QUEEN CITY LAW
BARRISTERS & SOLICITORS

Timing is everything

It can be a very frustrating experience to be instructed by a client, only to find that the best claim is now too late, barred by the provisions of the Limitation Act 2010, or the myriad other rules determining when a matter is out of time.

A recent case before the Court of Appeal sets out one element of such types of cases. In *Lee and Heard v Lee* [2015] NZCA 514, the Plaintiffs alleged that the defendant had improperly obtained an advantage from the parties parents. In effect, the son (working in the family business) purchased all the shares at an alleged undervalue, in circumstances where the parents may not have understood the nature and effects of the sale. The normal rule is that claims must be bought within 6 years of the relevant date, but this claim was much older than that.

However, because the claim was based on equitable principles, the Court determined that the claim could not be struck out as being too late. This is because (although it is not expressed in the judgment referred to above) underlying equitable claims is a discoverability test. If someone defrauds you, it may be many years before you can discover that you have been defrauded. Only when you can discover it, does the time start to run.

Some claims in tort have a similar test of discoverability. This has been explored in the leaky building disaster, where owners have not become aware of negligent building practices for some years. The time to make a claim does not start until the negligence is reasonably discoverable. However, there is also a statutory long stop for such claims, under the Building Act 2004, that limits any claims to a ten year period, regardless of when the damage was or might have been discovered.

So, we have the standard time bar of 6 years from the date the claim arose, which applies to most types of case. That is extended in tort and in equity, based on principles of discoverability. But statute can intervene to change any of these time limits (such as the one mentioned in the Building Act).

Another common time limit is for claims under the Fair Trading Act 1986, for misleading and deceptive conduct. While the claim under this statute looks like a type of tort claim (which have a 6 year limit extended by a discoverability test) the statute itself limits any claims to 3 years from the date of the conduct complained of. This is, of course, a very short time frame, and the fact that some conduct was misleading ort deceptive might not be apparent within that time.

A further example is tax law. A claim for a tax refund is limited for most purposes to 4 years (but there are exceptions), yet people must retain tax records for 7 years.

Criminal law is another area with a myriad of time periods for different types of offences – from crimes with no effective time limits, to those which require any criminal charge to be filed within 6 months of discovery of the relevant alleged offence.

Timing is everything. A claim made out of time can be barred completely. The court records have many examples of claims barred because a potential claimant "sat on his hands" instead of advancing a claim. When they finally moved, the claim was defeated because it was out time.

The remedy is, of course, to seek legal advice as soon as possible.

We look forward to hearing from you.

About the author

- Ross has been a partner and litigator in a leading mid-sized Auckland firm for almost a quarter century. He has specialised in dispute resolution.
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