DRAWING THE RIGHT ANALOGY: LIMITATION AND CLAIMS FOR EQUITABLE RELIEF

Tom Bell of Gatehouse Chambers considers the application of the Limitation Act 1980 to claims for equitable relief.

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Of the various legal problems created by the Limitation Act 1980 (LA 1980), a strong contender for the most difficult is working out whether it applies to a given claim for equitable relief.

Section 36(1) of the LA 1980 provides that the various time limits under it:

> "shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940."

The default position, therefore, is that claims for equitable relief are not subject to statutory time limits (they may of course be subject to the doctrine of laches, but that is a different matter). There is an exception, however, if the time limit in question may be applied "by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940". In other words, a statutory will apply if both:

- It has a statutory predecessor (a "corresponding time limit") in a Statute of Limitations predating the Limitation Act 1939.
- The earlier time limit was applied by the courts "by analogy" to the claim for equitable relief in question.

A defendant may be lucky enough to unearth a pre-1940 authority that is indistinguishable from its own and cite that as evidence of how the relevant time limit was applied by analogy. But it is not critical that they do, because in *Cia de Seguros Imperio v Heath (REBX) Ltd [2001] 1 WLR 112* (see *Legal update, Limitation periods and equity*) it was held that the words "was applied" can be read as "would have applied". Therefore, if an identical case cannot be found, one must "identify if possible the principle which the courts of equity adopted and ... apply a similar principle now" (*Clarke LJ at paragraph 125*).

This raises the question: what is the "principle" which led courts of equity to adopt the Statute of Limitations?

A NARROW PRINCIPLE: *THE UB TIGER* AND *ROYAL MAIL*

The decision of the Court of Appeal in *P & O Nedlloyd BV v Arab Metals Co (The UB Tiger) [2006] EWCA Civ 1717* is the most important recent decision in this area. The issue in that case was whether a claim for the equitable remedy of specific performance of a contract was subject by analogy to section 5 of the Limitation Act 1980, which applies a six-year limitation period to claims for breach of contract.

Following an extensive review of the authorities, Moore-Bick LJ, with whom Jonathan Parker and Buxton LJJ agreed, concluded that for equity to apply a limitation period by analogy, there needed to be a "correspondence" between both:

- The common law and equitable remedies.
- The circumstances in which those remedies are available (that is, the underlying cause of action).

Moore-Bick LJ held that, because there was no "coercive remedy" comparable to a decree of specific performance available at common law, and because specific performance was (in theory) available even where the defendant had not breached the contract in question, neither requirement was satisfied, with the result that claims for specific performance were not subject to limitation by analogy.

The reasoning in *The UB Tiger* was applied in the recent case of *Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd [2021] EWHC Civ 1173* (see *Legal update, Judicial precedent dictates that injunction claims are not subject to any limitation period (Court of Appeal)*). There the question arose whether a claim for an injunction to compel the defendant to perform its statutory duty to issue VAT invoices in respect of vatable supplies was subject to section 2 of the LA 1980, on the basis that it was "analogous" to a claim in tort for damages for breach of the statutory duty in question.

In a joint judgment by Lewison and Asplin LJJ and Sir Timothy Lloyd, the Court of Appeal considered that a claim for an injunction to enforce a statutory duty was, for limitation purposes, indistinguishable from a claim for specific performance of a contract. The court therefore concluded that it was bound by *The UB Tiger* to hold that claims for an injunction were not subject to limitation.

The court appears to have reached this conclusion with some reluctance and expressed doubt about the correctness of Moore-Bick LJ's analysis in *The UB Tiger* (at paragraph 182 of the judgment, they said that they had "reservations" about the reasoning). Even so, it rejected the defendant's invitation to treat *The UB Tiger* as having been decided per incuriam owing to its inconsistency with *Cia de Seguros*. (It was right to do so because *Cia de Seguros* was not only cited in *The UB Tiger* but moreover contributed significantly to its reasoning. The *per incuriam* doctrine, as explained in *Young v Bristol Aeroplane Ltd [1944] KB 718*, is not engaged simply because the Court of Appeal disagrees with the reasoning of an earlier Court of Appeal.)

If *The UB Tiger* and *Royal Mail* were correctly decided, it would mean that the analogy principle recognised by section 36 is a narrow one because it would apply only where the equitable claim in question is almost indistinguishable from its common law counterpart. This would be a surprising outcome. The courts have consistently recognised that the law of limitation serves an important public policy function, and there is therefore no reason to assume that when courts of equity adopted the provisions of the statute into their own rules of procedure, they did so reluctantly.

WAS *THE UB TIGER* WRONGLY DECIDED?

It is suggested that the law took a wrong turn in *The UB Tiger* and that the doubts expressed in *Royal Mail* were justified. To understand how the wrong turn came to be made, one must start with the case from which Moore-Bick LJ derived his twofold test, namely *Knox v Gye (1872) LR5 HL 656*.

