply as for a limitation amnesty- ensure the agreement is prospective, in writing and clearly drafted

Apply to extend the time for service of the Particulars of Claim

- ▶ The fourth approach is to serve the claim form and then apply for an extension of the time to serve the particulars of claim prospectively
- ▶ The application has to be within the standard 4 months for service
- ▶ The advantage is that when considering any prejudice, the only prejudice the court will consider is that *resulting from the grant of the extension of time itself (Robert v Momentum Services Ltd)*
- ▶ As such, it will be very difficult for the Defendant to resist such an extension

Key points to take away

- ▶ Limitation periods still apply
- ▶ As soon as it becomes apparent that there are going to be problems, proactively considering how to deal with them will save a lot of pain later on
- ▶ Extension by agreement should always be the first approach. Given the current pressure on the courts, unreasonable refusal that results in an application to the court is likely to have adverse costs consequences
- ▶ Ensure that any extension by agreement is prospective, in writing and precise about dates

Relief from sanctions

- ▶ There are yet to be any reported cases dealing with relief from sanctions in the context of Covid-19
- ▶ We can however obtain some guidance from CPR PD51ZA and reported cases on adjournments and applications to extend time as to how the courts are likely to deal with them

Practice Direction 51ZA

- ▶ CPR PD51ZA(4) states that:
 - ▶ “In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings and applications for relief from sanctions.”

Heineken Supply Chain BV

- ▶ Deputy High Court Judge Alexander QC had to consider timetabling and whether a trial should be postponed in a patent claim
- ▶ He acknowledged that the pandemic had required individuals to re-organize aspects of their personal and professional lives and that preparing documents and evidence had been made harder
- ▶ He criticized the lack of detail in the evidence as to the problems caused by the disruption
- ▶ He noted the efforts of other professionals at the current time and stated that it was *"not unreasonable to expect that lawyers concerned with keeping cases on track may need on occasion to push a little harder to enable that to be achieved"*

Municipio de Marina v BHP Group

- ▶ This case followed *Heineken*, and HHJ Eyre QC set out 9 principles to guide the courts when considering an application to extend time for compliance with directions or for the adjournment of hearings:
 - ▶ Existing deadlines should be kept to if achievable and any extension should be for as short as reasonably practicable
 - ▶ Legal professionals will be expected to use technology to overcome problems with remote working
 - ▶ Legal professionals will be expected to go further than might previously have been expected, particularly where a failure to meet a deadline will jeopardise a trial date
- ▶ Expert witnesses will be expected to do likewise

Municipio de Marina v BHP Group

- ▶ The courts should be willing to accept evidence that is less polished and focused than usual if necessary to meet a deadline
- ▶ The court should take account of the realities of the situation and avoid requiring compliance with deadlines which are not achievable even with “*proper effort*”
- ▶ The court must have regard to the consequences of movement restrictions and working from home, include it set-ups and other responsibilities such as childcare and supporting vulnerable persons
- ▶ An extension of time that will require the loss of a trial date will be granted less readily than one that does not

Key points to take away

- ▶ Referring to Covid-19 alone is unlikely to act as a magic bullet in applications for relief from sanctions
- ▶ A reference to Covid-19 backed up by a detailed explanation of the problems caused is however likely to satisfy the 'good reason' test
- ▶ A clear timeline is likely to be off assistance- the courts are more likely to be sympathetic to problems caused by disruption at the start of the lockdown than later on
- ▶ Issues about the availability of staff due to furlough are likely to only go so far, firms will be expected to have kept on enough staff to meet professional obligations
- ▶ If there was an issue due to the health of a witness or solicitor, obtain the evidence in good time

Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

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