

Limitation: When Does Time Start to Run?

1. This note addresses the commencement of time for limitation purposes. Later notes will address (a) when time pauses and (c) when time stops running.
2. The following issues are addressed:
 - a. When does time start to run? The “accrual of cause of action”.
 - b. Application to claims in contract (and in particular claims for payment for services and insurance), tort and restitution.
 - c. Situations postponing the ordinary date when time starts to run:
 - i. Disability.
 - ii. Later date of knowledge.
 - iii. Fraud, mistake or deliberate concealment.
 - d. Outstanding Issues.

When does time start to run?

3. The key phrase in most¹ but not all² of the sections of the Limitation Act 1980 is the accrual of the “cause of action”. Time runs from the accrual of the cause of action. The cause of action:
- a. is every fact which if traversed the plaintiff must prove in order to obtain judgment: per Esher MR in *Read v Brown* 22 QBD 128; *Bennett v White* [1910] 2 KB 643.
 - b. is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person: per Diplock LJ in *Letang v Cooper* [1965] 1 QB 232.³
 - c. can exist although one of the facts essential to the cause of action can only be proved otherwise than by evidence led in court and has not yet been proved when the action is brought: *Central Electricity Board v Halifax Corporation* [1963] AC 785, 801 per Lord Reid.⁴
 - d. distinct from the formal procedure required to bring an action: *Coburn v Colledge* [1897] 1 QB 702.

¹ Ss 2 (tort), 3 (conversion), 4 (theft), 4A (defamation or malicious falsehood), 5 (simple contract), 6 (certain loans, where the cause of action is deemed to accrue for the purposes of the statute on the date on which the demand was made), 7 (enforcement of certain awards), 8 (actions on a specialty), 9 (sums recoverable by statute), 11 (personal injuries), s 11A (action under the Consumer Protection Act 1987), 19A (breach of commonhold duty), s 27A (recovery of property obtained through unlawful conduct – POCA 2002).

² Ss 10 (contribution) “two years from the date on which that right [to contribution] accrued”, s 12 (Fatal Accident Act claim) “date of death”, 14B (overriding 15 year time limit for negligence) from “act or omission ... which is alleged to constitute negligence notwithstanding that the cause of action has not yet accrued”, s 15 (action to recover land) “date on which the right of action accrued”, s 16 (redemption action by mortgagor) 12 years after “possession by mortgagee of mortgaged land”, s 18 (settled land and land held on trust): “right of action”, s 19 (action to recover rent) – “six years from date on which the arrears became due”, s 20 (actions to recover money secured by a mortgage or charge) “date on which the right to receive the money accrued”, s 21 (actions in respect of trust property) – “right of action accrued”, s 22 (actions claiming personal estate of deceased person) – “right to receive the share or interest accrued”, s 24 (action to enforce judgments) – “date on which the judgment became enforceable”, s 27 (cure of defective disentailing assurance) – “twelve years from the commencement of the time when the assurance could have operated as an effective bar”.

³ See also Lord Guest in *Central Electricity Board v Halifax Corpn* [1963] AC 785 at 806: “the date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment. This I take it, is the effect of the judgment of Lord Esher MR in *Coburn v Colledge* ...”.

⁴ By the Electricity Act 1947, the assets of electricity undertakings were transferred to electricity boards on a given vesting date. The Minister was to determine whether property was used by local authorities in their capacity as electricity undertakers. Shortly before the vesting date, the respondent corporation had transferred £34,500 to their own account and the appellant electricity board claimed that the fund vested in them. The question was referred to the Minister under s 15(3) of the Act who (more than 6 years after the vesting date) held that the sum was held by the respondents who held it as undertakers (and therefore for the electricity board). The only competent method of proving that the sum was held as undertaker was by the Minister’s decision and it was argued that before that decision there was no complete cause of action. This was rejected by the House of Lords. It was not a condition precedent and had the action been brought within six years of the vesting date then the action could have been stayed to await the Minister’s decision.

4. The key point is to ascertain when the elements of a pleadable claim have come into existence.
5. For present purposes, let us focus on contract, tort and restitution.

