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UPDATE

The principle of finality, and the correct approaches to contributory negligence and extending the limitation period – the Privy Council judgment in *Primeo v Bank of Bermuda*

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In its second judgment in the *Primeo v Bank of Bermuda* litigation, the Privy Council has decided significant issues relating to the principle of finality of litigation, the availability of contributory negligence to breach of contract claims and the mental element for postponing the running of time for limitation purposes.

The Privy Council has handed down its second judgment in the *Primeo v Bank of Bermuda* litigation. This is a long-awaited judgment, the matter being heard as part two of the appeal in October 2021 over four days. A copy of the judgment can be accessed here.

The appeal related to losses suffered as a result of the Ponzi scheme operated by Bernard Madoff, perpetrated through Bernard L Madoff Investment Securities LLC (BLMIS). Primeo had invested directly and indirectly in BLMIS and the respondents were Primeo's administrator and custodian.

As at the completion of part one of the appeal in August 2021, Primeo had successfully overturned the reflective loss findings in the courts below and, as a result, was entitled to damages on all of its claims, subject to discrete issues to be addressed at a quantification hearing and subject to the hearing of the respondents' cross-appeal points.

However, on part two of the appeal the Privy Council has decided to reject Primeo's claims on procedural grounds. In summary, it has been held that Primeo should have anticipated that the trial judge may make findings that were contrary to all the parties' cases and should have made alternative arguments at trial based on those possible findings, including applying to adduce additional factual and expert evidence.

This has the following consequences:

- As for the strict liability claim against the custodian R2, Primeo has succeeded in establishing all elements of the liability but, as a result of the judgment, it is unable to advance quantification arguments to show it suffered loss and no damages are therefore due on that claim.
- In relation to the breach of duty claims against the administrator R1 and the custodian R2, Primeo has succeeded in establishing that the defendants owed the various duties and breached them, including acting with gross negligence, but, as a result of the judgment, Primeo is unable to argue that it lost an opportunity to withdraw its investments from BLMIS and the breach of duty claims have not therefore succeeded.

The important legal principles arising out of the ruling are discussed below. In this case, the issues around contributory negligence and limitation only went to quantum and not liability.

Finality of litigation principle

The Privy Council justified its approach by reference to the principle of finality, which has been emphasised by the UK Supreme Court in a number of decisions since 2020. The principle provides that it is in the interests of justice that parties advance their entire case at one time and there is finality to proceedings. However, whether that principle which addresses procedural matters delivers justice in any particular case obviously depends on the facts of that case.

It is noteworthy how much importance the courts are now attributing to the principle of finality, which has the risk of causing meritorious claims to be dismissed on procedural grounds. The principle stresses the need to avoid the injustice to the defendant of new points being taken, but a strict application of the principle can result in injustice to the plaintiff.

In the Primeo case, on the strict liability claim, the points that Primeo has been prevented from taking concern how loss should be calculated in light of the trial judge's finding that R2 is only liable for part of the relevant period, rather than the whole period (as contended for by Primeo) or none of the period (as contended for by R2). The Privy Council found that because Primeo, in its closing submissions, recognised that there was a possibility the trial judge may only find R2 liable for part of the period, it should have sought to adduce both factual and expert evidence as to the consequences of such a finding.

In relation to the breach of duty claims, an additional causation point arose in relation to custody confirmations. R2 did not provide proper disclosure of custody confirmations until immediately before trial. Those documents showed that from 2005 R2 had provided annual statements confirming the existence of assets held at BLMIS to Primeo's auditors, to satisfy the auditors that the assets existed and allow them to complete the annual audits. R2 provided those custody confirmations without taking any proper steps to verify that the assets existed and they did not in fact exist.

The trial judge rejected Primeo's argument that it would have withdrawn its investments had the respondents complied with their duties and went on to consider the position in relation to the custody confirmations. The judge held that whether the audit could have been completed would have depended on the actions of the auditors and BLMIS and found, on the balance of probabilities, that the auditors would have continued to act and Primeo would not have had to close down. The Court of Appeal found that the judge should have considered the custody confirmation analysis on a loss of a chance basis rather than on the balance of probabilities and indicated the matter should be remitted back to the Grand Court. The Privy Council overturned the Court of Appeal holding that Primeo should have expressly pursued a case based on loss of a chance at trial and adduced factual and expert evidence in support of that.

