ON THE CASE

GETTING ROUND THE 15-YEAR LONGSTOP IN A NEGLIGENCE CLAIM
Honda v Mercer

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In *Honda Group UK Pension Scheme Trustee v Mercer* [2022] EWHC 3197 (Ch), the High Court (Trower J) largely rejected an application by Mercer to strike out or obtain summary judgment against a negligence claim brought by the current trustee and participating employers of the Honda Group UK Pension Scheme. In the claim, the Claimants asserted that, when working on a consolidating deed, Mercer negligently failed to identify that an earlier purported change to Scheme benefits was invalid. Mercer argued the claim was time-barred by virtue of the 15-year longstop period in s 14B Limitation Act 1980.

Stated shortly, Trower J held that the Claimants had a real prospect of showing that the claim was not time-barred, essentially because the Claimants' allegation was one of a continuing failure to identify the error throughout the period up to the finalisation of the consolidating deed, which was within the 15-year longstop period. The decision can be contrasted with other recent decisions in the pensions context where it was held that advisers who gave negligent advice in relation to ineffective pension amendments were not in continuing breach of duty.

Trower J's decision is of particular interest for what it says about the longstop in s 14B Limitation Act 1980 and how this applies where an adviser advises in relation to the drafting of a pension scheme deed.

Introduction – the claim

In summary, Mercer provided the Scheme with actuarial, administration and benefits consultancy services during the 1990s, including work on a new consolidated deed executed in 1998 to replace the previous 1981 definitive trust and rules. The Claimants claimed that Mercer had negligently failed, when advising on the 1998 consolidating deed, to identify that benefit changes purportedly effected in 1986 by a previous adviser (Noble Lowndes) had been invalidly introduced (known as the "HUM benefits error"). The HUM benefits error resulted in employees of Honda of the UK Manufacturing Ltd being admitted to the Scheme with more generous benefit entitlements than had been intended (as established in a prior Part 8 claim culminating in *Honda v Powell* [2014] EWCA Civ 437).

The original HUM benefits error by Noble Lowndes had occurred decades ago and was on any view time-barred.

The Claimants' pleaded case was that, in advising as to the manner in which amendments should be made in the 1998 Deed, Mercer failed to notice and advise them in relation to the HUM benefits error committed by Noble Lowndes, wrongly assuming that the less generous HUM benefits structure had been properly incorporated into the Scheme, and Mercer then wrongly drafted the 1998 Deed to reflect that benefit structure for accruals since 1986. The Claimants claimed that if Mercer had correctly identified the problem when working on the 1998 Deed, the Claimants would have successfully sued Noble Lowndes for the additional benefit liabilities falling on the Scheme, with such claim being brought within the then still-current limitation period (presumably on the basis that Noble Lowndes' error had caused latent damage so it would not have been time-barred until expiry of the s 14B longstop in 2001, i.e. 15 years after 1986). The Claimants' claim against Mercer was for the lost opportunity to bring the successful claim against Noble Lowndes.

Thus the Claimants' claim was a "lost chance to sue" or "second generation" case of the sort often employed in pensions cases where the original drafting error is time-barred, but a subsequent adviser (the so-called second generation) negligently fails to spot the error before it became time-

barred, thus depriving the claimant of an opportunity to sue the original adviser for the earlier negligence within the original limitation period. In the pensions context, where (as is not unusual) no-one appreciates that an error has occurred and the damage remains latent for many years, "lost chance to sue" or "second generation" claims can result in litigation starting many years or even decades after the original error, because of the availability of two consecutive limitation periods each potentially up to 15 years for latent damage under ss 14A-14B Limitation Act 1980 (as the *Honda v Mercer* case illustrates).

In theory, there is no reason why there could not be a "third generation" claim, and so on, if a third generation adviser negligently fails to identify the errors of the earlier generations, and so on *ad infinitum*. There is also in principle no need for the advisers to be different persons: situations can arise where an adviser comes under a duty to advise the client of his own earlier error (though that gives rise to particular issues which are outside the scope of this article – as to which see e.g. *Gold v Mincoff Science & Gold* [2001] Lloyd's Rep PN 423 – which issues did not arise in *Honda v Mercer* where Mercer were a separate legal person from Noble Lowndes and had no involvement in the 1986 HUM benefits error: see Trower J's judgment at [19] (though they later became part of the same group [92])).

