Feature

KEY POINTS

- Where a lender makes a secured loan, the period of limitation for the lender's claim for repayment is governed not only by s 5 and s 8 of the Limitation Act 1980 (six years for simple contracts, 12 years for deeds), but also by s 20.
- Section 20 provides that claims to recover money secured by a mortgage or charge must be brought within 12 years "from the date on which the right to receive the money accrued". Claims for interest must be brought within six years of the date on which the interest became due.
- The meaning of the phrase "the date on which the right to receive the money accrued" is not at present clear. There is a risk to lenders that the courts may treat s 20 as having been triggered merely because an event of default has occurred.
- This article submits that s 20 should instead be interpreted as being triggered only where any necessary notice of acceleration has been served.

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Of loans and limitations: limitation and the enforcement of syndicated credit agreements

This article considers when time begins to run for limitation purposes where a lender, facility agent or security trustee makes a claim under or in connection with a syndicated loan. In doing so, it reviews the operation of limitation periods under ordinary non-syndicated loan contracts, both secured and unsecured. It concludes that while successful limitation defences against syndicated loan claims will likely be rare, there are potential complications and traps for lenders which may have escaped the notice of borrowers and lenders alike to date, but which merit further attention.

INTRODUCTION

Limitation is not a subject which will frequently trouble syndicated lenders. However, it has brought unwelcome surprises to earlier generations of lenders, and it is therefore well worth reviewing the principles to see if there may be problems in store for contemporary commercial lenders, including syndicated lenders.

There have been a number of cases and other developments over the past decade or so which make a review of the law of limitation in this context particularly timely. On the one hand, there has been a small but important series of cases dealing with how the Limitation Act 1980 applies to claims for repayment by mortgagees and chargees. On the other hand, there has been a flurry of commentary and contract amendment since *Charmway Hong Kong Investment v Fortunesea (Cayman) Ltd & Ors* [2015] HKCFI 1308, [2015] HKCU 1717 (Harris J), which has clarified the question of whether and if so when an individual syndicated lender has a right of suit in the first place.

This article begins by outlining which limitation periods apply to secured and unsecured loans in general, before considering how these principles apply to a typical syndicated loan transaction.

LIMITATION: WHERE TO START?

The basic rule is that a claim based on a contract must be brought within six years of "the date on which the cause of action accrued": Limitation Act 1980 (LA 1980), s 5. If the contract is executed as a deed, the period is 12 years; the trigger for limitation purposes is the same: LA 1980, s 8(1). Section 8(2) provides that the 12 year rule for deeds will give way where a shorter period of limitation is prescribed by some other provision of the Act.

A special rule applies to claims to recover money secured by a mortgage or charge. By LA 1980, s 20(1), such claims must be brought within 12 years "from the date on which the right to receive the money accrued". This 12 year period applies only to claims to the principal debt. Claims for interest attract a six-year limitation period: the claim to recover arrears of interest must be brought within six years from the date on which the interest became due (LA 1980, s 20(5)).

Under a typical modern commercial lending arrangement, there will be a loan contract, separate deeds of security, and (quite probably) a separate contract of guarantee and indemnity. The question of which of these contracts will be governed by s 8 (or s 5) of the Limitation Act, and which by s 20, is less obvious than might be expected. Though not often litigated, the intersection between the limitation rules for contract actions and the rules for recovery of secured debts has confounded litigants and even some judges ever since a limitation provision for secured debts (the predecessor to the current s 20) was first introduced in 1833.[1]

The leading cases are the decisions of the Court of Appeal and the House of Lords respectively in *Bristol & West Plc v Bartlett* [2002] EWCA Civ 1181, [2003] 1 WLR 284 (*Bartlett*) and *West Bromwich Building Society v Wilkinson* [2005] UKHL 44, [2005] 1 WLR 2303 (*Wilkinson*), both involving claims by mortgagees of residential property to recover shortfalls after sales of the properties. From these and other authorities, including the helpful Court of Appeal decision in the *Wilkinson* case [2004] EWCA Civ 1063, [2004] C.P. Rep. 42, the position of a secured lender as regards limitation appears to be as follows:

