

Equitable Claims – What is Laches?

The Meaning of “Laches”

The Oxford English Dictionary offers the following definition of the word “laches”:

“Laches (Old French): 1. Slackness, remissness, negligence, also, an act or habit of neglect. 2. Negligence in the performance of any legal duty; delay in asserting a right, claiming a privilege or making an application for redress.” (OED, 2nd ed. (1989))

In a modern legal context, laches is the term given to the exclusively equitable doctrine that delay in pursuing an equitable claim or remedy may result in the relief or remedy being lost. At one end of the spectrum the doctrine of laches applies where the claimant’s delay in bringing proceedings makes it impossible for a fair trial of the action to take place, e.g. because of the loss or destruction of evidence. In that context, the defence of laches has much in common with the principle of procedure, which enables the Court to strike out stale claims for want of prosecution. At the other end of the spectrum the doctrine of laches applies where the claimant’s delay induces the defendant to act on the basis that the claim will not be asserted or pursued. In that context, laches overlaps considerably with the doctrines of affirmation, acquiescence and estoppel:

“Sometimes laches is taken to mean undue delay on the part of the plaintiff in prosecuting his claim and no more. Sometimes acquiescence is used to mean laches in that sense. And sometimes laches is used to mean acquiescence in its proper sense, which involves a standing by so as to induce the other party to believe that the wrong is assented to. In that sense it has been observed that acquiescence can bear a close resemblance to promissory estoppel..” (Goldsworthy v. Brickell [1987] Ch 378, 410A-C)

The core principle of laches, as with so many equitable doctrines, is unfairness or unconscionability. In equity delay by itself has never been enough to prevent a claimant from obtaining relief. The defendant must establish that the consequences of the delay are such that it would be unfair for the Court to grant relief. The essential ingredients for laches are, therefore, a substantial delay coupled with the existence of circumstances which make it inequitable for the parties to go back on the arrangements they have made.

Time Limits in Equity

The doctrine of laches does not apply where the law provides a limitation period. In that event the claimant has the full period within which to launch proceedings. The defence of laches is normally relevant, therefore, in two distinct situations. First, where the cause of action arises at common law but equity affords a particular remedy, such as specific performance, which is not available at common law. In these circumstances, the claimant will lose his remedy if he delays unreasonably and fails to act promptly, often within a matter of days or weeks. Secondly, laches may also be a defence where the cause of action arises exclusively in equity and no statutory limitation period applies to the cause of action, e.g. where the claimant seeks to set aside a transaction for undue influence, mistake or fraud. Relief may also be refused in these circumstances on grounds of delay. But in these circumstances the critical question is usually whether the claimant acted promptly after becoming aware of his or her legal rights. If the claimant was ignorant of his or her right to bring proceedings until years after the event, e.g. because he or she remained under the influence of the wrongdoer or was wholly ignorant of the facts giving rise to the claim, the claimant may not be barred from seeking relief, even years after the event.

For largely historical reasons early limitation statutes did not apply to claims in equity. Because equitable remedies were very largely discretionary, the Court could control more flagrant abuses of its procedure by dismissing late claims in the exercise of its discretion. In relation to other claims, especially money claims, a practice developed of applying common law statutes by analogy where it appeared appropriate to do so. This equitable regime was largely left unchanged by both the *Limitation Act 1939* and the *Limitation Act 1980*, which still largely reflects the historical position as it applied in the 19th and early 20th centuries. 20 years on, the absence of a comprehensive code for civil actions seems even more difficult to justify and the Courts have largely given up trying to do so (and for some fairly trenchant criticism see: *Cia de Seguros Imperio v. Heath (REBX) Ltd* [2001] 1 WLR 112, 124E-F.)

The Law Commission has recently proposed wide-ranging reform in the whole field of limitation: see the Law Commission Report No 270, *Limitation of Actions*; but until those proposals are enacted, practitioners must continue to wrestle within the existing regime. Under that regime, equitable still claims fall into three separate categories:

- First, equitable claims to which no limitation period is applicable and to which the only defence based on delay is laches;
- Secondly, equitable claims for which a limitation period is expressly provided by the LA 1980; and
- Thirdly, equitable claims to which the Court generally applies a common law limitation period by analogy.

Category 1: No Statutory Limitation Period

The principal claims for which there is no statutory limitation period are claims for equitable relief, whether the cause of action arises at common law or in equity. Claims for equitable relief are expressly excluded from the application of the LA 1980: see S.36; and the only defence to a claim for equitable relief based on the delay of the claimant is laches. The Act also expressly excludes certain claims for breach of trust. The principal claims for which there is no limitation period are as follows:

- Claims for specific performance of a contract;
- Claims for rescission or rectification of a contract, trust or other instrument on grounds of fraud, undue influence, misrepresentation or mistake;
- Claims for a final injunction;
- Claims for fraudulent breach of trust against a trustee (S.21(1)(a)); and
- Claims to recover trust property or the proceeds of trust property from a trustee (S.21(1)(b)).

