Neutral Citation Number: [2021] EWCA Civ 252

Case Numbers: A3/2020/0048 & A3/2020/0378

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
Mrs Justice Falk
[2019] EWHC 3850

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE NEWEY

- -

(1) GRAHAM SCOTT BUTTERS
(2) CAROL LINDA HAYES **Appellants**

and

TIMOTHY FRANCIS LAGE HAYES **Respondent**

- -
- -

Clive Wolman for the **Appellants** (by Direct Access)
Guy Sims (instructed by **French & Co Solicitors**) for the **Respondent**

Hearing date : 11 February 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 25 February 2021

Lord Justice Peter Jackson:

1. Does the non-payment of a court fee mean that time continues to run for limitation purposes in respect of a new claim within existing proceedings? In my view it does not. If a new claim which is not otherwise abusive is made by amendment within the limitation period, it will not later become time-barred because a requisite court fee had not been paid.

The statutory framework

2. The matter turns on the interpretation of s. 35 of the Limitation Act 1980 ('the Act'), which concerns new claims in pending actions. Part I of the Act sets the ordinary time limits for different classes of action, so that an action of a certain kind may not be brought after a specified period of time. The ordinary time limits may be extended or excluded in the circumstances provided for in Part II, while Part III, where s. 35 is to be found, concerns miscellaneous situations, including new claims.

3. Section 35 relevantly provides:

> *35 New claims in pending actions: rules of court.*
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> (a) …
>
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
>
> (a) the addition or substitution of a new cause of action; or
>
> (b) the addition or substitution of a new party;
>
> …
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.
>
> ...
>
> (4)-(9) …"

4. 'Rules of court', as referred to in ss. (3), are defined in Schedule 1 of the Interpretation Act 1978 as "rules made by the authority having power to make rules or orders

regulating the practice and procedure of that court". By s. 1 of the Civil Procedure Act 1997, the Civil Procedure Rules ('the CPR') govern the practice and procedure in the county court, the High Court and the civil division of the Court of Appeal, and by s. 2 the Rules are to be made by the Civil Procedure Rule Committee.

5. By contrast, the power to make fees orders arises under s. 92 of the Courts Act 2003, which provides that the Lord Chancellor may by order, with the consent of the Treasury and after consultation, prescribe fees payable in respect of anything dealt with by the Senior Courts, the family court, the county court or the magistrates' courts. By s. 92 (8), such fees are recoverable as a civil debt. The power to prescribe fees is exercised under the Civil Proceedings Fees Order 2008 ('the Fees Order'), which contains a schedule of fees that is amended from time to time by statutory instrument. Fees orders are not made by the Civil Procedure Rule Committee and in my opinion they are therefore not 'rules of court' as referred to in the Act; I further doubt that they can be described as 'regulating the practice and procedure of [the] court'.

6. CPR rules 3.7, 3.7A1, 3.7A and 3.7AA concern the consequences of non-payment of the fees payable for a hearing. If a fee is not paid when due the court sends a warning notice, and if the fee is not then paid the claim (or counterclaim) will be struck out. There is no suggestion that a failure to pay a fee invalidates an underlying claim. Nor do the CPR contain any express sanction for a failure to pay a fee due on amendment,

7. The rules of court applicable to new claims are in CPR rule 17, which states:

> *Amendments to statements of case*
>
> **17.1**
>
> (1) A party may amend his statement of case at any time before it has been served on any other party.
>
> (2) If his statement of case has been served, a party may amend it only –
>
> (a) with the written consent of all the other parties; or
>
> (b) with the permission of the court.
>
> (3) …
>
> *Power of court to disallow amendments made without permission*
>
> **17.2**
>
> (1) If a party has amended his statement of case where permission of the court was not required, the court may disallow the amendment.
>
> (2) A party may apply to the court for an order under paragraph (1) within 14 days of service of a copy of the amended statement of case on him.

