

COVID-19 AND THE “NEW NORMAL” A CASE FOR FREEZING OF LIMITATION LAWS?

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INTRODUCTION

The recently discovered Corona Virus causes the highly infectious corona virus disease (“**COVID-19**”). By March 11, 2020, the World Health Organization characterized the virus as a pandemic. It is estimated that one infected individual may infect 2.5 individuals within a 5-day period, which may increase to about 406 individuals within 30 days, in the event that those who are infected infect others.¹ As a result, several countries have found it necessary to issue sit-at-home orders to curtail the spread of the virus.

proceedings in some Nigerian states thereby hindering prospective claimants from instituting fresh actions in court. Given limitation statutes which prescribe a specified time limit within which an action may be instituted, we explore whether freezing the running of the usual statutory timelines during the pandemic period is a reasonable response to the claimant’s inability to file within the stipulated timeframe and the practical steps which may be explored towards achieving the “freezing” solution.

One of the impacts of the COVID-19 pandemic is the suspension of several activities including judicial



¹ Covid-19, The Math Behind Social Distancing Marcus Lu accessed online at: <https://www.visualcapitalist.com/the-math-behind-social-distancing/> on April 5,2020.

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

POLICY RESPONSES TO COVID-19

On March 30, 2020, the President of the Federal Republic of Nigeria issued the COVID-19 Regulations 2020 (the “**COVID-19 Regulations**”), which directed the cessation of movements in three (3) States (i.e. Lagos, Ogun and the Federal Capital Territory, Abuja) for an initial period of fourteen (14) days with effect from 11:00 pm on Monday, March 30, 2020. By April 13, 2020, the directive on restriction of movement was extended for a further two (2) weeks to last till April 27, 2020. In other words, citizens are directed to stay in their homes, all businesses and offices fully closed and inter-state travels postponed. However, establishments rendering essential services such as hospitals, food companies, private security companies; and court matters that are urgent as may be directed by the Chief Justice of Nigeria, are exempted from the restriction.²

Prior to the issuance of the COVID-19 Regulations, the Chief Justice of Nigeria had enjoined all Heads of Courts to suspend court sittings from March 24, 2020 for an initial period of two (2) weeks in the first instance, save for matters which are urgent, essential or time bound according to Nigerian extant laws.³

While the National Industrial Court, Lagos Judicial Division, immediately completely shut down all activities,⁴ the High Court of Lagos continued to run skeletal services at its registries during specified periods. However, following the COVID-19 Regulations, the Chief Judge of Lagos State also ordered a complete shutdown of judicial activities in the State until further notice, save that administrative magistrates in the seven (7) Magisterial districts may sit only on Mondays, Wednesdays and Fridays, between the hours of 10.00 am and 1.00., pm, to attend to only remand and bail applications on offences such as terrorism, armed robbery, homicide and other non-bailable offences.⁵

Judiciaries across the world have also developed different coping measures⁶ ranging from delivery of judgments with the aid of video links⁷ and other technological methods such as Skype and emails,⁸ remote hearings aided by video teleconferencing, to the extent possible⁹ or restricted solely to criminal matters in some cases,¹⁰ e-filings,¹¹ restriction of court services to essential litigation¹² among many others.

Arbitral institutions are also not left out. For instance,

²Regulations 5, 6 and 7 of Covid-19 Regulations, 2020.

³This directive was renewed vide a circular dated April 6, 2020 by which the CJN again directed that all Court sittings be suspended till further notice, given the lockdown measure put in place by Federal and some state governments to curb the spread of COVID-19. Again, the CJN repeated the platitudes that “*courts are expected to sit particularly, to dispense matters that are urgent, essential or time bound in line with our extant laws*” without providing any direction as to how this ought to work in real terms.

⁴An attempt was made to file an urgent application on March 25, 2020 but the court’s registry at the Lagos Judicial Division was closed.

⁵Entry into Court Premises Guidelines No. 2” dated March 30, 2020.

⁶COVID-19 Disputes: Arbitration and court impacts posted by Clyde & Co on March 30, 2020 accessed online on April 5, 2020 via: <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration>.

⁷United Kingdom.

⁸Kenya.

⁹Australia, United Arab Emirates.

¹⁰Rwanda.

¹¹United States.

¹²France, Canada, South Africa.

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

on April 8, 2020, the Chartered Institute of Arbitrators (CI Arb) launched its new Guidance note on Remote Dispute Resolution Proceedings which provides information on the possible use of technology, software and equipment to aid virtual proceedings and hearings during the subsistence of the COVID 19 pandemic and beyond.

By April 16, 2020, thirteen (13) major arbitral institutions¹³ issued a joint statement encouraging arbitral tribunals and parties to mitigate the effects of any impediments to hearing to the largest extent possible while ensuring the fairness and efficiency of arbitral proceedings. As such, stakeholders are invited to utilize to the extent possible, institutional rules and any case management techniques that may permit arbitrations to substantially progress without undue delay despite current impediments.