Category 2: Statutory Limitation Period

There are also a number of specific claims for which the LA 1980 provides a specific limitation period. Laches has no relevance to these claims and the claimant has the whole period within which to bring his claim. The LA 1980 provides the following limitation periods for the following equitable claims:

- Claims for non-fraudulent breach of trust (6 years) (S.21(3));

- Claims by a beneficiary to recover trust property from a third party (6 years) (S.21(3));
- Claims to the personal estate of a deceased person (12 years) (S.22(a)); and
- Claims to recover the arrears of interest in relation to a legacy (6 years) (S.22(b)).

Category 3: Statutory Limitation Period applied by Analogy

The LA 1980 also preserved the practice of applying common law limitation periods by analogy: see S.36. Again, where a statutory limitation period is applied by analogy, laches is not relevant and the claimant has the full period within which to bring his claim. The Court has applied common law limitation periods by analogy in the following principal cases:

- Claims against an agent or partner for failure to account (6 years by analogy with breach of contract) (*Knox v. Gye* (1872) LR 5 HL 656);
- Claims for dishonest breach of fiduciary duty equivalent to fraudulent misrepresentation or conspiracy to defraud (6 years by analogy with fraud) (*Coulthard v. Disco Mix Club Ltd* [2000] 1 WLR);
- Claims for breach of fiduciary duty equivalent to breach of contract (6 years by analogy with breach of contract) (*Cia De Seguros Imperio v. Heath (REBX) Ltd* [2001] 1 WLR 112).

Constructive Trusts: A Grey Area

Constructive trusts present a particular problem. Confusingly, where the claim involves a constructive trust, sometimes s.21(1) applies (i.e. there is no limitation period) and sometimes it does not (and the Court will apply a common law period by analogy) The distinction between claims for which there is a period of limitation and claims for which there is not is also largely a historical one because traditionally the Court treated some constructive trusts as the equivalent of express trusts but not others. This distinction is not easy to apply in practice and although there may be some logic to it, it seems needlessly complicated to subject the parties to a detailed and complex enquiry, both factual and legal, in order to determine whether a claim is barred by limitation in the first place. Far less does there appear to be any rooted policy reason for making the distinction in the first place. (For a detailed exposition of the position see *Paragon Finance plc v. D.B. Thakerar & Co* [1999] 1 All E.R. 400, 406f-416g and the Law Commission Report, paras. 2.40-41.) But for the moment, at least, the distinction must continue to be made. The following types of claim have been held to fall within S.21, i.e. no limitation period is applicable to them:

- Claims for the recovery of property held under a secret trust or property purchased on behalf of another (*Paragon* above);
- Claims by a beneficiary against an executor de son tort, i.e. an executor or trustee who intermeddles in an estate or trust without formal appointment (*James v. Williams* [2000] Ch 1);
- Claims by a company against a director or employee for misapplication of company funds entrusted to them (*BCCI (Overseas) Ltd v. Jan* (Jonathan Parker J, unreported, 17 November 1999);
- Claims by a company for recovery of the proceeds or profits made by a director as a consequence of a breach of the fair dealing rule, i.e. a gift by the company to the

director, or the purchase by him, of property belonging to the company on unfair terms (*J J Harrison (Properties) Ltd v. Harrison* [2001] WTLR 1327);

- Claims for an account of profits against a director for exploiting corporate opportunities belonging to the company c.f. *Deg-Deutsche Investitions mbh v. Koshy* (Rimer J, unreported, 23 October 2001).

On the other hand the following claims have been held to fall outside S.21, i.e. they are claims involving the second category of trust and a limitation period applies by analogy with common law:

- “*Re Diplock*” claims against a beneficiary or volunteer for the return of trust property paid by mistake (*Re Blake* [1932] 1 Ch 54) (6 years);
- Claims based on knowing receipt of trust property (“recipient liability”) or dishonest assistance in a breach of trust (“accessory liability”) (6 years by analogy with fraud) (*Paragon* above but c.f. *Gwembe Valley Development Co Ltd v. Koshy* [1998] 2 BCLC 613, which may now be regarded as wrongly decided);
- Claims against an agent for the recovery of a bribe (*Metropolitan Bank v. Heiron* (1880) 5 Ex D 319, approved in *Cia Imperio* (above) [2001] 1 WLR 112, 123C-D).