Mr Knox, who was the personal representative of Mr Thistlethwayte, claimed an account of profits of a partnership alleged to have been entered into between the deceased and Mr Gye. The House of Lords dismissed the claim on the ground of limitation because, although the Limitation Act 1623 only applied to actions for an account at law, equity adopted the statute by analogy in respect of claims for an account in equity.

At paragraph 674 of the judgment, Lord Westbury said:

> "For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a court of equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in equity corresponds

> with an action at law which is included in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure."

The key phrase comes at the start of this quotation, namely "where the remedy in equity is correspondent to the remedy at law". Crucially, in *The UB Tiger*, Moore-Bick LJ thought that this meant that the two remedies had to be of an intrinsically similar nature, such as common law damages and equitable compensation, or, as in *Knox v Gye*, an account at law and an account in equity.

What Moore-Bick LJ did not appear to consider, however, is the possibility that it was not the abstract or intrinsic nature of the two remedies that needed to correspond with each other, but rather the function they respectively performed (or would perform) in the case at hand. It is not uncommon, for example, for an employee whose contract of employment has been wrongly repudiated by their employer to claim as their primary remedy specific performance of the contract (an equitable remedy), and to claim damages (a common law remedy) in the alternative. In that scenario, it is not a misuse of language to say that the two remedies correspond, because both perform the same function: namely, to put right the employer's wrongdoing.

In *The UB Tiger* at first instance (reported at *[2005] EWHC 1276 (Comm)*), Colman J (whom the Court of Appeal overturned) was not troubled by what he described as "the intrinsic dissimilarity" between damages and specific performance. He said at paragraph 31 of the judgment:

> "The essence of the matter is that a continuing breach of contract is alleged for which damages are claimed and in relation to which the granting of the equitable remedy will simply put an end to the continuing accumulation of loss. In such a case the function of that remedy is to diminish the loss which would otherwise sound in damages."

Moore-Bick LJ saw things differently, however. What mattered was not the correspondence between the two remedies in the context of the case in question, but rather their correspondence for all purposes.

Moore-Bick LJ went on to say that, since, as the Privy Council decided in *Hasham v Zenab [1960] AC 316*, specific performance may be ordered even though the defendant has not (yet) breached the contract in question, it was "wrong in principle to treat specific performance as merely an equitable remedy for an existing breach of contract" (at *paragraph 47*). But this is to throw the baby out with the bathwater. Just because there may be fact patterns where the claim for specific performance does not correspond to a claim for damages, it does not follow that the two remedies can never correspond.

EVIDENCE OF A WIDER PRINCIPLE

A somewhat puzzling aspect of Moore-Bick LJ's judgment in *The UB Tiger* is that he not only cited, but in fact quoted the key passage from, a decision that contradicts his conclusion on specific performance. The case is *Redgrave v Hurd (1881) 20 ChD 1*, in which the Court of Appeal held that it is no defence to a plea of fraudulent misrepresentation that the claimant could have discovered the fraud with due diligence. Jessel MR, with whom Baggallay and Lush LJJ agreed, said at paragraph 13:

> "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them." I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations. That, of course, is quite a different thing."

The Master of the Rolls was making the point here that "delay" by the representee in finding out the truth was only a defence to a claim for rescission if it gave rise to a limitation defence. Significantly for present purposes, the Master of the Rolls said that it was "a settled doctrine of equity" that the limitation-by-analogy principle applied both to claims for specific performance and to claims for rescission.

In *The UB Tiger*, Moore-Bick LJ referred to this passage from *Redgrave v Hurd* when considering a different point, which was whether laches can operate as a defence to a claim for equitable relief even if that claim is subject to a statutory limitation period by analogy. His view was that it could, but only if it had a prejudicial effect on the

defendant. What is unclear is why, when considering the limitation-by-analogy principle, he did not touch on the Master of the Rolls' statement in *Redgrave v Hurd* that specific performance was a remedy that was subject (or potentially subject) to the Statute of Limitations.

The second case which may be said to undermine Moore-Bick LJ's narrow approach in *The UB Tiger* is the Court of Appeal's decision in *Molloy v Mutual Reserve Life Insurance Company (1906) 94 LT 756*. Mr Molloy claimed rescission of an insurance policy that had been fraudulently mis-sold to him. The Court of Appeal dismissed Mr Molloy's claim on the basis that it was brought more than six years after he was placed on notice of the defendant's fraud.

In reaching this conclusion, all three judges (Collins MR and Romer and Cozens-Hardy LJJ) proceeded on the basis that it was well established that the limitation-by-analogy doctrine applied to claims for rescission. At paragraphs 761-2, Romer LJ said:

> "In a case where a fraud has been committed, the defrauded person may have two remedies. He may have an action for damages at common law; or he may have, possibly, in a case like the present, an equitable remedy for rescission of contract ... Now, if instead of bringing his action at law, he seeks the equitable remedy, it is true that the Statute of Limitations does not directly apply. But it applies indirectly, for it is settled law that where it is only a question of the remedy and you come into equity with a case such as I am considering for the purpose of getting equitable relief, then the equity of the court acts by analogy to the Statute of Limitations ..."