- Section 20(1) does not only bar the mortgagee or chargee's proprietary remedies in respect of the secured debt (after the expiration of 12 years). It is worded to prohibit any "action … to recover … any principal sum of money secured by a mortgage or other charge on property (whether real or personal)". Those words are to be read literally so as to cover the mortgagee's personal claim on the mortgagor's covenant to pay – whether that covenant is contained in the mortgage deed or in a separate instrument: *Sutton v Sutton* (1882) 22 Ch. D. 511; *Fearnside v Flint* (1882) 22 Ch. D. 579; *Bartlett* at [18] & [27].
- For these purposes, the words "other charge on property" include liens, pledges and charges arising from judgments and analogous statutory burdens: McGee, *Limitation Periods* (7th ed, 2014) at [12.017]; see too *Gotham v Doodes* [2007] 1 WLR 86 at [26].
- The key question is whether, at the time when the right to receive the balance of the principal sum accrues to the lender, the lender's debt is secured by a mortgage or other charge on property. If it is, then the s 20 limitation period applies. It makes no difference that by the time proceedings are issued the security has been realised or released: *Wilkinson* at [10]. It does not matter that the debt is only partially secured at the relevant time (in the sense that realisation of the security will not be sufficient to cover the principal debt).
- Where there is a contract of loan and the borrower's repayment obligation is secured on property, it appears that both s 20 and s 5/s 8 will apply where their respective preconditions are fulfilled. Although the Court of Appeal in *Bartlett* stated (at [27]) that "the specific limitation provisions relating to mortgages take precedence over the general provisions relating to specialities", the Court of Appeal in *Wilkinson* (at [50]) treated both the s 8 and the s 20 periods as concurrently applicable. It is submitted that the *Wilkinson* approach of dual applicability is justified, firstly, by the literal wording of the Limitation Act (which nowhere states that the application of one section precludes the application of another), and, secondly, by considering the historical origins of the two provisions as explained by Collins LJ and Romer LJ in *Barnes v Glenton* [1899] 1 QB 885.
- The scope of s 20(1) is not unlimited: it will not apply if the obligation being sued on is not secured, even if the obligation arises in the context of a secured lending transaction. Thus, it seems that s 20(1) will not apply to a claim against a guarantor of the mortgagor's obligation: *In Re Powers* (1885) 30 Ch. D. 291. The limitation period will instead be defined by s 5/ s 8. (However, if the guarantee is itself secured on property, it would follow that s 20 applies to the claim under the guarantee.)
- Care must be taken where there is a simple loan contract followed by a deed of security, since the analysis may be that the two contracts have become merged. The doctrine of merger is dealt with in *Chitty on Contracts* (32nd ed) at [25-001]–[25-002]. Its application depends on the intention of the parties. The general principle is that:
  - a debt or security by simple contract is extinguished by a specialty security being given for the same if the remedy on the latter is coextensive with that which the creditor had upon the former; but
  - if it appears on the face of the specialty or from the nature of the transaction that the specialty was intended only as an additional or collateral security, it will not operate as a merger.

Modern mortgage deeds will frequently exclude the doctrine of merger in terms.

This analysis implies a greater role for s 20 than may be generally assumed. Some textbooks either make no mention of s 20 at all, or (where they do mention s 20) assume that s 20 will have no application provided only that the contract of loan (or contract of guarantee as the case may be) is a separate contract from the security instrument. This is a misconception, although in many cases it will be a misconception with no practical effect. *Fearnside v Flint* (1882) 22 Ch. D. 579 establishes that it makes no difference to the application of s 20 that the loan contract happens to be in a separate instrument to the mortgage deed; and this must be correct. As Bowen LJ remarked in *Re Powers* (1885) 30 Ch. D. 291, 297, "to hold otherwise would be to give an instrument a different effect on account of its not being on the same sheet of paper".

Does this analysis of s 20 and s 5/s 8 both applying in appropriate cases make any difference? Or is it irrelevant given that the s 20 limitation period is 12 years? This depends on the trigger for the limitation period under s 20. It appears from some recent case law that the s 20 limitation period may in some cases begin running well ahead of the limitation period under s 5 or s 8. Where this is so, s 20 will be a lot more important than has been generally recognised.

THE LIMITATION TRIGGER

Section 20(1) provides (in full) that:

> "(1) No action shall be brought to recover— (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or (b) proceeds of the sale of land; after the expiration of twelve years from the date on which the right to receive the money accrued."

This may be contrasted with the trigger under s 5 or s 8, which is "the date on which the cause of action accrued". This latter expression historically gave rise to problems because of decisions to the effect that the lender's cause of action on a loan repayable on demand accrued when the

loan was first made, and was not postponed until the making of a demand by the lender: see *Re Brown* [1893] 2 Ch 300, and (more recently) *MS Fashions v BCCI* [1993] Ch 425, 447. LA 1980, s 6 was enacted to reverse the effect of those decisions so far as loan contracts not under specialty are concerned. In rather more words than this, it deems the cause of action in such a case to have arisen only at the time when a demand for repayment is actually made (in writing). There is a useful explanation of how s 6 operates in Waite LJ's judgment in *Boot v Boot* (1997) 73 2 P&CR 137.