> *Amendments to statements of case with the permission of the court*
>
> **17.3**
>
> (1) Where the court gives permission for a party to amend his statement of case, it may give directions as to –
>
> (a) amendments to be made to any other statement of case; and
>
> (b) service of any amended statement of case.
>
> (2) The power of the court to give permission under this rule is subject to –
>
> (a) rule 19.1 (change of parties – general);
>
> (b) rule 19.4 (special provisions about adding or substituting parties after the end of a relevant limitation period); and
>
> (c) rule 17.4 (amendments of statement of case after the end of a relevant limitation period).
>
> *Amendments to statements of case after the end of a relevant limitation period*
>
> **17.4**
>
> (1) This rule applies where –
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;
>
> (ii) …
>
> (iii) …
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.
>
> (3) …
>
> (4) …"

8. The structure of the statutory regime is therefore that a new claim made in the course of any action shall be deemed to have been commenced on the same date as the original

action (s. 35 (1), known as 'relation-back'). After service, a statement of case (as defined in r. 2.3) may only be amended by consent or with permission of the court (r. 17.1) and, except as provided by rules of court, the power to give permission may not be exercised to allow a new claim after the expiry of a time limit (s. 35.(3)). The rules however permit the court to allow an amendment where a time limit has expired if the new claim arises out of the same facts (r. 17.4).

9. The next question is when a new claim by way of amendment is 'made' under s. 35 (1). As seen above, amendment after service can be made by consent or with the permission of the court. The amendment occurs on the date of the amended document, but the new claim will not in my view be made until the document is filed at court or served on the other party, whichever is the earlier: see CPR PD17 1.3 and 1.5, which provide for filing within 14 days of permission to amend or within such other period as the court may direct, and for service on other parties.

10. Where a claim or counterclaim is amended, and the fee paid before amendment is less than that which would have been payable if the document, as amended, had been so drawn in the first instance, the party amending the document must pay the difference: Schedule 1 to the Fees Order. However, the CPR do not provide that a new claim will not be considered to have been 'made' if an appropriate increment is not paid; nor, as already noted, do they provide that an original action will not have been 'brought' if the original court fee is not paid. The CPR might have said that, but they do not.

11. That, therefore is the statutory framework that leads to the conclusion that the non-payment of a fee does not of itself prevent a new claim from being 'made' for the purposes of s. 35 of the Act. Does the case law lead to a different conclusion?

The case law

12. In *Barnes v St Helens Metropolitan Borough Council* [2006] EWCA Civ 1372, [2007] 1 WLR 879, a claim was lodged at court on the eve of the expiry of the limitation period but was not issued until three days after the period had expired. The claim was held to have been 'brought' for the purpose of the Act when the claim form as issued was received in the court office, and not on the later date when it was actually issued. Tuckey LJ said this at 883G:

> "The 1980 Act can perfectly properly be construed so that in the context of the CPR a claim is brought when the claimant's request for the issue of a claim form (together with the court fee) is delivered to the court office."

13. The same approach was taken in *Page v Hewetts Solicitors* [2012] EWCA Civ 805. That case concerned the correct test for summary judgment where the appellant asserted that a claim form that had been issued after the expiry of the limitation period had been delivered to the court in time. Lewison LJ stated that when an action was brought was a question of construction of the Act. He considered *Barnes* and *Aly v Aly* [1984] 1 WLUK 936. That was a case in which an application to set aside an order had been sent to the court within the time permitted but not issued until afterwards. This court held that the application to court had been made in time. Eveleigh LJ said this:

> "… one can only treat the words "apply to the Court" as meaning doing all that is in your power to do to set the wheels of justice in motion according to the procedure that is laid down for the pursuit of the relief [for] which you are asking."

In *Page*, Lewison LJ concluded:

> "38. If, therefore, the claimants establish that the claim form was delivered in due time to the court office, accompanied by a request to issue and the appropriate fee, the action would not, in my judgment, be statute barred. …"

14. *Barnes* and *Page* were concerned with when an action was 'brought' under Part I of the Act. They were not concerned with the making of a new claim under s. 35 of the Act. They establish that for limitation purposes, time will cease to run upon the delivery of the claim form to the court office. That interpretation was justified by the obvious unfairness of a claim becoming time-barred because of a delay in issuing on the part of the court where the litigant had done "all in [his/her] power to set the wheels of justice in motion". The decisions assume that this will include payment of the appropriate court fee, but they did not expressly consider a situation where a claim form is lodged in time but with an incorrect fee, whether inadvertently or abusively. Nor did they concern the position where a claim is issued by the court within the limitation period, despite a non-payment of the correct fee.

15. The reference in *Barnes* and *Page* to the payment of an appropriate fee in the context of limitation has been taken up in six first instance decisions which cannot all be reconciled with each other.