Contract

6. S 5 of the Limitation Act 1980. “s 5 an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued”.
7. A claim in simple contract must be brought within six years from the date of the accrual of the cause of action.
8. The phrase “simple contract”⁵ distinguishes the relevant section from other contractual claims which are for example loans or agreements made under deed (or “specialties”⁶) (which are dealt with by ss 6 and 8 of the Limitation Act respectively).
9. It is frequently the case that the relevant cause of action accrues on breach (e.g., the repudiatory breach; the failure to deliver the goods or services etc.) and in those cases time runs from that date. That is why it is often said (inaccurately) that in a claim in contract time runs from breach.
10. However, it should be noted that (as set out above) s 5 operates by reference to the accrual of the cause of action and not “breach of contract” which is a gloss from the case law of general but not universal application. Therefore if (even absent a breach) the claimant can bring its claim as it has a complete cause of action in simple contract, then time runs from that date.
11. This is typically and importantly the case in contracts for work or services and insurance contracts.

Contract for work or services

12. In the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances the right to payment does not depend on the making of a claim for payment by the party who has provided the work or services or (if later)

⁵ The phrase has been used in the limitation statutes since time immemorial. “... debts by simple contract are such where the contract upon which the obligation arises is neither ascertained by matter of records, nor yet by deed or special instrument, but mere oral evidence, the most simple of any; or by notes unsealed, which are capable of more easy proof, and (therefore only) better, than a verbal promise (4 Bl. Com 465, 466)” (Stroud’s Judicial Dictionary).

⁶ *Collin v Duke of Westminster* [1985] QB 581.

refusal to pay by the counter-party: *Birse v McCormick* (HHJ Peter Coulson QC, as he then was, at p 3 – 4⁷ [2004] EWHC 3053); as approved by CA [2005] EWCA Civ 940.

13. The principle stems from the leading case of *Coburn v Colledge* [1897] 1 QB 702 which is authority for two separate propositions:
 - a. that in a contract for work or services, the right to payment arises as soon as the work is done or completed (and this applies to a solicitor as much as any other professional⁸): at p 705 and 707 per Lord Esher LJ; Lopes LJ at 709; Chitty LJ at 710. Therefore time runs against a solicitor notwithstanding no bill has been delivered.
 - b. time once started continues to run despite a prohibition on taking action for the fees. Therefore it commences before and continues during the one month period of the Solicitors Act 1843: *Coburn v Colledge*, supra.
14. These principles are subject to any contractual provision to the contrary. Such a provision has to be clear, especially where it might put in the hands of one of the parties control over when time starts to run⁹: Lord Neuberger MR in *LSC v Henthorn* [2011] EWCA Civ 1415 (obiter).
 - a. in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, the issue of an engineer's certificate was a condition precedent to liability and therefore time ran from its issue and not when the work was completed. But *cf London & Regional v MOD* [2008] EWCA Civ 1212 (not a limitation case) at pars 21 – 28.
 - b. another example of a contractual provision to the contrary (there is no case law on it, as solicitors who act under CFAs and DBAs are astute to seek prompt payment) lies in conditional fee agreements or damages based agreements, which depend for their payment terms upon the achievement of "success". An integral part of the cause of action is a plea that success has been achieved, as well as that the work has been done. Time would ordinarily start to run on the achievement of "success", however defined. It would be an odd commercial result if time ran and potentially expired against a solicitor before he became entitled to payment.

Claim under an insurance policy

15. In an insurance contract, does the cause of action accrue when the event giving rise to the claim (such as the theft, loss of vessel etc) occurs or the later date such as demand or if and when the insurer refuses to make payment under the policy?

⁷ He cited *Coburn v Colledge* [1897] 1 QB 702 as the leading authority for this proposition.

⁸ N.B., contractual terms aside, it accrues when the solicitor's retainer (an entire obligation) is performed in full: *Underwood, Son & Piper v Lewis* [1894] 2 QB 306. Not from when each partial bit of work is carried out.