STATUTE OF LIMITATION

Limitation laws by their nature are statutes which prescribe a specified timeline within which an action may be filed. Where a statute of limitation prescribes a period within which an action must be commenced, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. In other words, a claimant who might otherwise have had a cause of action loses the right to ventilate it by judicial process once the period of the time laid down by the limitation laws for instituting such an action has elapsed.¹⁴ The rationale or justification supporting the existence of statutes of limitation include the following:

- a. long dormant claims have more of cruelty than justice in them;
- b. a defendant might have lost the evidence to disprove a stale claim;
- c. persons with good causes of action should pursue them with reasonable diligence¹⁵ and;
- d. to obviate the inconvenience and embarrassment to defendants who may have been led to change their status due to the inordinate delay in filing the action.¹⁶

Limitation laws or statutes are generally founded on the public policy premise that an unlimited and perpetual threat of litigation or legal action, leads to disorder, confusion, uncertainty and creates an anxiety, agitation and insecurity. To underscore this point, in the case of **Wema Bank Plc v. Alhaji Adisatu Owosho**¹⁷ the Court of Appeal held that:

“legal rights are not perpetual and should not last for eternity for the public good and freedom from perpetual threat and harassment of legal actions”

Therefore, the objective of limitation statutes is to limit, the use or employment of the judicial processes of a Court of law, which is also a Court of justice and equity, in pursuit of rights or claims which, by effluxion of time, have become dormant and even stale.

The period of limitation begins to run from the date on which the cause of action accrued. Simply put, a cause of action consists of a fact or a combination of facts, which if proved by a party, would entitle it to a judicial remedy against another party.¹⁸ To determine

¹⁴ *Arema II vs. Adekanye* (2004) 13 NWLR (Part 891) 572 at 592-593

¹⁵ *Ibid.*

¹⁶ See *Sterling Plantation and Processing Company Limited v. Chief Solomon Akoteyon Agbosu* (2013) LPELR-22146 (CA).

¹⁷ (2018) LPELR-43857(CA)

¹⁸ *Dantata v Mohammed* (2000) 7 NWLR (Pt. 664) P.176

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

whether an action is statute barred, all that is required is an examination of the Writ of Summons and the Statement of Claim alleging when the wrong was committed and comparing that date with the date on which the Writ of Summons was filed. If the date on the Writ is beyond the period allowed by the limitation law, then the action is statute-barred.¹⁹

Several exceptions or extensions of the statutory time limits (as the case may be) have been developed to the application of the doctrine. These exceptions or extensions are either clearly set out in the relevant limitation law or developed from case law. Some of the grounds include [disability](#),²⁰ [fraud](#),²¹ [mistake](#),²² [claims bordering on specific performance or equitable reliefs](#), [continuance of damages](#),²³ [continuance of damage or injury where the limitation principle sought to be applied falls under the Public Officer Protection Act or Law as the case may be](#)²⁴.

The case of ***Sifax Nigeria Limited & Ors. v. Migfo Nigeria Limited & Anor***²⁵ enunciated that in computing the time limit for the purpose of determining whether an action is statute barred or not, time spent litigating an action in the wrong court will be excluded. This rule was first propounded by Lawal-Akapo J. of the High Court of Lagos state, and was affirmed by the Court of Appeal and Supreme Court following Sifax’s appeals. The Court of Appeal succinctly laid down the rule as follows:

“Where an aggrieved person commences an action within the period prescribed by the statute and such an action is subsequently struck out for one reason or the other without being heard on the merit or subjected to an outright dismissal, such action is still open to be recommenced at the instance of the Claimant and the limitation period shall not count during the pendency of the earlier suit. In other words, computation of time during the pendency of an action shall remain frozen”



Re-echoing this sentiment, the Supreme Court²⁶ held that when it struck out the first suit because it had been commenced in the wrong court, the Respondents' action remained "pending", and they had the right to re-institute the suit in the proper court as they did.

¹⁹ Egbe vs. Adefarasin (1987) 1 NWLR (Pt.47) 1at 20-21

²⁰ For instance, Section 36(1)a of the Limitation Law of Lagos State 2015 provides that:

'If on the date when any right of action accrued for which a period of limitation is fixed by this Law, the person to whom it accrued was under a disability, the action may subject to the subsequent provisions of this section, be brought at any time before the expiration of six (6) years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation had expired". See also UBA v. BTL Ltd (2006) 19 NWLR (Pt. 1013) 67.

²¹ Alfa Arowosaye v. Felix Oluwaseun Ogedengbe & Anor (2008) LPELR-3701 (CA) wherein the Court of Appeal held as follows: "It has long been established that it is only in cases of concealed fraud that the statute of limitation becomes inoperative. Thus, the true position is that the statute of limitation does not apply in cases of concealed fraud so long as the party defrauded remains in ignorance of the fraud without any fault of his own". See also Section 58 of the Limitation Law of Lagos State 2015.

²² See also Section 59 of the Limitation Law of Lagos State 2015.