16. *Page v Hewetts Solicitors* [2013] EWHC 2845 (Ch) ('*Page No. 2*') was the decision of Hildyard J following the appeal. He was called upon to consider two claims. Having heard evidence about the first claim, he did not accept the assertion that it had been delivered to the court within the limitation period. As to the second claim, which had been delivered in time, he noted that the Fees Order was not easy to construe but he held that the fee proffered (£990) had been insufficient by £400. He said that:

> "It is, in a way, concerning that the fate of a claim should depend upon the miscalculation by such a relatively small amount of a court fee. I have considered whether it is so *de minimis* that the Court should not take it into account, or make some exception or allowance."

However, applying what he took to be the rationale of this court's decision, he concluded that the claimants had not done all that was required of them. Accordingly, even though the underpayment arose from a miscalculation and that there was no question of abusive procedural conduct, the claim was time-barred.

17. In *Lewis and others v Ward Hadaway* [2015] EWHC 3503 (Ch), claims in negligence against the defendant firm of solicitors were advanced by 31 claimants over a nine-month period. All of the claims were issued close to the expiry of the limitation period, and in 11 cases the claim forms were issued by the court office after the period had expired. Although the judge (John Male QC) found that the claimants' solicitors had

deliberately understated the value of the claims to avoid or defer payment of the full court fees and that this was an abuse of process, in the exercise of his discretion he did not strike out the claims as a whole. However, in relation to the 11 claims issued after the limitation period, he granted the defendants' application for summary judgment on the ground that, following *Aly* and *Page*, the claimants had (by failing to pay the appropriate fee in time in a manner amounting to an abuse of process) not done all that was in their power to do to set the wheels of justice in motion. Consequently, the claims had not been brought within the limitation period and were statute-barred.

18. In *Bhatti v Asghar* [2016] EWHC 1049 (QB), the defendants sought to strike out proceedings on the basis that the fee paid by the claimants on issue within the limitation period (£1920) was in one case £680 less than should have been paid and in another £480, and that the claims were now statute-barred. In an extempore judgment, Warby J reviewed *Barnes*, both *Page* decisions, and *Lewis*. He did not distinguish them on the basis that they applied to actions issued outside the limitation period, and he considered that they mandated a very strict approach to underpayment of fees. He found that the limitation period for the pleaded claims had expired because the fee had been underpaid but he did not grant summary judgment because the point had been taken at a very late stage and there were factual issues that remained to be explored. He also noted that there might need to be a deeper consideration of the authorities than had been possible at that hearing: see paragraph 39. It is therefore apparent that Warby J was seeking to follow established law, and not to change or extend it, when he said this:

> "34. These authorities appear to identify a clear principle by which the court is to determine whether a claim has been "brought" for the purposes of stopping the limitation from running, the principle being that a claim is only brought for those purposes when the party concerned has done all that is in his power or to set the wheels of justice in motion. If he has done that, then the risk of any failing on the part of the court is cast upon the court and the opposite party. Doing all that is in one's power often, and perhaps ordinarily, involves proffering the correct fee to the court office at the same time as presenting the claim form and the applicable particulars of claim. In *Page* and in *Lewis*, a failure to do that led to the failure of the claim. It is however possible in principle that a failing on the part of the court at that stage of the process might lead to the claim being brought for limitation purposes, even though the correct fee was not paid. If, for instance, the court assumed the burden of calculating the appropriate fee and made an error, for which the claimant was in no way to blame it might, in appropriate circumstances, be said that the claimant had done all that was in his power or, to adopt the words of Mr Male QC, all that he reasonably could do to bring the matter before the court in the appropriate way."

19. In *Glenluce Fishing Co. Ltd. v Watermota Ltd.* [2016] EWHC 1807 (TCC), the claimant sued for losses arising from a fishing vessel repair contract. The original pleading related to the damage to an engine, and the appropriate court fee was paid. After the expiry of the limitation period, the claimant applied to amend to increase the claim to

the value of the vessel as a write-off. The defendant sought to resist the application on the basis that the revised claim was a new claim that should have been included in the original claim form, that a higher court fee should have been paid, and that the new claim was now statute-barred. Roger ter Haar QC allowed the application to amend on the basis that the increased claim was not abusive and that to the extent that it introduced a new claim it did not introduce a new cause of action, but rather new heads of claim arising from the same facts. In reaching his decision, he reviewed the authorities since *Page* and expressed reservations about what he saw as the extension of the true ambit of the appellate decisions that could lead to meritorious claims being lost because of the miscalculation of a court fee: see paragraphs 46 – 48 and 54 – 55.

