

Steven Snowden appeared for the Defendant before His Honour Judge Mitchell (Designated Civil Judge for London) who in a reserved judgment held that it is an abuse of process to begin a second set of proceedings when an earlier action on the same facts and causes of action had been struck out for failure properly to serve the Claim Form. That was so even when the second action was issued after the expiry of the limitation period and the Claimant was seeking to obtain an extension under s.33 of the Limitation Act and to rely on the decisions of Horton v Sadler, Richardson v Watson and Leeson v Marsden.

In the case of *Dixie v British Polythene*, the facts were as follows. The Claimant suffered an accident at work on 27.2.05. He instructed solicitors in August 2005 and liability was admitted by the Defendant's insurers in October 2005. The Claim Form was issued only five days within the primary limitation period and no attempt at service was made until more than two weeks after the last day of the four-month period for service. Despite opposition from the Claimant, the Defendant's application to strike out those proceedings was successful. CPR 7.5 provided a period of four months which was to be strictly enforced. The Claimant was not able to bring the action within any exception.

Two weeks later, the Claimant issued further proceedings claiming exactly the same damages, based on exactly the same facts and causes of action. Those Particulars of Claim expressly recognised that the first set of proceedings had been struck out, that this set was out of time and that an extension of time under s.33 of the Limitation Act would be necessary. The Defendant applied to strike this set of proceedings out as an abuse of process.

In a reserved judgment the Judge accepted that:

1. Whether conduct amounted to an abuse of process was not a matter of discretion – it either was or was not.
2. The Court of Appeal had in a long line of decisions commencing with Vinos v Marks & Spencer and running through Anderton v Clwyd and Hashtroodi v Hancock emphasised that the time limit for service of the Claim Form was important and was to be strictly observed; that in general three years to issue and four months to serve was plenty of time; and that it was only in the most exceptional cases that service would be dispensed with or any retrospective extension of time given. Practitioners ought to have been well aware of the need to serve in time, and of the high price to be paid if they did not.
3. It could not have been the implied intention of the House of Lords in Horton that those decisions were all to become redundant.
4. It was settled law that where a first action had been struck out for breach of a peremptory order or as an abuse of process, issuing a second action on the same facts would be an abuse of process.
5. Cases where the first action was struck out for failure to serve properly were analogous to cases of breach of a peremptory order.
6. The Limitation Act (and the cases of Horton and Richardson dealing with s.33) sought to regulate the position as between the parties – considering what was equitable between them. Questions of abuse of process were more fundamental, and dealt with how a party behaved towards the Court.
7. The cases of Horton and Richardson therefore did not answer the question of

- whether the second action in this case was an abuse of process.
8. That view was consistent with the case of *Collins v CPS Fuels Ltd*, in which the first action was struck out for failure to comply with an unless order and the second action, even though still time within the Limitation Act, was struck out.
  9. *Leeson v Marsden* was distinguishable and/or wrongly decided on the basis of a concession that the Court in that case should treat the question of abuse of process and the s.33 decision as both involving the same exercise of discretion. Further, the Court in that case had not been referred to the numerous Court of Appeal cases on failure to serve properly.
  10. In all the circumstances, the issue of the second action in this case was an abuse of process.

Recognising the importance of his decision and the likelihood that the point would occur in other cases, the Judge gave the Claimant permission to appeal and ordered that the appeal be “leapfrogged” to the Court of Appeal.

Steven Snowden of Crown Office Chambers appeared for the successful Defendant, instructed by Kennedys, Birmingham.