What, then, is the difference (if any) between "the date on which the right to receive the money accrued" and "the date on which the cause of action accrued"? This is a question which Lord Hoffmann declined to answer in the *Wilkinson* case. It is not straightforward.

The difficulty comes from a Court of Appeal decision, *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 QBD 1 (*Hornsey*), on the question of when a local authority had acquired a "present right to receive" certain expenses for pavement works which had been charged on the adjoining properties pursuant to the Public Health Act, 1848. The Court of Appeal held that the "right to receive" accrued as soon as the expenses had been incurred and the charge imposed by statute: it did not matter that the authority had not engaged its surveyor to apportion the expenses between the various houses, or served the relevant notice on those houses. The authority's claim was therefore statute barred. Lopes LJ said, at p 11:

> "When, then, does the right accrue to the person or persons in whose favour the charge is imposed to receive the amount secured by the charge? It appears to me that it accrues the moment the charge is imposed on the premises by the statute, that is when the expenses have been incurred and the works completed. It may be that certain things have to be done before the right can be enforced, but the right to receive what is secured by the charge arises concurrently with the charge. The words are "present right to receive," not "present right to recover."

In other words, *Hornsey* established a distinction between "receivability" and "recoverability".

Hornsey was considered recently by the Court of Appeal in *Gotham v Doodes* [2005] EWHC 2576 (Ch), [2007] 1 WLR 86, a case about a charging order created under s 313 of the Insolvency Act 1986 in favour of a trustee in bankruptcy. The court concluded (at [32]) that *Hornsey* stood as authority for the proposition that "the right of the local board to receive specific sums from individual frontagers was a present right because the only future event on which it could depend was within the power of the local board to procure". The editors of *Fisher and Lightwood's Law of Mortgage* (14th ed, 2014) at [26.34] cite *Hornsey* for the proposition that "there can be a present right causing time to start running, notwithstanding there may be no means of immediately enforcing it".

If it is correct that there is a present right to receive money whenever the only thing between the claimant and a fully enforceable right to recover the money is something within the claimant's own power, then this would give rise to serious problems in commercial lending transactions. Lenders' rights to accelerate a loan on an event of default are typically very widely drawn; however, it is frequently the case that a lender will choose not to accelerate or enforce a loan despite the occurrence of an event of default. If the *Hornsey* principle as stated above is good law and of general application, then it would follow that time begins running under s 12 as soon as the borrower commits an event of default. This is precisely what the defendant borrower argued in the *Wilkinson* case, though in the event the House of Lords did not need to reach a conclusion on this point (see at [21]).

It is submitted that there are strong reasons for distinguishing or reinterpreting *Hornsey*. At first sight, this looks an uphill struggle. Lindsay J at first instance in *Gotham v Doodes* [2005] EWHC 2576 (Ch), [2006] 1 WLR 729 considered *Hornsey* impossible to distinguish on the case before him, and the Court of Appeal distinguished it only because of the specific statutory wording of s 313 of the Insolvency Act 1986. (This provision secured "the amount which is payable otherwise than to the bankrupt … out of the estate …", and thereby imported a requirement that the money actually be payable and not just receivable. On the facts of the *Gotham* case, the money was not payable until the court made an order for sale of the bankrupt's house.) *Hornsey* itself is a decision of a strong Court of Appeal (Lord Esher MR, Lindley LJ and Lopes LJ), asserting in trenchant and general terms that there is a difference between a "right to receive" and a "right to enforce payment".

It is suggested that the start of an answer comes from the fact that, in *Hornsey*, there was no question of any choice on the part of the local authority whether or not to require payment of the pavement repair expenses (other than in the sense that it could perhaps have waived them or simply not enforced them at all). The statute provided that if the local authority proceeded with the pavement works after the adjoining property owners refused to do so, the expenses of doing so "shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor …" Procedures were then set out in the statute for how the local authority could enforce payment of that debt. It made sense in that statutory context to find that there was an accrued right to receive the money as soon as the works were completed, and to treat the processes of apportionment and enforcement as being separate matters which did not go to the question of whether or not the local authority had a "right to receive" the money in question. The alternative would have been to permit the local authority to extend time indefinitely as a result of failing to carry out its public law duty to apportion and enforce payment of the repair expenses.