Mercer's applications

Mercer sought to strike out or obtain summary dismissal of the Claimants' claims on the basis that they were time-barred under s 14B Limitation Act 1980, as (so Mercer argued) any operative act of negligence by Mercer took place in or before October 1994, outside the 15-year longstop period. October 1994 was the date Mercer produced a first draft of what became the 1998 Deed, already having failed to appreciate the HUM benefits error and wrongly reflecting the HUM benefit structure on the erroneous assumption that it had been validly introduced in 1986. Mercer argued that its negligence (if any) occurred when it produced the first draft in October 1994 because by this stage all the alleged errors in the process of consolidation had already taken place; it was at this point that any failure to alert the Claimants to the HUM benefits error occurred, Mercer being (so it said) under no duty subsequently to revisit the issue. The proceedings were started just over

15 years after October 1994, in December 2009 (then stayed for the *Honda v Powell* Part 8 claim and a rectification claim which settled in 2020).

This article focuses on Mercer's s 14B limitation argument. Mercer had a subsidiary ground for striking out the claim, namely that the Particulars of Claim fell outside the scope of the 2009 Claim Form, which had been drafted in very high level terms. The Judge rejected this argument at [103]-[127] of the judgment, on fairly case-specific grounds, though it is notable that the Judge took a wide view of the breadth of the specific claims (including lost chance claims) that can be covered by a pretty vaguely-worded Claim Form.

Section 14B Limitation Act 1980

In broad terms, s 14A Limitation Act 1980 provides an extended limitation period for claims in negligence in respect of latent damage. This is subject to the longstop period in s 14B, which provides:

> *(1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission –*
>
> > *(a) which is alleged to constitute negligence; and*
> >
> > *(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).*
>
> *(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that –*
>
> > *(a) the cause of action has not yet accrued; or*
> >
> > *(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;*
>
> *before the end of the period of limitation prescribed by this section.*

As encapsulated by Trower J at [50] of his judgment, s 14B gives rise to the question whether any act or omission which is alleged to constitute negligence, and to which all or some part of the

loss in respect of which damages are claimed is attributable, occurred less than 15 years before the issue of the Claim Form.

It is to be noted that the question under s 14B is when the relevant negligent act or omission occurred, not (as is the question for the ordinary limitation period for tortious negligence) when the damage occurred. The search is for the last of the negligent acts or omissions to which the damage which is the subject of the claim can be attributed even in part, not for the first or main negligent conduct. Since "attribution" is a wide concept, this potentially gives a claimant some scope to point to later causative acts or omissions so as to retard expiry of the 15-year longstop. This is essentially what happened in *Honda v Mercer*: although Mercer's production of the first draft in October 1994 was probably the main instance of the alleged negligence, the Claimants relied on Mercer's continued omission thereafter to identify the HUM benefits error up to the finalisation of the 1998 Deed some four years later, such that expiry of the longstop period was correspondingly pushed back.

The Judge's analysis

Trower J was not persuaded by Mercer's principal argument, namely that during an ongoing project, a professional who believes he has completed a task commits no "continuing breach" in failing to revisit past work to check for latent mistakes. Mercer relied on various cases which make the point that the Court is generally reluctant to impose a duty on professionals to review work already undertaken to correct errors. However, Trower J considered that the "critical question" was to identify the nature and scope of the ongoing duty of care on which the claim is based, having regard to the specific facts of the particular case (judgment [55], [62]-[63]). He considered it was necessary to ask whether Mercer's provision of the first draft was "completion of a basic aspect of the design which the defendants never had cause to revisit" [64].

Trower J was not satisfied that the first draft amounted to completion of the design work: the retainer was to produce the finalised consolidating deed, and the first draft was merely the end of one stage in the process [67]. Although Mercer argued that nothing which transpired after production of the first draft gave them any cause to revisit their earlier work [70], the Judge

considered that this was not determinative: Mercer had never considered whether the HUM benefits structure was valid, so the case-law which establishes that a professional is generally under no duty to revisit a completed task was not on point [73]-[74]. Mercer could not say that once the issue was considered there was no need to reconsider it, because the issue was never considered in the first place [74].

