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# Limitation in Industrial Disease Cases where the Defendant is Insolvent

## *Holmes -v- S & B Concrete Limited [2020]* EWHC 2277 (QB)

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To read the full judgement of *Holmes -v- S & B Concrete Limited* [2020] EWHC 2277 (QB), please click here.

Defendant insurers responding to industrial disease claims have recently been met with a novel and ingenious argument on limitation where the Defendant company has been in liquidation, and then dissolved.

The argument runs as follows:

1. The Defendant company was in liquidation;

2. The Defendant was then dissolved;

3. The Claimant applied to have the Defendant company restored to the register for the purposes of bringing a claim against the company, to be satisfied by the Defendant's historic employer's liability insurer;

4. Upon restoration of the company, the Defendant is returned to the position that it was in immediately prior to dissolution (namely, a position of liquidation) by operation of S.1032 of the Companies Act 2006;

5. The general moratorium with regard to the running of limitation periods against companies in liquidation therefore applied, namely that limitation did not run in such circumstances;

6. As such, the limitation defence did not apply to periods in which the Defendant was in liquidation, and the Defendant was unable to assert a limitation defence for these periods.

There is case law in support of this position, in particular *Financial Services Compensation Scheme Ltd -v- Larnell* [2005] EWCA Civ 1408.

I have experience, both personally and anecdotally from colleagues, of this argument finding favour at the District Bench. For Defendant insurer clients, this was a cause of some considerable consternation.

In many cases, it produced a rather perverse result. For example:

1. The Claimant is employed by Company A, up until he is made redundant in 1989 due to the company becoming insolvent;

2. In 1990, Company A enters liquidation;

3. In 1994, Company A is dissolved;

4. In 2005, the Claimant is diagnosed with noise induced hearing loss by his doctor;

5. In 2018, the Claimant's solicitors apply to restore Company A to the register and then subsequently proceedings are issued against Company A for personal injury.

In this example, applying *Larnell*, the Claimant's case (despite being ostensibly brought ten years' out of time) would not be limitation-barred.

The High Court has now considered this argument in the context of historic disease cases. In *Holmes v S & B Concrete Limited* [2020] EWHC 2277 (QB), Martin Spencer J considered this issue. In dismissing the Claimant's appeal against the decision of HHJ Owen QC, he rejected the Claimant's argument that the Court should discount the periods in which the Defendant was in liquidation when assessing the limitation defence.

The Defendant's arguments are summarised in paragraph 15 of the Judgment:

> *15. Mr Kent further submitted that the learned judge was right to distinguish the Financial Services case, although not on the basis that this was a personal injury claim: he did not rely on any differences between the provisions of sections 14A and 14B on the one hand and sections 11, 14 and 33 on the other. He submitted that:*
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> *i) The Claimants in the Financial Services case had "knowledge" of their cause of action for the purposes of sections 14A and 14B of the Limitation Act in 1997 which was before the company was wound up in 2000;*
>
> *ii) The Claimants in Financial Services had put in a proof of debt in August 2001 which had neither been admitted nor rejected by the liquidator;*
>
> *iii) By contrast, the Claimant's date of knowledge in the present case was long after the Defendant company had been wound up and although he may have had an accrued cause of action for the injury to his hearing, he was unaware of it and therefore could not, practically, have lodged a claim with the liquidator then.*
>
> *iv) In Financial Services, the policy of liability insurance to which the Claimant intended to have recourse had a limit of indemnity of £250,000 while the claim itself amounted to £607,000;*

*v) By contrast, the claim in the present case relates to employers' liability in respect of which, at all material times, the Defendant was required to have compulsory insurance for which the minimum level of insurance required was £2,000,000;*

*vi) In those circumstances the factors relied upon by the court in Financial Services which were considered to make it impossible to see the claim as being one made "outside the liquidation" and not directed at property within the statutory trusts had no application to the present case.*

Martin Spencer J, in his Judgment, held that Parliament could not have considered *Larnell* when passing the 2006 Act. As is set out at paragraphs 16 and 17 of the Judgment:

*It seems to me clear that, in enacting these provisions, parliament cannot have had in mind the effect of Financial Services or its predecessor, the General Rolling Stock case, as interpreted by the Claimant in the present case: otherwise, for a large number of cases such as the present, the restoration of the company to the Register would be automatic, the effect would be to mean that the limitation period had never run, and there would then be no need to direct that the period between the dissolution of the company and the making of the order to restore was not to count for the purposes of the Limitation Act. However, if Mr Penman is right as to the effect of restoration to the Register of a company which had been in liquidation, then whether or not Parliament can have had this effect in mind is neither here nor there.*

*17. In my judgment, Mr Kent QC is right that the decision of the Court of Appeal in Financial Services can and should be distinguished, and it does not have the effect contended for by Mr Penman.*

Dismissing the appeal, Martin Spencer J further held that this was a desirable outcome:

*21. In my judgment, this is also a desirable outcome. It means that a Claimant whose claim is otherwise unmeritorious because he acquired the necessary knowledge more than three years before the issue of proceedings and in respect of whom it would be inequitable for the court to exercise its discretion under section 33 of the Limitation Act 1980 (the situation in the present case) would not gain an unexpected and undeserved windfall by virtue of the application of the rule set down in a 19th century case which, it seems to me, was never intended to apply to a case such as the present. Furthermore, in my judgment, the decision of the Court of Appeal in Financial Services was never intended to apply to the situation which has arisen in the present case and there was no intention to contradict the decision of the Court of Appeal in Smith v White Knight Laundry Limited [2001] EWCA Civ 660, a decision which was not cited in Financial Services. In Smith v White Knight Laundry Limited, the Court of Appeal held that where the applicant for a restoration order was a prospective Claimant in a personal*

*injuries action in circumstances where the claim would otherwise have been statute-barred, the effect of a direction under section 651 of the Companies Act 1985 (the predecessor to section 1030 of the Companies Act 2006) was the same as a grant of relief under section 33 of the Limitation Act 1980 ; and that, since the section 651 direction was made in the absence of the Defendant and it was by no means clear that the Claimant would succeed if she made an application pursuant to section 33 of the 1980 Act, justice required that the section 651(1) direction be set aside so that the Defendant's insurers could be heard on any application the Claimant might make pursuant to section 33. It should make no difference whether or not the Company was in liquidation at the time it was dissolved.*

This decision provides welcome clarity to an area in which there has been some contention.

The position is now as follows: a Claimant bringing a claim for personal injury cannot generally rely upon the provisions of the Companies Act 2006 to avoid a limitation defence on the basis of *Financial Services -v- Larnell*.

Philip Godfrey
24 August 2020

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