The key phrase here is "where it is only a question of the remedy". Therefore, as Romer LJ saw it, the doctrine of limitation-by-analogy is concerned not so much with the comparative nature of the common law and equitable remedies in question, but rather the fact that they provide alternative means of redress for the defendant's wrongdoing. The court was therefore untroubled by the manifest differences between damages and rescission. It was also untroubled by the fact that equitable rescission has a direct counterpart remedy in the form of common law rescission, yet under Moore-Bick LJ's approach, the correspondence between equitable rescission and rescission at common law would militate against there being a correspondence between equitable rescission and damages.

Molloy was applied in the recent case of *HMRC v IGE USA Investments Ltd [2021] EWCA Civ 534* (in which the author acted for the appellants) (see *Legal update, Section 36(1) Limitation Act 1980 meant equitable rescission claim for fraudulent misrepresentation subject to six-year limitation period by analogy to claim for damages for tort of deceit (Court of Appeal)*). As in *Molloy*, the claimants, HMRC, were claiming rescission of a contract, namely a settlement agreement made in 2005 in respect of the defendant's tax affairs.

At first instance, Zacaroli J held that HMRC's claim to rescind the contract on the ground of fraudulent misrepresentation was not subject to a limitation period because, unlike in *Molloy*, HMRC's claim for rescission was unaccompanied by a money claim; and as Zacaroli J saw it, it was the money claim in Molloy that justified the analogy with a claim for damages in the tort of deceit. The Court of Appeal (per Henderson LJ, with whom Asplin and Birss LJJ agreed) allowed the defendants' appeal, holding that the ratio in *Molloy* embraced all claims for equitable rescission, not just those which included a claim for an account or restitution of money.

In reaching this conclusion, the court rejected HMRC's attempt to undermine the binding nature of *Molloy* on *Young v Bristol Aeroplane* grounds by reference to, among other cases, *The UB Tiger*. As Henderson LJ saw it, *The UB Tiger* was distinguishable from *HMRC v IGE USA Investments Ltd* because, whereas Moore-Bick LJ regarded damages for breach of contract and specific performance as remedies that differed in a material respect, the same could not be said of damages and rescission, which did not differ in a material respect. Henderson LJ explained why this was so at paragraph 79:

> "In the former case [i.e. HMRC's putative claim in tort], HMRC would have sought to recover the underpaid tax by way of damages, quantified by reference to the assessments which they would have raised if the Settlement Agreement had never been entered into. In the latter case, the object and purpose of the rescission would be to place HMRC in a position where they could recover the same amounts of underpaid tax by direct assessment."

It is understandable that Henderson LJ did not see fit to criticise the approach taken in *The UB Tiger*. Indeed (as the author can personally vouch for) the defendants did not invite the court to do so. But it is respectfully suggested

that Henderson LJ's reasoning here is in tension with Moore-Bick LJ's. For whereas, as has been shown, Moore-Bick LJ focused on the nature of remedies in the abstract, Henderson LJ identified a correspondence between damages and rescission by reference to the function the two remedies would serve by reference to the particular facts of the case.

In fact, there may well be cases where damages and rescission would lead to different results. Suppose that, by a fraudulent misrepresentation, X induces Y to sell a family heirloom for £10,000 which X believes is worth £20,000. In fact, it is worth only £1,000. Thus, as a result of the contract, Y is £9,000 better off. If, therefore, Y were to bring a claim in the tort of deceit, they would receive (at best) nominal damages. Conversely, if Y were to claim rescission, they would receive the painting back and repay the £10,000, leaving them £9,000 worse off.

It seems quite possible, therefore, that *The UB Tiger's* narrow approach to limitation-by-analogy would have led to a different result in both *Molloy* and *HMRC v IGE USA Investments Ltd*. As it happens, neither of those cases was cited in *Royal Mail*, which is both unfortunate and surprising, since Asplin LJ was on the panel in the *IGE USA* appeal. If they had been cited, one wonders whether the court in *Royal Mail* might have been more willing to depart from *The UB Tiger* and instead apply the reasoning in *Molloy*.

CONCLUSION

The principle by which equity applies the LA 1980 by analogy is a wide one, designed to prevent claimants from circumventing a limitation period simply by invoking the court's equitable jurisdiction to achieve the same (or substantially the same) result as they would have achieved at common law. In the most recent case on the subject, *Royal Mail*, the court correctly doubted the narrowness of the test set out in *The UB Tiger*, regarding it as having stemmed from a misreading of the correspondence of remedies principle in *Knox v Gye*. Hopefully, *Royal Mail* will proceed to the Supreme Court so that much-needed clarity in this difficult area of law can be provided.