Laches: The Test

By contrast, when it applies, the test for laches is a simple one: Is it unfair to disturb the status quo given the delay by the claimant in bringing his claim? The classic statement of the law remains that made by Lord Selborne in *Lindsay Petroleum Company v. Hurd* (1873) 5 App Cas 221, 239:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.”

Applying the Test

The factors, which the Court will take into account in determining whether to accept a defence of laches will include some or all of the following:

- The length of, and reasons for the delay on the claimant’s part;
- The effect of the passage of time on the defendant’s ability to defend the action;
- The effect of the passage of time on the cogency of any evidence to be called by the claimant or by the defendant;

- The extent to which the claimant acted promptly and reasonably once he or she was aware of the facts giving rise to the claim;
- The availability of legal advice to the claimant and the steps, if any, taken by the claimant to obtain legal or other expert advice;
- The nature of the remedy sought;
- The nature of the subject matter of the claim;
- The conduct of the defendant after the cause of action arose and any change in his or her position;
- The extent to which that conduct was induced or encouraged by the claimant or by the failure of the claimant to take action promptly.

The Importance of the Claimant's Knowledge

In most cases, time begins to run when the claimant becomes aware of his or her legal rights and the claimant must act promptly or the right to equitable relief may be lost. But although the claimant's conduct when he or she becomes aware of her legal rights may be a determinative factor, the Court may still refuse relief on grounds of delay even if the claimant was ignorant of those rights for a substantial period of time: see *Holder v. Holder* [1968] Ch 353, 394. A deliberate decision not to take action may also give rise to a defence of laches. The foundation for the modern law of undue influence, *Allcard v. Skinner* (1887) 36 Ch D 145, was actually decided on the principles of laches and acquiescence. Miss Allcard joined the Sisters of the Poor in 1868. The rules of the sisterhood demanded total obedience and provided that the sisters were to hand over all their property to the Mother Superior, Miss Skinner. Until 1879 Miss Allcard remained a member of the sisterhood and handed over all of the property, which she received during that period. In May 1879 she left the sisterhood and revoked her will in its favour. In August 1885 she brought proceedings for the return of all the gifts. The Court of Appeal held (by a majority) that when she left the sisterhood in 1879 she was entitled to the return of her property on grounds of undue influence but that the delay in bringing proceedings until 1885 was fatal to her claim. In 1880 she was told that she might have a potential claim against the sisterhood by her brother and her solicitor but she took a conscious decision to accept the validity of the gifts when free of the sisterhood's influence although she chose to revoke her will. A good modern example of the flexibility of the doctrine is *Elton John v. James* [1991] FSR 397. In that case, Elton John and Bernie Taupin sought to set aside their publishing and recording agreements with Dick James and a number of his companies. They also sought the return of the copyright in their songs and sound recordings and for an account of profits. Dick James became their manager in the mid 1960s when they were unknown and in 1967 they also entered into recording and publishing contracts with him and a number of his companies. The contracts were renewed in 1969 and on a number of other occasions through the 1970s. In 1982 they issued proceedings to set aside those contracts for undue influence. The Court found that the contracts made in 1967 and 1969 had been procured by undue influence but refused rescission on grounds of laches. For many years Elton John had taken advantage of the relationship with Dick James and his record companies although his manager, John Reid, had been aware of the claims but had taken a decision not to pursue them but to keep them in his back pocket until the relationship broke down.

The Law Commission Proposals

The Law Commission Report No. 270, *Limitation of Actions*, was published on 9 July 2001. The principal proposals suggested by the report were as follows:

- There should be a single “core limitation regime” which will apply to, as far as possible, to all claims for a remedy of a wrong, claims for the enforcement of a right and claims for restitution. The regime will consist of (1) a primary limitation period of 3 years; (2) the start date will be the date of knowledge rather than the accrual of the cause of action; and (3) there will be a longstop date period of 10 years.
- The core regime will apply to all equitable remedies and all equitable claims apart from specific performance: see para. 4.273.
- The Court will continue to have jurisdiction to refuse an application on grounds of laches even though the limitation period for that claim has not expired: see para. 4.278.

These proposals are welcome. If enacted, they will simplify the position in relation to equitable time limits considerably. At the same time, the core regime proposed by the Law Commission should not fundamentally curtail the principle of fairness underlying the law as it currently applies. A core regime under which time runs from the date on which the claimant becomes aware of the claim would address one of the principle concerns of the equitable doctrine. Furthermore, it would still be open to the Court to refuse relief on general equitable principles if the conduct of claimant within the primary limitation period made it unconscionable to do so.

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