⁹ "Save where it is the essence of the arrangement between the parties that a sum is not payable until demanded, it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed"

16. The leading decision is *Chandris v Argo Insurance* [1963] 2 Lloyd's Rep 65 (Megaw J) (a marine insurance policy¹⁰). The judge concluded after an analysis of earlier cases: "the consequence of the action being an action for unliquidated damages is, as it seems to me, at least in the absence of special contractual provisions, the assured can bring his action without alleging that demand for payment has been made on the insurer" (at 74).
17. The clearest statement in non-marine cases is in the case of *Callaghan & another v Dominion Insurance & others* (unreported, 8th May 1997), Sir Peter Webster. In that case, a claim was made on an insurance policy insuring C against damage by fire to a nightclub in Sheppey, Kent. The fire occurred on 20th September 1989. On 16th May 1990, the policy was avoided on the ground of non-disclosure. On 16th May 1996, the proceedings were issued. D contended that the claim was statute-barred.
18. The judge accepted the submission for D that: "the authorities all plainly establish that a contract of indemnity gives rise to an action for unliquidated damages arising from the failure of the indemnifier to prevent the indemnified person from suffering loss and that once the loss is suffered the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss or expense" (p 2G – 3B). That probably even precedes the date when the loss or damage is manifested or the insured incurs expenditure.
19. Attempts have been made to rationalise the position by asserting that the occurrence of the peril (or at least the immediate failure of the insurer to hold the policyholder harmless) is the breach of contract,¹¹¹² but this is evidently bit of a fiction.
20. It may be an unnecessary fiction, given that the wording of s 5 does not require a breach but merely the accrual of a cause of action. Sir Peter Webster described it as: "an agreement by an insurer to confer upon the insured a contractual right which prima facie comes into existence immediately when loss is suffered by the happening of an event insured against, to

¹⁰ Approved by the Privy Council in *Castle Insurance Co v Hong Kong Shipping* [1984] 1 AC 226 at 237 (Lord Diplock giving the judgment of the Board), although the relevant paragraphs relate to claims for contribution under general average in marine insurance policies. Cf also dictum of Lord Goff in *Firma C-Trades SA v Newcastle Protection and Indemnity Association* [1990] 2 Lloyd's Rep 191 at 202.

¹¹ *The Fanti* [1990] 2 Lloyd's Rep 191, 202: "I accept that at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party. I also accept that at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss: see *Collinge v Heywood* [1839] Ad & E 634. This is as I understand it because the promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss or expense" (per Lord Goff).

¹² See *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308, par [35]: "First of all, in a case where (as here) an insurer has agreed to "indemnify" the insured against loss or damage caused by an insured peril, the nature of the insurer's promise is that the insured will not suffer the specified loss or damage. The occurrence of such loss or damage is therefore a breach of contract which gives rise to a claim for damages: see *Firma C-Trade SA v Newcastle Protection and Indemnity Association ('The Fanti' and 'The Padre Island')* [1991] 2 AC 1, 35; *Ventouris v Mountain (The Italia Express (No 2))* [1992] 2 Lloyd's Rep 281, 292; *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70."

be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position” (at par 9 B – E).

21. However, where the cause of action is on a contract the parties “may prescribe the terms and conditions which must be fulfilled before payment becomes due. The parties can say what events are to happen – what facts are to exist – before one is obliged to make payment to the other, or to be in breach for non-payment (at 74, per Sir Peter Webster)”.

Claim in tort

22. It is trite law that time starts to run for the purpose of a claim in tort when damage¹³ is sustained.

23. Typically, the time when a personal injury is suffered (the leg is broken) or the clinical negligence occurs (e.g., the swab left in the body) is when the time starts to run, subject to (later) date of knowledge ss 11 and 14 of the Limitation Act 1980.¹⁴

24. In the professional negligence context, for example, it means that it accrues and time starts to run:

- a. the signing of a contract which mortgaged a property subject to significant unknown liabilities: *Forster v Outred*, [1982] 1 WLR 86.¹⁵
- b. when the purchaser of the defective building exchanges contracts: *Byrne v Hall Pain & Foster* [1999] 1 WLR 1849.
- c. when the basket of securities (not necessarily worth less than it was said to be worth but certainly more risky as an investment) is purchased: *Shore v Sedgwick* [2008] EWCA Civ 863.

25. The incurring of contingent liabilities (such as a guarantee) do not amount to damage for the purposes of s 2 until the contingency occurs: *Law Society v Sephton* [2006] 2 AC 543 per Lord Hoffmann at [30] – but *cf Forster’s case* above. *Sephton* (not a guarantee case in fact) has often been treated as a case on its own facts.