20. In *Dixon v Radley House Partnership* [2016] EWHC 2511 (TCC), the court refused to allow defendants to amend their defence to raise limitation arguments in a situation where the claimants had failed to proffer the correct court fee when issuing proceedings. The claim had been sent to the court before the limitation period expired, but had been issued by the court after the expiry date. Stuart-Smith J expressed his conclusion in this way:

> "2. The summary answer to the dispute, in a case where it is not alleged that a claimant's failure to proffer the correct fee is abusive procedural conduct, may be split into two periods:
>
> i) In the period between (a) when the claimant submits the claim form and proffers the inadequate fee and (b) when the court issues proceedings, the failure to proffer the correct fee will prevent the conclusion that the action has been "brought" for the purposes of the Limitation Act 1980 before the moment that the court issues the proceedings; but
>
> ii) Once the court issues the proceedings, the mere fact that the fee proffered by the claimant and accepted by the court (a) is less than should have been proffered and accepted for the claim identified in the claim form or (b) becomes so because of a subsequent increase in the quantum of the claim advanced in the proceedings does not prevent the action from being "brought" for the purposes of the Limitation Act 1980 when it is issued by the court."

21. In his analysis at paragraphs 34 and 36 , Stuart-Smith J considered it axiomatic that in relation to claims included in proceedings as issued, time stops running for the purposes of the Act when the proceedings are issued. The test propounded in *Page* by Lewison LJ at paragraph 38 (above) was applicable where the claimant wanted to establish that his claim was "brought" on a date before proceedings were issued. It said nothing to establish or suggest that the issuing of proceedings itself would not stop time running if an inadequate fee had been paid on issue: that question did not arise and was not considered. Stuart-Smith J declined to follow the reasoning in *Bhatti* on the basis that it did not observe that distinction, and he associated himself with the reservations expressed in *Glenluce*. In relation to *Lewis*, he noted that the reason why the 11 claims failed was not because of the non-payment of a fee but because the non-payment had been abusive. He further held that "the appropriate fee" is the fee required by the relevant fees order, which is to be determined by reference to the claim or claims

articulated in the claim form (and, if issued simultaneously, the particulars of claim). In the absence of abusive behaviour, it is not to be determined by reference to claims which are articulated later, whether or not the later claims are ones which the claimant hoped or even intended to bring later at the time of issuing proceedings.

22. The last case is *Liddle v Atha & Co Solicitors* [2018] EWHC 1751(QB), [2018] 1 WLR 4953. The claimant's solicitor sent the claim form to the court two days before the limitation period expired, but it was not issued until a week after. The value of the claim had been understated. Turner J held that, though not dishonest, this had been an abuse of process. However he did not strike out the claim, and nor did he enter summary judgment for the defendants on the basis that the additional claim was time-barred due to the failure to pay the correct fee. In a review of the authorities, he noted that, despite *Barnes* not having been concerned with the payment of a court fee, the narrative allusion to the usual process on issuing proceedings in that case and in *Page* had been subsequently taken to have laid down the principle that a claim has not been brought at the time of the delivery of the claim form to the court unless the appropriate fee has also been tendered. He rejected a universal test of "doing all that is in your power to do to set the wheels of justice in motion", as adopted in *Lewis* (as he read it) and in *Bhatti*, and he associated himself with the observations made in *Glenluce* and the analysis in *Dixon*. He held that where abuse is not egregious and has no impact on the timing of the issue of the claim it may be thought that it would be wrong in principle to permit the provisions of the Act to be deployed as what he described as "a tool of retrospective and disproportionately draconian discipline". He ended by saying that what he described as the proliferation of irreconcilable first instance decisions was such that the time was ripe for authoritative guidance from the Court of Appeal.

23. This short summary of the case law does not capture the density of analysis undertaken in these decisions, but it is sufficient. From it, I reach the following conclusions:

    (1) The cases, with the possible exception of *Glenluce*, are concerned with the bringing of actions under Part I of the Act. They do not directly concern a new claim made by amendment within existing proceedings.