The significant difference between this case and the case of a typical loan contract is that a lender's right to receive repayment of the full outstanding loan upon an event of default by the borrower will only arise if it makes a positive election to serve a notice accelerating the borrower's obligations. The lender ought to be free to consult its commercial interests in deciding whether to serve a notice. Unless a notice of acceleration is served, the lender's right is a right to serve such a notice, not a right to receive the outstanding loan balance. It is submitted that this is a solid basis for distinguishing *Hornsey* in the context of a contract of loan where the loan is not automatically made repayable in full upon an event of default.

Arguments can be made from authority, too, to doubt the scope or force of the *Hornsey* decision. In particular, it should be noted that *Hornsey* has not been followed in the context of LA 1980, s 22(a), which (dealing with claims to personal estate of a deceased person) uses precisely the same formulation of a "right to receive" the interest in question: see *In re Loftus, decd* [2005] 1 WLR 1980, [2007] 1 WLR 591. Though, as a first instance decision on a different section of the Act, it is of no use as an argument from authority, a court considering the matter afresh might wish to take note that in *Re Pardoe* [1906] 1 Ch 265, Kekewich J held that "a present right to receive" a share of an intestate's personal estate meant "a right to recover by legal proceedings"; and said that he could not "conceive that the words can mean anything different from that".

In conclusion, this is a point that merits consideration by the Court of Appeal or even the Supreme Court, given the weight of precedent (not all of it consistent) and the unresolved question left over by the House of Lords in *Wilkinson*. It would be prudent meanwhile to exercise caution when giving advice as to how the expression "right to receive a principal sum of money secured by a mortgage or charge" will be interpreted when it falls to be considered in the context of a secured loan. It is submitted, though, that this expression, the trigger for s 20, is satisfied only where:

- the defendant owes a debt to the claimant which is immediately due and payable (whether or not it is yet enforceable or fully ascertained); and
- that debt is secured by a mortgage or charge.

It is not enough that the claimant has a right to serve a notice which will accelerate the defendant's repayment obligation.

ACKNOWLEDGEMENT AND PART PAYMENT

One of the reasons why limitation issues such as these are so rarely encountered in the commercial lending context is that where the borrower either acknowledges or makes part payment of the debt, the limitation period is reset from the moment of that acknowledgement or part payment: LA 1980, s 29(5)–(7). For these purposes, payments of interest do not reset the limitation period for claiming arrears of interest, but do cause time to begin running from zero again in respect of claims for repayment of the principal debt: LA 1980, s 29(6).

An "acknowledgement" in this context means simply a clear admission of the claim. Sections 30–31 contain further rules about the conditions for a valid acknowledgement or part payment. In particular, to trigger the running of time afresh, the acknowledgement or part payment must be made by the debtor (or the debtor's agent) to the creditor (or the creditor's agent) – though it seems that indirect transmission will suffice. Any acknowledgement must be in writing and signed: s 30(1). It is thought that electronic signatures will qualify for these purposes: *McGee* at [18.026].

It is perhaps hard to imagine a scenario where a commercial lender faced with a total failure to make interest payments for any length of time will fail to take enforcement action shortly thereafter. But it is possible to imagine a long term loan with interest rolled up where there would be no interest payments for over 12 years. This could give rise to a situation where there is an event of default at the beginning of the term, and no reason for any acknowledgement or part payment to restart the limitation period. Under the *Hornsey* principle as interpreted in *Gotham v Doodes*, that could be enough to start time running under s 20(1).

LIMITATION AND SYNDICATED LOAN CONTRACTS

How, then, does this analysis of s 20 and the "right to receive" apply to the position of lenders under a syndicated loan? Within the scope of this article, it is only possible to note some headline points. The precise position will always depend in any event on the specific terms of the relevant facility agreements and security instruments.

There is a preliminary question over whether a syndicated lender has an individual right to sue for repayment in the first place, or whether instead (as was held in Hong Kong in the *Charmway* decision) individual lenders are either owed no debt or unable to enforce any debt in the event of default.[2] It is now clear that a syndicated loan contract on the terms of the current LMA recommended forms of facility documentation will (as a matter of English law, and absent any contrary amendment) permit individual lenders to take action to recover sums due to them. But the answer may vary depending on the contract wording, and (perhaps) depending on the choice of law governing the agreement. In any case, since it is typically only the facility agent acting on the instructions of the majority lenders who can serve a valid demand for payment, it will be rare indeed for an individual lender to be able to bring a repayment claim against the wishes of the majority lenders. Given the requirement to share recoveries with other lenders under the sharing clause, it will be rarer still that an individual lender will wish to bring such a claim.

