Unrepresented litigant found to have abandoned a limitation defence

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Introduction

1. A person intending to present his or her case before a court without legal representation would be wise to first take a look at the case of *Chapman v Colson*,[1] a recent decision of the Supreme Court of New South Wales.

2. In that case, the unrepresented litigant's defence, prepared by his former solicitor, pleaded that the plaintiff's cause of action was statute barred under the *Limitation Act 1969* (NSW). At the hearing in the Local Court, however, the unrepresented litigant did not pursue the defence and judgment was given in favour of the plaintiff. Had the unrepresented litigant pursued the defence, the plaintiff's cause of action may have been statute barred and the unrepresented litigant may have been entitled to a judgment in his favour.

3. On appeal, the Supreme Court held that the unrepresented litigant:

    - had not been misled by incorrect views expressed by the plaintiff's legal representative and the magistrate as to the law applying to the running of the limitation period;
    - had never intended to rely upon the limitation defence and had made a positive and informed decision to abandon it; and
    - could not now rely on the limitation defence.

Chapman v Colson

The pleaded case

4. Mr Chapman's former father-in-law, Mr Colson, had commenced proceedings against Mr Chapman in the Local Court in 2013. His amended statement of claim pleaded that:

    - by an oral agreement made between Mr Colson and Mr Chapman in 1999, Mr Colson had advanced the sum of $50,000 to Mr Chapman;
    - it was a term of the loan that it was repayable on demand; and
    - in late 2012, Mr Colson had made a demand upon Mr Chapman to repay the loan but Mr Chapman had neglected and/or refused to pay it.

5. Mr Chapman's amended defence, prepared by his then solicitor, apparently pleaded that the loan was not made to him but to his now ex-wife, Mr Colson's daughter. It

[1] [2015] NSWSC 120.

also pleaded that, if Mr Chapman was found to be indebted to Mr Colson, then any action by Mr Colson to recover any moneys owed was statute-barred by virtue of s 14(1) of the *Limitation Act*.

6. Section 14(1) of the *Limitation Act* relevantly provides:

> "*(1) An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims:*
>
> > *(a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed.*"

The Local Court hearing

7. Mr Colson was represented by his solicitor at the hearing of the matter. When the matter was first called, Mr Chapman's solicitor appeared on his behalf but sought leave of the Court to withdraw and leave was granted. Mr Chapman then presented his case before the Court without legal representation.

8. At the beginning of the hearing, the parties outlined their cases to the Magistrate without mentioning the limitation defence. The Magistrate then asked whether the limitation issue had been resolved and also asked Mr Chapman if he had a copy of s 14. Mr Chapman indicated that he did not have a copy of the section and said that "I feel like I'm on a boat with no sail out in the ocean at the moment."[2]

9. The Magistrate then said that "the Court will do their best to assist you but I'm not a lawyer in respect to I don't assist anybody that appears before me with legal advice" and that she could only "tell you as best that I can the processes involved." The Magistrate also said that Mr Colson's solicitor was "an officer of the Court and he will assist the Court as best he can, given that we've got an unrepresented person before the Court."[3]

10. After Mr Colson's solicitor showed Mr Chapman a copy of s 14, Mr Colson's solicitor submitted to the Magistrate that the words "from the date that the cause of action first accrues" in s 14(1) did not mean the date on which the loan was made in 1999 but rather the date on which Mr Colson made a demand for payment. The Magistrate agreed with this, saying: "Okay, Well that's immediately, that has come to mind, is the cause of action couldn't possibly start when the loan was made, or if it was in fact a loan."[4]

11. The Magistrate then asked Mr Chapman for his views, indicating that the limitation issue had been raised in his amended defence. Mr Chapman replied as follows:

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[2] Above, n 1, at [23].
[3] Above, n 1, at [23].
[4] Above, n 1, at [23].

> "*I don't have a defence or any amended defence. To shed light on that, I know that my former solicitor … said that he wanted to seek this as the reason to – make it go away. And I said to him at the time, which I'll say now, 'To me that looks like we're just trying to avoid something through legality. I don't want to avoid it through some legal loophole like a statute of time, it's not' – 'it didn't happen, I didn't get a loan, so why am I trying to find a loophole to get rid of it'. So if it pleases you I'm happy to just get rid of that right now, go on evidence.*"[5]

12. The Magistrate then said that she would not then rely "on that particular cause."[6]

13. The hearing then proceeded and towards the end, during closing submissions, Mr Colson's solicitor asked the Magistrate if she wished him to address her on the "issue of limitation" and the Magistrate said no. Neither party made any closing submissions on the limitation defence.[7]

14. The Magistrate subsequently delivered a decision in favour of Mr Colson and ordered that Mr Chapman pay $50,000 plus interest to Mr Colson. The limitation defence was not mentioned in the Magistrate's reasons for decision.

The appeal to the Supreme Court

15. Mr Chapman appealed from the decision of the Magistrate to the Supreme Court of New South Wales. He was legally represented on the appeal which was heard by Harrison AsJ.

16. At the outset, Harrison AsJ noted that the views expressed by Mr Colson's solicitor and the Magistrate as to when time started to run under s 14(1) had been incorrect. The settled law, her Honour said, was as follows:

    - a loan repayable on demand is repayable at once, without the need for any demand;
    - the lender can bring an action for recovery of the debt without the need to make a demand; and
    - the limitation period, accordingly, begins to run from the date on which the loan is made.[8]

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[5] Above, n 1, at [23].
[6] Above, n 1, at [23].
[7] Above, n 1, at [25]-[26].
[8] Above, n 1, at [13]-[17]. See *Young v Queensland Trustees Limited* [1956] HCA 51; (1956) 99 CLR 560 at [10]; *Woodward v McGregor* [2003] NSWSC 672 at [83] and [85]; *Chidiac v Maatouk* [2010] NSWSC 386 at [235]-[239]; *Voce v Deloraine* [2012] NSWSC 1187 at [11]; and *Ki Bun Kwon v Kun Il Cha* [2013] NSWSC 1372 at [17]. Note: In October 2004, the NSW Law Reform Commission in Report 105 had recommended that the law be changed so that a loan payable on demand should run from the date on which demand was made: see "*Time limits on loans payable on demand*" [2004] NSWLRC 105.