    (2) Accordingly, none of the decisions suggests that the non-payment of a fee prevents a new claim from being 'made' for the purposes of s. 35 of the Act.

    (3) As a matter of construction of Part I of the Act, an action will be brought within the limitation period if it is issued by the court within that period. The statement in *Bhatti* that an action will be statute-barred if issued in time but without the appropriate fee is not correct.

    (4) The decisions of this court in *Barnes* and *Page* establish that an action will be brought within the limitation period if it is delivered in due time to the court office, accompanied by a request to issue and the appropriate fee. They do not decide that an action will be brought in time *if and only if* it is accompanied by the appropriate fee.

24. There is a division of opinion at first instance as whether an action delivered but not issued in due time is brought at the date of delivery if the correct fee has not been proffered. There are perhaps three approaches. In *Page No. 2* and *Dixon* it was held that an action would not be brought by reason of the non-payment alone. In *Lewis*, it

was held that the action had not been brought because the non-payment was abusive. In *Liddle* it was held that the action had been brought because the non-payment had not been materially abusive, in the sense that it did not impact on the timing of the issuing of the claim. Each approach involves a trade-off between the advantages of certainty and an appreciation of the justice of the individual case. Tempting though it is to seek to resolve the question, it is unnecessary for us to do so for the purposes of the present appeal. That said, my provisional view is that there is force in the concerns expressed in a number of the cases about the disallowing of a claim on limitation grounds merely because of an inadvertent miscalculation of a court fee. I also agree with the observations of Stuart-Smith J in *Dixon* about the range of other responses that are available to the court to control any abuse of its processes:

> "56. … If identified before issue, the court may simply refuse to issue the proceedings until the proper fee is paid. If proceedings are issued, the court could direct the payment of the missing fee either at the time of issue or later. Non-compliance with that order could result in the proceedings being stayed or in a succession of peremptory orders of increasing severity that could, at least in theory, lead to a claim being struck out for non-compliance. The existence and potency of these procedural responses demonstrates that the nuclear option (i.e. holding that all proceedings that are issued without the correct fee being paid are ineffective to stop time running) is unnecessary as well as being unwarranted."

However, even if good faith miscalculations were not ineffective to stop time running, there is a further difficult question about where the line should be drawn in relation to calculated underpayments, as can be seen from the different approaches taken in *Lewis* and *Liddle*. As the present case is not one in which such abuse was found, resolving that question is beyond the scope of this appeal and the matter must be left for decision in a case in which the issue directly arises.

25. Against that background, I turn to the present case.

The appeal

26. These parties have existed in a state of permanent litigation of one sort or another since Mr and Mrs Hayes divorced in 1990 after a twenty-year marriage. The episode from which this second appeal arises is a harassment claim brought 15 years ago by Mr Hayes ('C') against Mr Butters and Mrs Hayes ('D') and it is an aspect of the procedural history of that claim that now concerns us.

27. In November 2005, C brought an action alleging 49 acts of harassment starting in February 2003. On 15 June 2011, at a case management conference, District Judge Rhodes gave leave to C to file an amended statement of case by 9 July 2011, and C did so on 8 July in the form of amended particulars of claim ('APOC') in which he alleged a further 120 acts of harassment between 2005 and March 2011. In 2012, in response to a further direction of the court, C filed a schedule of loss, claiming in excess of £1m.

28. On issuing the claim in 2005, C had paid a fee of £900, although only £800 was due. D asserts that the value of the claim increased by reason of the APOC and the later schedule of loss so that a further fee of £770 should have been paid. C disputes this on

the basis that the case was at that point proceeding on liability only, special damages having earlier been disallowed due to a period of time when C had been made bankrupt at D's behest and a claim for special damages would have vested in his trustee.

29. It took until early 2019 for a trial of liability to take place, the extraordinary delay reflecting the intensity of the interlocutory litigation and other related proceedings. The matter was heard by His Honour Judge Hellman on dates in January and March 2019. On 7 February 2019, between the two parts of the hearing, D issued an application to strike out the APOC on limitation grounds for non-payment of the court fee.

30. At trial, Judge Hellman found in favour of C in relation to many but not all of the alleged acts of harassment. In his judgment of 8 April 2019, he addressed D's strike-out application argument and rejected it on the facts. He was not satisfied that, at the time the pleading was amended, there had been an intention to increase the value of the claim, the consequence being that an increased fee was not required.