Trower J considered there was a realistic prospect of the Claimants establishing that Mercer continued to be in breach throughout the drafting process by proceeding on an (erroneous) assumption that the HUM benefit structure had been validly introduced in 1986 and never considering the issue [77], [81]. By analogy with the design/engineering cases of *Pearson Education v Charter Partnership* [2007] EWCA Civ 130 and *Cameron Taylor Consulting v BDW Trading* [2022] EWCA Civ 31, the relevant question was not when the negligent professional originally made the design error but when it was incorporated into the final product, which in the present case meant when the erroneous assumption as to the HUM benefits was incorporated into the 1998 Deed as executed in 1998 [82]-[85]

The Claimants also had a realistic prospect of successfully arguing that Mercer should have advised on the HUM benefits problem when they took the trustees through the draft deed in 1995, within the longstop period [90]-[91], and that Mercer subsequently had cause to revisit their earlier work during the drafting process [98].

However, the Judge did not consider that Mercer were in breach of duty in failing to tell the Claimants to seek independent advice [92]-[95]. Such a duty cannot arise where the professional genuinely believes the advice he has given is good advice (even if it was in fact negligently wrong): see *Ezekiel v Lehrer* [2002] EWCA Civ 16. Nor were Mercer in breach of duty in not identifying the HUM benefits error when preparing a wholly separate deed in 1999 dealing with the discrete issue of pension increases. The work on the 1999 Deed gave Mercer no obvious reason to focus on the benefit structure generally [101].

Discussion

A central feature of the judgment is Trower J's view that it was well-arguable that Mercer were in continuing breach of duty throughout the drafting process, because they never considered the HUM benefits error at all. There is clearly much to recommend this view: the reality of the situation is that the client retains a pensions draftsperson to produce the end-product, i.e. the finalised deed, and it is artificial to divide up the professional's work into the initial preparation/planning (at which stage the negligence might have actually occurred) and the delivery of the end-product. If the drafter has made an error at an earlier stage, it is equally an error in the production of the finalised deed. The drafter is engaged in an <u>ongoing</u> task which is not finished until the final draft is substantially completed and sent to the client (subject perhaps to sorting out details such as engrossment). Therefore the situation is quite unlike those cases where the professional has <u>completed</u> his/her task and it is alleged that he/she subsequently comes under a new duty to revisit the earlier work and discover the error.

It was for this reason that Trower J felt able to distinguish the cases which held that a professional was under no duty to revisit completed work. This included distinguishing two broadly-similar pensions cases.

The first was *Capita (Banstead 2011) v RFIB Group* [2015] EWCA Civ 1310, where a pensions consultant had failed to inform the pension scheme trustees that amendments to the scheme required a formal document and could not be retrospective, such that various amendments to limit members' benefits were ineffective, exposing the scheme to greater liabilities. The Court of Appeal held that, despite the consultant having a continuing retainer with the trustees, there was no continuing breach of duty in the continued omission to tell the trustees to formalise the invalid amendments: these were "original acts of negligence" which occurred at the time of the ineffective amendments and not on a continuing basis thereafter.

The second was the recent case of *PSGS Trust Corporation v Aon UK* [2022] EWHC 2058 (Ch). That was another claim on behalf of the trustee and employers of an occupational pension scheme against a consultant who had provided legal, actuarial and administrative services. The complaint

was that the consultant had failed to advise that immediate deeds were necessary to effect amendments to close the scheme to new members and subsequently to future accrual; the changes were only purportedly given effect by later retrospective deeds which, so it was alleged, could only validly take effect prospectively. The claimant argued that the consultant was, for many years after the original errors, under a continuing duty to administer the scheme in accordance with its rules, which meant they were under a continuing obligation to advise about the ineffectiveness of the purported changes. Miles J followed *Capita (Banstead 2011)*, holding that the consultant's breaches occurred at the time of the original errors, there being no continuing duty thereafter to revisit the earlier work and advise of the earlier errors.

In *Honda v Mercer*, Trower J said at [62] that *PSGS* was simply an application of the established principles (presumably, the general principle that a professional who has completed a piece of work is not normally under a duty to revisit it and/or the principles discussed in *Capita*); and, in relation to the *Capita* case, Trower J said at [86] that the important point was that it was an unsuccessful attempt to impose liability on a professional who had completed the task, notwithstanding that there was a continuing retainer.

Honda v Mercer does not question the general position that a pensions professional who carries out negligent advisory or drafting work in relation to a scheme amendment commits a breach at the time of his/her work on the amendment and is not normally, in the absence of other facts, thereafter under a continuing duty to revisit the correctness of the earlier work. *Honda v Mercer* instead establishes that the professional is at least arguably under a continuing duty until he/she actually completes the advisory or drafting work.