17. It followed, therefore, that a person who sought repayment of a loan which was payable upon demand only had 6 years from the date of the loan in which to bring proceedings for its recovery. As the loan was made in 1999, had Mr Chapman pursued his limitation defence at the hearing, the Magistrate may have held that Mr Colson's cause of action had become statute barred by the end of 2005 and that Mr Chapman was entitled to judgment in his favour.[9]

18. Mr Chapman's grounds of appeal included that the Magistrate had erred in law by:

    - failing to give any reason for rejecting Mr Chapman's reliance on s 14(1);
    - failing in her reasons to identify the limitation ground as an issue to be determined in the case despite the fact it had been pleaded in the defence; and
    - failing to dismiss the proceedings on the basis of the limitation ground.[10]

19. Her Honour, however, found that:

> "*Mr Chapman, informed by legal advice, made an election to abandon his limitation issue. He was aware that his solicitor had advised him to rely upon it yet chose not to do so. At the hearing, the Magistrate confirmed that 'we' [being the Court and the parties] are not going to rely on the limitation 'cause'. The hearing proceeded on the basis that the limitation point was no longer in issue.*"[11]

20. As Mr Chapman had elected to abandon the limitation defence, her Honour said that it was not incumbent on the Magistrate to identify it as an issue for determination in her reasons and that, therefore, the Magistrate did not need to give specific reasons for rejecting Mr Chapman's reliance on s 14(1) and was not obliged to dismiss the proceedings on the basis of the limitation defence.[12]

21. A further ground of appeal was that the Magistrate had denied Mr Chapman procedural fairness because she had failed to inform him (an unrepresented litigant) that:

    - while Mr Colson's solicitor was an officer of the Court and bound to assist the Court, his view on the law as to when time started to run for the purpose of the limitation defence, could be wrong;
    - the Magistrate's statement to the effect that the submission by Mr Colson's solicitor on the law was correct was not a concluded view, that she had not considered the authorities, and that it might not be correct;
    - if the action was, in fact, "out of time", then that provided a complete defence to the action; and

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[9] Above, n 1, at [18].
[10] Above, n 1, at [29].
[11] Above, n 1, at [42].
[12] Above, n 1, at [44].

- the consequence of any true abandonment of the limitation defence by Mr Chapman would be that the Magistrate would not go on to consider the limitation defence.[13]

22. Her Honour considered what was meant by procedural fairness[14] and noted what had been said about the court's duty to unrepresented litigants – that the court has a duty to ensure that an unrepresented litigant does not suffer disadvantage from exercising the right to be self-represented and that a trial judge should take steps to ensure that an unrepresented litigant is not ignorant of a fundamental procedure which, if invoked, could be of advantage to him.[15]

23. Her Honour also noted that it was submitted on behalf of Mr Chapman that the views expressed by Mr Colson's solicitor and the Magistrate had not provided Mr Chapman with an "effective choice" when given the opportunity to press his limitation defence and, further, had misled him into withdrawing the defence.[16]

24. Her Honour, however, held that the views of Mr Colson's solicitor and the Magistrate had not misled Mr Chapman because Mr Chapman had never intended to rely upon the limitation defence and had made "a positive decision" [17] and an "informed decision"[18] to abandon it. Furthermore, the Magistrate had given Mr Chapman the opportunity to rely on the limitation defence as a valid defence but he had chosen not to rely on it.[19]

25. Her Honour went on to say as follows:

> "*While the Court has an obligation to afford procedural fairness … it does not extend to ensuring that a party makes the correct decision. It is my view that, in all the circumstances, the Magistrate acted judicially; dealt with the matter for decision without bias; gave each party the opportunity to adequately present their case; observed the procedural and other rules provided for in the relevant statute and came to her decision with that sense of responsibility that is the necessary accompaniment of the duty to do justice.*"[20]

26. Finally, her Honour held that the Court on appeal should not now allow Mr Chapman to rely on the limitation defence. Her Honour said that she was not in a position to say with certainty that Mr Colson would not have conducted his case differently had the

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[13] Above, n 1, at [45].
[14] Above, n 1, at [46]-[48].
[15] Above, n 1, at [49]; see *Hamod v State of New South Wales* [2011] NSWCA 375 at [309] and following. Note: The trial judge's duty in dealing with a claim by an unrepresented litigant was also considered by the New South Wales Court of Appeal in *Cicek v The Estate of the Late Mark Solomon* [2014] NSWCA 278. The author has previously written about this case: see K Ottesen, "*Self-represented litigants: The limits to the judge's assistance*", 22 September 2014.
[16] Above, n 1, at [50]-[51].
[17] Above, n 1, at [54].
[18] Above, n 1, at [56].
[19] Above, n 1 at [55].
[20] Above, n 1, at [56].

limitation defence remained in issue at the hearing in the Local Court and, therefore, Mr Chapman could not now rely on the limitation defence.[21]

The decision of the Supreme Court

27. Her Honour accordingly dismissed the appeal and affirmed the decision of the Magistrate.

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[21] Above, n 1, at [77]-[78].