The issues noted above only arose immediately before or during trial. It is doubtful that, even if Primeo had raised with the judge the possibility of adducing further factual and expert evidence, the judge would have granted a lengthy adjournment to allow for that. The trial already involved a huge number of points with evidence being given by 10 witnesses and 17 experts over a period of four months and the judge was due to retire at the end of trial.

The takeaway from the findings in the Primeo case are that it is not safe for a plaintiff not to address any issue that may arise, even if that is not part of its primary case and even if the issue arises very late in the day. This obviously has implications for plaintiffs in terms of proportionality, the resources required when pursuing complex litigation and the costs that are likely to be incurred. It also introduces significant risk because matters that may not be considered crucial at the time they arise can, as a result of unexpected findings and the nature of the appeal process, become determinative when viewed with hindsight many years later.

Contributory negligence in breach of contract claims

The Privy Council has confirmed that reductions to damages awards based on a plaintiff's contributory negligence are applicable to claims for breach of contract. This resolves a major point of academic and judicial debate in the common law world and, as explained below, has implications for the drafting of contracts.

In the UK first instance decision in *Vesta v Butcher* [1986] 2 All ER 488, which was upheld in the Court of Appeal, Hobhouse J held that contributory negligence (and therefore apportionment) was available where the defendant's liability in contract is the same as a liability arising in the tort of negligence independently of the existence of any contract. Accordingly, if the contractual claim could be framed as a tortious claim in negligence (for example, a contractual term to take reasonable care) damages could be reduced.

The basis for making a contributory negligence reduction to this category of breach of contract claim has been debated for decades. The highest appellate court in Australia, the Australian High Court, firmly rejected the proposition that contributory negligence could apply to contractual claims in *Astley v Austrust*

[1999] Lloyd's Rep CN 758 but the position had not been considered by the UK Supreme Court or Privy Council until the Primeo case.

The Privy Council decided that *Vesta v Butcher* was correctly decided but also found that no reduction for contributory negligence should be applied to any damages payable by R2 as custodian because the duties expressed in the custodian agreement were to do something specific (eg to require the sub-custodian to implement the most effective safeguards in order to ensure the most effective protection of the assets) and not coextensive with a duty to exercise reasonable skill and care.

Parties should be aware of the approach that the courts will adopt to contributory negligence when drafting contracts. If the aim is to ensure responsibility is allocated to one party and avoid the risk of a reduction for contributory negligence, it will be important to avoid imposing duties to use reasonable skill and care and instead impose specific obligations to achieve a particular result.

Deliberate concealment postponing the limitation period

The Privy Council also made a significant finding on the mental element required for the purpose of postponing the running of the limitation period where there has been a deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time. The relevant wording of the Cayman Islands statute is materially identical to the English Limitation Act 1980.

In *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 the English Court of Appeal had held that a reckless breach of duty was sufficient to postpone the running of the limitation period and this issue was considered in both Primeo's appeal to the Privy Council and the appeal in *Canada Square* to the UK Supreme Court.

The Privy Council has decided that recklessness is not sufficient and that the Court of Appeal decision in *Canada Square* was wrongly decided. The finding was based on the ordinary meaning of *'deliberate'* being doing something intentionally and this being different from the ordinary meaning of *'recklessness'*, which means doing something without thought or care for the consequences of an action. The requirement for intention, the Privy Council found, was supported by the reasoning of the House of Lords in *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384. It also found that there is a strong policy basis for protecting professional people from claims for the indefinite future whenever it could be argued that a person was aware of a risk and it was unreasonable to take that risk: '[t]*he implications for professional practice would be drastic, with indefinite exposure to stale claims, long after indemnity insurance had expired.*' The UK Supreme Court has also determined the same point in the *Canada Square* case and elaborated on the reasoning.

It is useful that this point of law has now been settled at the highest level. The practical consequence is that plaintiffs need to satisfy a very high bar if they seek to postpone the limitation period using the deliberate concealment gateway. This may cause difficulties in practice where breaches do not come to light for some time, and plaintiffs should therefore take great care to bring their claims as soon as possible.

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