



In this series of articles, we aim to highlight 3 of the most interesting cases in our field decided in the past month. This month: time limits on appeal, cynical breach of restrictive covenants, and limitation periods for breach of statutory duty under FSMA.

Readers may also be interested in 89 Holland Park (Management) Ltd v Dell & Dell [2023] EWCA Civ 1460, concerning the recoverability of legal and professional costs via a service charge. Our colleague Edward Blakeney, who acted for the appellant lessor, has written a summary which you can find [here](#).¹

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Chedington Events Limited v Brake [2023] EWHC 3094 (Ch)

Summary

The High Court determined that it had no power to extend time for the filing of an appellant's notice.

HHJ Paul Matthews formally handed down a judgment in the proceedings without attendance by the parties, and directed that consequential matters would be dealt with by way of written submissions. Those submissions were then duly filed. No application was made either for permission to appeal or for a direction under CPR r52.12(2)(a) concerning the period for the filing of an appellant's notice. The Defendants then sought an extension of time to file an appellant's notice at the Court of Appeal.

The judge determined that he no longer had any power to give any direction about the time for filing of an appellant's notice; that power now lay only with the Court of Appeal.

Why it's important

As discussed in the judgment, the rules concerning how and when steps for pursuing an appeal are to be taken have been the subject of change. This case therefore provides helpful clarity on the position under the current CPR, as well as guidance on how time limits apply in modern practice, where many judgments are circulated in draft and then handed down without a hearing.

Key to the judge's decision was the wording introduced into r52.12(2)(a) in 2016 that a direction regarding the time for filing of an appellant's notice may be given 'at the hearing at which the decision to be appealed was made or any adjournment of that hearing'. In this case, the direction for written submissions operated as an adjournment of the hand-down; once those submissions had been made, the court no longer had power to give any direction.

¹ <https://www.falcon-chambers.com/news/89-holland-park-management-ltd-v-dell-dell-2023-ewca-civ-1460>



Practitioners are, as ever, advised to check the applicable time limits carefully.

Fosse Urban Projects Limited v Whyte [2023] UKUT 286 (LC)

Summary

The Upper Tribunal (Lands Chamber) declined to exercise its discretion to discharge or modify a restrictive covenant. The applicant's decision to 'build first and apply later' was a 'cynical breach' which ought not to be condoned.

The applicant, a property development company, had constructed a new house on land subject to a covenant not to use it other than as garden land. The objectors were the occupants of nearby properties, already determined to have the benefit of the covenant.

The Tribunal found that the likely purpose of the restriction was to preserve a boundary between development and farmland; the whole area had now been developed, such that the covenant was now obsolete. Although the covenant had some benefit to the objectors in respect of privacy and the open aspects of their properties, those practical benefits were not of substantial advantage. Two jurisdictional grounds for modification were therefore established.

However, in the absence of any evidence from the applicant as to why it had chosen to build the house in breach of covenant, the Tribunal inferred that the applicant had done so cynically. The Tribunal therefore declined to exercise its discretion to discharge or modify the covenant.

Why it's important

This decision builds on the relatively recent decision of the Supreme Court in ***Millgate Developments Ltd v Alexander Devine Children's Cancer Trust*** [2020] 1 WLR 4783 (SC), considering the extent to which the fact that a breach is 'cynical' should impact upon the exercise of the Tribunal's discretion. The judgment explains that it is not for the objector to prove that a breach is egregious; rather, it is for the applicant to demonstrate why its conduct in breach of covenant was not cynical, for example because the applicant had been unaware of the covenant. The approach of the Tribunal in this case may make informative reading for practitioners advising on evidence in similar cases.

Shokrollah-Babae v EFG Private Bank Limited [2023] EWHC 3270 (Ch)

Summary

The High Court struck out a claim for damages for breach of statutory duty, namely the Mortgage Conduct of Business (MCOB) rules, and for breach of a duty of care in tort at common law.



The claimant had borrowed various sums from the defendant, initially in 2012, secured by mortgages against a property. The defendant lender obtained valuations of the property as part of the lending process. The claimant eventually failed to repay, and the defendant called in the loans. The claimant alleged that he had been induced to take out the loans on the basis of overvaluations, and that the defendant had breached various MCOB rules, including a duty to provide a valuation which gave a reasonable assessment of value.

Miles J struck out the claim, finding that (i) the claims for breach of statutory duty were limitation-barred, (ii) the claim for breach of a duty of care in tort was not included in the claim form, and in any event no duty of care had arisen; and (iii) only one claim for breach of MCOB was included in the claim form, but there was no realistic case that the defendant was in breach of that duty, having relied on a reputable valuer whose report was otherwise unchallenged.

Why it's important

This case usefully summarises the authorities relating to limitation and claims for breach of statutory duty under s.138D Financial Services and Markets Act 2000, and concludes that such a claim is not an 'action for damages for negligence' within the meaning of s.14A Limitation Act 1980. Accordingly, the ordinary 6-year limitation period applies and will not be extended by later knowledge.

This case is also a salutary reminder of the importance of careful pleading, including in the claim form, particularly where future amendment may be affected by the expiry of limitation periods.

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