It might be questioned whether this aspect of *Honda v Mercer* is consistent with the outcome of the debate surrounding Oliver J's decision in *Midland Bank Trust Co v Hett Stubbs & Kemp* [1979] Ch 384. There, a solicitor negligently failed to register a 10-year option. Oliver J held he was in continuing breach of duty until the end of the 10-year period, in part because the solicitor's file remained open and he was consulted from time to time about exercise of the option by the option-holder. This was doubted in *Bell v Peter Browne & Co* [1990] 2 QB 495, CA, where a solicitor

negligently failed to secure a declaration of trust for a divorcing husband who transferred the family home to his wife, intending to keep a share of the sale proceeds. The Court of Appeal held that the solicitor's continued omission to secure the declaration of trust after the transfer was not a continuing breach of duty; the single cause of action accrued at the time the solicitor failed to protect the husband's interests at the moment of transfer and thereafter the file was closed. The tension was resolved in *Capita (Banstead 2011)*: the Court of Appeal preferred *Bell v Peter Browne & Co* to *Midland Bank*. It held that the fact that the file remained open in *Midland Bank* and further advice was given (unlike in *Bell*) was a factually incidental distinction and not a distinction of principle.

Thus the proposition in *Midland Bank* – that the solicitor was under a continuing duty where his file remained open and he gave further advice on the same subject – has been disapproved. Could it be said that the *Midland Bank* proposition is not much different from what Trower J held in *Honda v Mercer*? It might be argued that, at root, Trower J's decision was that Mercer were still working on the relevant task and owed a continuing duty until it was complete, which is essentially similar to the (now disapproved) analysis in *Midland Bank*.

However, I do not think there is much mileage in such an argument. The subsequent disapproval of *Midland Bank* seems to be focused on the fact that a continuing duty was found to exist in that case even after the defective transaction (the grant of the option) was supposedly completed. The key feature of *Honda v Mercer* is that the relevant "transaction" (the introduction of the 1998 Deed) was not complete until the drafting was finalised in 1998.

It is also worth mentioning that the "continuing duty" / *Capita (Banstead 2011)* issue arose in another pensions professional negligence case, *Earnshaw v Prudential Assurance* [2017] EWHC 916 (Ch) (in which I appeared for Prudential). Prudential were administrators of the scheme and it was alleged that they had misunderstood the date on which the scheme had equalised in the 1990s and had consequently miscalculated benefits for many years thereafter. Prudential successfully obtained summary judgment on this claim, on the basis that any errors in identifying the date of equalisation had occurred in the first half of the 1990s outside the longstop period, and (relying on *Capita (Banstead 2011)*) there was no continuing duty thereafter to revisit the question of

equalisation, even though Prudential as administrators had a continuing obligation to pay benefits in accordance with the scheme (as equalised): see *Earnshaw v Prudential* at [67]-[69]. It seems that this is largely the same as the point that was decided the same way some years later by Miles J in *PSGS v Aon*, i.e. that an administrator does not (by virtue of its duty to administer a scheme in accordance with its rules) owe a continuing duty to revisit the effectiveness of earlier benefit changes.

Practice point – when to issue proceedings?

One of the practical points to take away from *Honda v Mercer* is that it is not necessarily correct for a claimant to treat the date when a defective deed was executed as the relevant date for calculating the applicable limitation period, at least where the s 14B longstop period is concerned in a latent damage case. Litigation experience suggests that the date of the deed is often seen as the key date, so that proceedings are issued (or standstills agreed) just within 15 years of the date of the deed. Yet *Honda v Mercer* shows the potential for this to be too late in the context of s 14B. On Trower J's analysis, the last relevant negligent act or omission may occur "when the task is completed" as objectively determined in the context of the retainer (*Honda v Mercer* at [78]) or, put another way, "when the drafting exercise was complete" (*Honda v Mercer* at [80]). This is not necessarily the same as the date of execution of the deed, and indeed will in most cases probably be some time earlier than that date. Typically there will be a lapse of time between the drafter giving the final draft to the client with any accompanying advice, and the actual execution of the document by potentially numerous signatories. In such cases, if the completion of the drafting and giving of any advice is regarded as the last negligent act or omission under s 14B, a Claim Form issued (or standstill agreed) just within 15 years of the date of execution could well be out of time.

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