26. It is fair to say that damage tends to be found early and typically on entry into the defective or unsatisfactory contract.¹⁶

¹³ It has been held to mean (rather compendiously): “any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency particularly a contingency over which the plaintiff has no control things like loss of earnings capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases”: *Forster v Outred & Co* [1982] 1 WLR 86 at 94, CA.

¹⁴ Of course there is an extension period under s 33 of the Limitation Act 1980.

¹⁵ There is a vast case law on the subject and I do not analyse it here as there are plenty of other places such as *Flenley & Leech, Solicitors Liability* where it is dealt with very thoroughly.

¹⁶ Save where it is a guarantee.

27. It may well be that the relatively strict interpretation of damage can be justified by the fact that s 14A typically operates to give the claimant three years from date of knowledge (see below).

When does time start to run for a claim in unjust enrichment?

28. A claim in unjust enrichment is said to be governed by the limitation provisions of s 5 of the Limitation Act.

29. An independent restitutionary claim is said to be regarded as founded on simple contract: *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38; [2015] 1 WLR 2961 per Lord Mance at [25]; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890, 942-943, per Hobhouse J, which was not questioned by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, when it had to consider whether, in the circumstances of that case, section 32(1)(c) of the Act operated so as to extend the normal six-year limitation period.

30. In the ordinary way, it has been held that where the recipient obtains a real and incontrovertible benefit time runs from that moment: e.g., *Sixteenth Ocean GmbH & Co Kg v Société Générale* [2018] EWHC 1731 (Comm) (06 July 2018) per Peter McDonald Eggers QC sitting as a Deputy High Court Judge at pars 109 – 113.

31. However, by analogy with the interpretation of contractual claims for services it may (if different) run from the date when the work was done or completed.

On what day does time start to run?

32. An action cannot be brought until the cause of action is complete.

33. If the relevant event occurs during a day, then that day is excluded for the purposes of calculating time and in effect time runs from the beginning of the next day: *Pritam Kaur v S Russell & Sons* [1973] QC 366 (QB), where the deceased had been killed at work during the day; *Marren v Dawson Bentley & Co* [1961] 2 QB 135.

34. However, where the action can be brought at the very beginning of the day (a “midnight deadline” case) then time runs from the beginning of that day, because the claimant has the entirety of that day in which to consider the cause of action: *Matthew & others v Sedman and others* [2019] EWCA Civ 475; but probably even if it arises very early in the day, time runs from the next day because of the general principle that English law disregards fractions of a day (per Irwin LJ at pars 33 – 35 and Underhill LJ at 39).

Postponement of Time

35. A number of provisions of the Limitation Act 1980 have the effect of postponing the date when time starts to run: ss 14A; S 32 and s 28. To deal with them briefly:

Date of Knowledge

36. In a claim for negligence, s 14A of the Limitation Act 1980 (and see especially *Hawards v Fawcetts* [2006] 1 WLR 682¹⁷) causes time to run from any later date of knowledge¹⁸ and provides that the claim be brought within 3 years from that date of knowledge.

37. The “starting date” is “the earliest date on which [C] ... first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action” (s 14A(5)).

38. The “knowledge required for bringing an action for damages” means knowledge of:

- a. the material facts about the damage in respect of which damages are claimed (s 14A(6)(a)); and
- b. that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence (s 14A(8)(a)); and
- c. the identity of the defendant (s 14A(8)(b)).

39. *Hawards v Fawcett* has – in several of their Lordships’ speeches – summarised the degree of knowledge required to start time running:

- a. “for time to start running there needs to have been something which would reasonably cause [C] to start asking questions about the advice he was given” - per Lord Nicholls at 688 C-D.
- b. “... the requisite knowledge is knowledge of the facts constituting the essence of the complaint of negligence” – per Lord Scott at 696F.
- c. “involves knowing enough to make it reasonable to investigate whether or not there is a claim against a particular potential defendant” – per Lord Mance at 724G-H.¹⁹

¹⁷ Cited and applied in numerous cases since – e.g., *Chinnock v Wasbrough & Anor* [2015] EWCA Civ 441 and *Su v Clarksons Platou Futures Ltd & Anor* [2018] EWCA Civ 1115.