31. D applied for permission to appeal on ten grounds, and received permission in respect of one, concerning limitation and non-payment of a fee. On 13 November 2019, Mrs Justice Falk ('the Judge') heard the appeal alongside an appeal in a separate matter by C. In an impressive extempore judgment, she found that Judge Hellman's conclusion about the intention to increase the value of the claim had relied to some extent upon a misunderstanding of the sequence of events surrounding the amendment and that she would have been inclined to remit the question to him to make a finding in the light of the accurate facts. However, she did not do that because she found that the appeal failed for other reasons. In the first place the amended claim had been properly brought because it had been allowed to proceed by the court in its order of 15 June 2011, when no additional fee had been demanded. The APOC had added new causes of action under s. 35 (2) (a) in the form of each alleged continuation of a course of conduct amounting to harassment: *Hayes v Butters* [2015] Ch 495. It thereby made new claims under s. 35 (1) (b) that were deemed to have been commenced at the same time as the original action, and so within the limitation period. Further, having reviewed the authorities, the Judge rejected D's argument that to stop time running the appropriate court fee had to have been paid when the amendment was made. She held that:

> "78. In my view the new claim was "allowed" in June 2011, but if that was not correct it was allowed at the latest when the amended particulars of claim were actually filed the following month, in July. The fact that the amendments may not have been filed with the correct fee does not mean that the limitation period continues to run. At most it means that the Fees Order or the relevant order of the court was not fully complied with. It does not mean that the action taken was a nullity."

32. Permission to appeal was granted by Asplin LJ on a single reformulated ground:

> "Falk J erred when she found that the claim was not statute barred when no fee was paid upon the amendment to the Particulars of Claim in 2011. This error arises from her interpretation of s.35 of the Limitation Act 1980 that a claim was "allowed" when permission for the amendment was given, or at the latest when the amended Particulars of Claim were filed (and

> thus deemed to be "brought" at the date of the original claim), and in failing appropriately to apply Court of Appeal authority in *Barnes v St Helens MBC* [2006] EWCA Civ 1372 and in *Page v Hewetts Solicitors* [2012] EWCA Civ 805 to the circumstances of this case."

33. By Respondent's Notice, D seeks to uphold the Judge's decision on additional grounds:

> "1. Upon amendment of the Particulars of Claim there was no increase in value so no additional fee was payable.
>
> 2. The filing of the schedule of loss in 2012 did not trigger any requirement to pay fees.
>
> 3. The amendment should be allowed in any event as the claim is based on the same or similar facts to matters already in issue.
>
> 4. Any error of fact by Judge Hellman was not material to his decision.
>
> 5. No amendment to the order is required even if the appeal succeeds in principle."

34. Before us, Mr Clive Wolman firstly argues that the Judge was wrong to treat the order of 15 June 2011 as having allowed the new claims to have been made. He points out that CPR PD17 1.2 requires an application to amend a statement of case to be accompanied by a copy of the statement of case with the proposed amendments. In this case the court gave leave without this happening, so it was not in a position to vet the proposed amendments and to disallow any that would be time-barred as required by s. 35 (3) of the Act and CPR 17.4 (2). The order is therefore void or liable to be set aside for fundamental mistake: *Firman v Ellis* [1978] 1 QB 886. Alternatively it was to be regarded as a provisional order that could only take effect on the next occasion that the court came to consider the case and vet the amendments, which turned out to be in May 2012.

35. These arguments are in my view hopeless. The order, which was made at a hearing at which C was represented by a solicitor and D were in person, provided that:

> "1. The claimant has permission to file and serve any amendment to his statement of case by 4pm on 9th July 2011. Both defendants to file and serve any amendments to their counterclaim by 4pm on 8th July 2011.
>
> 2. The claimant is to file and serve an amended defence to the counterclaim by 4pm on 5th August 2011. Both defendants to file and serve their amended defence to the claim by 4pm on 5th August 2011.
>
> 3. All parties are to serve their witness statements and any other evidence on which they intend to rely by 4pm on 9th September 2011.

> 4. The case is to be heard in a trial window between 7th November 2011 and 13th January 2012 with a time estimate of 5 days. The trial is to be on the issue of liability only."