A second point to note is that the LMA draft Multicurrency Term and Revolving Facilities Agreement gives the facility agent the option, after an event of default, either to declare that the entire loan is immediately due and payable, or to "declare

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that all or part of the Loans be payable on demand, whereupon they shall immediately become payable on demand by the Agent on the instructions of the Majority Lenders": Clause 23.13. This latter scenario may test the limits of when a lender's cause of action, or alternatively "right to receive" the money, has accrued. The effect of such a notice was considered in *Strategic Value Master Fund v Ideal Standard* [2011] EWHC 171 (Ch), [2011] 1 BCLC 475, where it was held (at [49]–50]) that the notice simply gave the majority lenders an additional right to make demand; it did not sweep away the existing contractual repayment obligations and replace them with a single requirement to pay on demand.

A third point to note is that an acceleration notice declaring the outstanding loans to be payable on demand can be withdrawn. The LMA draft documentation provides (at Clause 35) that the majority lenders may waive "any term" of the finance documents and that such waiver will be binding on all parties – subject to certain exceptions where the consent of all lenders is required. In the *Ideal Standard* case it was held that this waiver clause was not engaged by the majority lenders' withdrawal of a notice of acceleration (because what was being waived was a right to demand immediate repayment, not a "term"). The withdrawal of the notice by the majority lenders was held to be valid, despite the opposition of a minority lender.

In light of the analysis above, it is suggested that:

- The limitation period for the claim of a syndicated lender where the borrower gives proprietary security for the performance of its repayment obligation will be governed by both s 20 and s 8 (or, exceptionally, if the loan agreement is not executed as a deed, s 5) of the Limitation Act 1980.
- Time will begin running under s 8 against the individual lender (or against the syndicate acting collectively) only when a valid notice has been served demanding payment, or upon expiry of the term. While it is well established that in general time begins running as soon as a loan is "payable on demand", this is ultimately a question of construction of the loan agreement: *Levin v Tannenbaum* [2013] EWHC 4457 (Ch). In the case of a typical syndicated loan, it would be a condition precedent to a claim under the loan agreement that a valid demand for payment has been served, and therefore time would begin running only from that point.
- What will be of more concern to (secured) lenders is the question of when time begins running under s 20. For reasons discussed above, it is submitted that if and when the question arises, it should be concluded that a lender's "right to receive" repayment of its loan does not accrue until the due date: whether that is the contractual due date in the case of a term loan, or the accelerated due date if (but only if) a valid demand for payment is served following an event of default.
- On this basis, it appears that there will be no practical difference between s 8 and s 20, so far as repayment of principal is concerned: both provide for a 12 year limitation period, and both will be triggered at the same time.
- In most cases, the rules about acknowledgement and/or part payment contained in ss 29–31 of the Act will in any event mean that lenders are amply protected against their claims for repayment becoming statute barred.
- Section 20 will however make a difference insofar as s 20(5) provides that the time limit for recovering arrears of interest is six years from the date on which the interest became due.

CONCLUSION

In *Re Frisby* (1889) 43 Ch. D. 106, the Court of Appeal's seminal decision seven years earlier in *Sutton v Sutton* (1882) 22 Ch. D 511, was described in argument as having come as "a surprise to the profession generally". Well over a hundred years later, the potentially wide scope of s 20 of the Limitation Act continues to surprise. Some lenders were caught out as a result in the mortgage shortfall recovery cases which followed the house price crash of 1990–1992. The broad scope that has been given to the critical words "right to receive" money in this context means that there is potential for further unwelcome surprises in the context of new lending arrangements and any future wave of defaults and asset devaluations.

However, the analysis above shows that not only are limitation questions unlikely in practice to arise for large-scale commercial lenders including syndicated lenders, but that if limitation questions do arise in future then there are principled reasons for resolving the question of how to interpret a "right to receive" in the context of s 20 in a way which makes the s 20 limitation trigger practically the same as the trigger under s 8. If that happens, few should mourn the loss of a distinction between the two provisions. ■

1 Real Property Limitation Act, 1833, s 60.
2 *Charmway Hong Kong Investment v Fortunesea (Cayman) Ltd & Ors* [2015] HKCFI 1308, [2015] HKCU 1717 (Harris J). For discussion, see Rawlings 'Majority rule and minority rights in syndicated loans' [2016] 2 JIBFL 70; Hooley 'Enforcing syndicated credit agreements: all for one and one for all?' [2016] 2 JIBFL 74.

Further Reading:

- Enforcing syndicated credit agreements: all for one and one for all? [2016] 2 JIBFL 74.
- Limitation periods for breach of trust or fiduciary claims with reference to directors' duties [2009] 5 JIBFL 256.
- LexisPSL: Banking & Finance Practice Note: Limitation – contract.