¹⁸ It is the same as with a claim for personal injuries under s 11 and 14 of the Limitation Act 1980.

¹⁹ C has to know “something of which he would prima facie be entitled to complain” per Lord Walker at 705A - B.

- d. Lord Donaldson's comments in *Halford v Brookes* [1991] 1 WLR 428, 443 were cited. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice. Per Lord Nicholls at par [9].
40. When C knows enough "to realise that there is a real possibility of damage having been caused by some flaw or inadequacy in his advisers' ... advice and enough therefore to start an investigation into that possibility, which s 14A gives him 3 years to complete" per Lord Brown at 710F-G (see also at 709G-H to the effect that "nothing more is needed" than that "[C] knew that his loss might well have resulted from an investment made on [D's] advice").
41. See also the very recent decision of Nugee J in *Cole & Ors v Scion Ltd & Ors* [2020] EWHC 1022.
42. Importantly of course, knowledge includes knowledge which C might reasonably have been expected to acquire from facts observable or ascertainable by him: s. 14A(10) of the Act.

Deliberate Concealment

43. Where fraud is alleged, or deliberate concealment, or relief from the consequences of a mistake is sought then C has 6 years from the date he discovered the fraud, concealment or mistake or when he could with reasonable diligence have discovered it: s 32.
44. S 32(2) is now accepted as requiring the breach to have been deliberately concealed or committed:
- a. "In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose": per Lord Millett at par 25 in *Cave v Robinson, Jarvis & Rolfe* [2003] AC 384.
 - b. "...deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, i.e. the concealment, must be an intended result...A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the

usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often difficult."

45. The relevant date is taken to be when C could allege the bare bones of a cause of action: *The Kriti Palm* [2007] 1 Lloyd's Rep 555, citing *Johnson v. Chief Constable of Surrey* (CA, unreported, 19 October 1992) and *C v. Mirror Group Newspapers* [1997] 1 WLR 131 (CA) (esp pars 322 – 325 per Rix LJ). It was cited in some depth by the Chancellor in *Arcadia Group Brands Ltd & Ors v Visa Inc & Ors* [2015] EWCA Civ 883.
46. For a detailed summary and its application to competition claims see *Granville Technology Group Ltd & Ors v Infineon Technologies AG & Anor* [2020] EWHC 415 (Comm) (25 February 2020).

Disability

47. Under s 28 of the Act, "if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired."
48. A person of adult age is presumed to have the mental capacity to manage his property and affairs until the contrary was proved. The burden of proving the contrary rested on whoever asserted incapacity.
49. The test to be applied was whether the party to legal proceedings was capable of understanding with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent was likely to be necessary in the course of those proceedings; that although the decisions actually made were likely to be important indicators of the existence or lack of understanding, a person was not to be regarded as unable to make a rational decision merely because a decision he had made would not have been made by a person of ordinary prudence.
50. A person was not to be regarded as incapable of pursuing or compromising a claim merely because he would not be capable of taking investment decisions in relation to any large sum ultimately recovered in compensation.

Outstanding Questions

51. A few tricky questions remain:

- a. Under s 14A, does the time run from the date when C should start taking steps (*Haward v Fawcetts*) or from the (later) date when if he had done so he would have obtained the relevant knowledge?
- b. Under s 14A(10), where the negligent professional reassures the troubled client that nothing has gone wrong where otherwise the client might consider there is indeed reason to investigate further does that amount to the “expert” advice which is contemplated? Or is C (relying upon this duff advice) driven to bring a claim on the basis of the negligence that is the mistaken reassurance?
- c. With fraud and mistake under s 32, the moment of discovery starts time running. However, where C discovers the deliberate concealment before the elements necessary to plead a cause of action, it appears from the literal wording that time runs from that date rather than the date when the cause of action could be pleaded. In most cases, of course, the discover of the fraud and mistake would be one and the same. Certainly the *Kriti Palm* appears to equate the discovery of the relevant fact with the discovery of the concealment. But it is entirely conceivable that C discovers the last piece of knowledge which completes his ability to plead a cause of action some time after the concealment is discovered.

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²⁰ Disclaimer (there’s always a disclaimer). No responsibility etc. This is pretty generalist stuff so take proper, full advice if you have a specific problem.