It would no doubt have been better if the District Judge had been in a position to see the amendments that both parties wished to make to their cases before granting permission to amend, though he was no doubt told of their general nature. It would have been open to him to make the permission conditional upon the payment of any fee. But whatever the position, an order has effect unless and until it is set aside. It was not a provisional order, contingent on judicial consideration at some unspecified future date: apart from anything else, the fact that the matter was set down for trial shows that it was intended to have immediate and final effect. Any complaint about the order's contents or validity could and should have been taken on appeal at the time. In any case, D had the opportunity to plead limitation by way of amendment to the defence, but did not do so. No doubt that was because the amendments as made do not fall outside the limitation period at all (though Mr Wolman faintly suggested that two of the 120 acts might).

36. Next, Mr Wolman submits that relation-back does not take effect when a new claim is "allow[ed]… to be made" under s. 35 (3) but only when it has been "made" under ss. (1). I agree that the new claim is made on the date when the amendment itself is made and not on the date of the order allowing it to be made. That much is established by *Welsh Development Agency v. Redpath Dorman Long Ltd.* [1994] 1 WLR 1409 at 1421C:

> "The wording of section 35(3) of the Act of 1980 "neither the High Court nor any county court shall allow a new claim . . . to be made in the course of any action after the expiry of any time limit under this Act …" is so clear as to admit of only one interpretation. That is that the relevant date is the date at which the amendment is actually made, which by definition must be no earlier than the date at which leave is granted to make the amendment."

Apart from authority, the facts of the present case, where the amendment was allowed before the amended claim was formulated in a document, shows why this must be so. To that extent, the Judge was not correct to focus on when the new claim was allowed. However, Mr Wolman's submission takes him nowhere in this case, as the amendment was made in accordance with the order and the CPR within the limitation period.

37. Mr Wolman's central submission is of course that C should have paid the extra court fee when amending, and that the first instance decisions following *Barnes* and *Page* mean that the failure to do so have the consequence that time continued to run. D therefore has the absolute right, he says, to have the APOC struck out now, nine years later (or indeed at any time), regardless of whether the amendment was abusive. I have explained why this argument is unsound as a matter of law, and I reject it in the circumstances of this case.

38. In the course of making his central submission, Mr Wolman argued that there is no reason in principle why a different approach should be taken to the making of new claims under s. 35 and the bringing of actions under Part I. I do not agree. As noted

above, different considerations arise in relation to new claims, which by definition arise in the course of an action that has already been brought. They do not have to be issued by the court, and the question of whether or not they may be made is subject to the control of the court in accordance with the provisions of s. 35 and CPR 17. By contrast, the bringing of an action is not under the control of the court, and it is subject to a different statutory regime.

39. For C, Mr Guy Sims broadly argues for the conclusions I have endorsed. He submits that it would be an absurd conclusion that a new claim is invalidated by an innocent miscalculation of a court fee, allowing a defendant to wait to take the point after the limitation period has expired. He points to the range of sanctions available to the court to counter any abusive procedural conduct, as described by Stuart-Smith J in *Dixon*. He further notes that it is undisputed that C's claim for an injunction is unaffected by any argument about the payment of a fee.

Conclusion

40. The Judge was right to dismiss D's appeal and we should do likewise. Whether or not a fee was payable, the new claims contained in the APOC did not fall outside the limitation period. The attempt to strike them out was opportunistic, without merit, and unfortunately typical of the satellite litigation that characterises the feud between these parties. As long as eight years ago, on 23 November 2012, Her Honour Judge Davies gave a judgment in which she reflected:

> "Reading the papers has reminded me of the case of Jarndyce v. Jarndyce in Bleak House by Dickens. There is a danger that all the parties to this litigation will lose sight of how this case began, and what any of them hoped to achieve at the start of this litigation."

Subsequent events suggest that the danger has long since become a reality. It is true that in this instance D managed to obtain permission for not just one but two appeals, but I express the hope that any judge dealing with this dispute in future will have in mind the element of the overriding objective that requires the court to allot an appropriate share of the court's resources to the case, while taking into account the need to allot resources to other cases.

Lord Justice Newey

41. I agree.

Lord Justice Lewison

42. I entirely agree. The only points that I wish to emphasise are these. First, in *Page v Hewetts Solicitors* in this court the correctness or otherwise of the fee was not argued and not in issue; and the court gave it no detailed thought. Second, it is a mistake to read a judgment as though it were a statutory text, especially on a point that was not in issue.
