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Paying the court piper

Rebecca Williams considers what comes next for practitioners following the *Lewis*, *Bhatti*, and *Glenluce Fishing Co Ltd* cases

As litigators, we are all by now familiar with *Lewis v Ward Hadaway* [2015] EWHC 3503, which put the spotlight on the serious implications of failing to pay the correct court fee when issuing a claim. However, the question of incorrect fees is an evolving area considering the subsequent application of this decision.

In *Lewis*, the claimant's solicitors had understated the values of claims and then only later, after expiry of the limitation period, sought to amend the statement of value and pay the correct fee. The defendant applied to strike out for abuse of process and for summary judgment on the basis the claims were issued outside of limitation. It was held there had been an abuse, but the court declined to strike out.

However, the court accepted the 'deliberate' failure to pay the obviously correct fee meant the claimants had not done everything in their power to issue proceedings in time and had not paid the appropriate fee. They had issued outside of the primary limitation period and summary judgment was granted.

Subsequently, *Bhatti v Ashghar* [2016] EWHC 1049 held that issuing with an incorrect fee was not automatically an abuse of process. Moreover, the reasons for failing to pay the correct fee before limitation were a highly material consideration.

In *Bhatti*, the limitation point was never pleaded in the defence. Rather, the issue was raised in an application shortly before trial. Although not granting summary judgment, Mr Justice Warby considered there were compelling reasons why limitation should be addressed at trial and not at application. The court acknowledged a claim will only be 'brought' for limitation purposes when the claimant has done all in his power to set the wheels of justice in motion, i.e. pay the correct issue fee.

The most recent case of *Glenluce Fishing Co Ltd v Watermota Ltd* [2016] EWHC 1807 involved an application to amend the statement of value on the claim form under the Civil Procedure Rules 17.4, after proceedings were served. The claimant argued the new heads of loss arose out of the same, or substantially the same, facts as in the claim form, and the amendment would not prejudice the defendant. The defendant objected, arguing that the claimant should have identified the value was understated, a higher fee should have been paid, and, therefore, the claim was statute barred as limitation had expired.

The application in *Glenluce* was allowed and the court found that although the claimant had not done all it reasonably could to identify the correct value, consideration must be given to whether any prejudice would be suffered by the defendant if the amendment to the form were allowed. It was held that the application of the decisions in the authorities outlined above should be made only in relation to applications to strike out on the basis that claims are statute barred.

In accordance with *Glenluce*, applications to strike out on limitation grounds will not be treated in the same way to applications to amend, with only strike out applications requiring consideration of these decisions. It seems it will turn on the facts as to whether the defendant can show any prejudice arising from an undervalue and whether there are any conduct features in play. If the defendant can show consistent undervaluing as a matter of course by a firm, it may strengthen their case.

The authorities do not arise from personal injury claims. Therefore, the water remains untested as to whether an application for permission to retrospectively extend the limitation period under section 33 of the Limitation Act 1980 would succeed, in view of these decisions. Anecdotal reports suggest the courts are taking varying approaches at case management and interlocutory hearings. Both claimant and defendant lawyers will be keeping a close eye on this evolving principle. SJ

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