²³ Oba J. A. Aremo ii v. S. F. Adekanye & Ors. (2004) LPELR-544(SC)

²⁴ Ajao v. Permanent Secretary, Ministry of Economic Planning Budget Civil Service Pensions Office & Anor (2016) LPELR-41407(CA); Oshua Dada Abiodun & Ors. v. Attorney General of the Federation (2007) LPELR-8550(CA)

²⁵ (2015) LPELR 24655 (CA)

²⁶ Supra, SC/417/2015

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

A CASE FOR A FREEZING PERIOD



Considering public policy considerations behind the different exceptions, suspension or rules, it is worth reflecting on whether similar policy considerations ought to weigh on the court's minds in determining the application of the limitation statutes, vis-à-vis a claimant who is prevented from filing his claim as a result of the Covid-19 Regulations and consequential closure of the court's registries in those states. As it stands, the court's registries are likely to be shut until the Heads of Courts respond to calls²⁷ to leverage on technology to keep the courts' doors open, albeit in a limited manner. While the CJN directed that courts should continue to entertain matters which are urgent, essential or time-bound according to Nigerian extant laws, there has not been a lot of traction in this regard. Rather, criminal actions which ought to be given expeditious hearing are caught up in the closure fiasco with the carte blanche closure of court registries and suspension of court proceedings in the affected states.

For instance, a major policy consideration in the Sifax case is that there is no satisfaction to be gained in barring a party who has been otherwise diligent in ventilating its claims simply because it had the misfortune of commencing its case in the wrong court. In the case of concealment or fraud, the policy consideration behind this is that nobody (the defendant) should be allowed to benefit from his own wrongdoing, “*ex turpi causa non oritur action*”²⁸. Whereas in the case of recurring injury, it is only logical that the statute of limitation would not apply where the cause of action could not be said with specificity to have arisen or even where it has arisen, a separate act by the defendant had given way to a fresh cause of action.²⁹

Indeed, in recognition of the difficulties which may be faced by litigants in accessing the courts in the normal course, the justice departments in some jurisdictions have issued specific orders suspending limitation timelines till a future date or during the subsistence of the COVID-19 pandemic. For instance, the Ontario Ministry of Justice made an order on March 19, 2020 (the “Ontario Order”) suspending all limitation periods in Ontario retroactive to March 16, 2020. The Ontario Order was made pursuant to section 7.1 of the *Emergency Management and Civil Protection Act*, [“EMCPA”] R.S.O. 1990, c. E.9. The said section authorizes the Lieutenant Governor-in-Council “to make appropriate orders when, in the opinion of the Lieutenant Governor-in-Council, victims of an emergency or other persons affected by an emergency need greater services, benefits or compensation than the law of Ontario provides or may be prejudiced by the operation of the law of Ontario.”³⁰

²⁷ There have however been calls spearheaded by the Justice Reform Project for remote hearings aided by the use of technology during this pandemic period as opposed to a complete shutdown of the judiciary. In what appears to be a reaction to the calls, on April 21, 2020, the Lagos State Judiciary issued a draft Practice Direction for remote hearing which seeks to ensure that new urgent matters and existing matters involving urgent or time bound interlocutory applications are expeditiously heard remotely.

²⁸ The Administrators/Executors of the Estate of Gen. Sani Abacha (deceased) v. Samuel David Eke-Spiff & Ors. (2009) LPELR-3152(SC)

²⁹ Yarai v Modibbo Adama University of Technology Yola (CA/YL/109/2015) [2016] NGCA 36 (17 May 2016) (Ca/YL/109/2015) [2016]

³⁰ Daniel Waldman- Limitation Periods Suspended in Ontario in the Wake of the COVID-19 Pandemic

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

The Ontario Order temporarily suspends the operation of any provision of a statute, regulation, rule, by-law or order of the Government of Ontario establishing any: (i) Limitation period or (ii) Period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding.³¹ While the Ontario Order does not provide any discretion with respect to the limitation period suspension, it subjects the suspension of procedural deadlines to the discretion of the court, tribunal or other decision-maker.³²

Several states in the United States are also toeing a similar direction. For instance, on March 20, 2020, New York Governor, Andrew M. Cuomo, issued an executive order (the “New York Order”) tolling statutes of limitations until April 19, 2020, extended till May 7, 2020 by another executive order issued on April 7, 2020.³³ The New York Order extends “*any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state.*” Similarly, a March 17, 2020 order issued by the Iowa Supreme Court tolled “*any statute of limitations, statute of repose, or similar deadline for commencing an action in district court*” until May 4, 2020, and the Supreme Court of Oklahoma has issued an emergency order that, “*subject only to constitutional limitations, all deadlines*

and procedures whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be suspended for 30 days from the date of this order.” The Oklahoma order also explicitly tolls the statute of limitations in any civil case for thirty (30) days starting from March 16, 2020.³⁴ In view of the subsistence of the pandemic, it is not unreasonable to expect that these specified dates may be extended.

Though not directly on statute of limitations but related, the UK Judiciary also issued New Practice directions 51ZA which allows the parties to mutually agree an extension up to fifty-six (56) days without formally notifying the court (rather than the current twenty-eight (28) days), so long as that does not put a hearing date at risk. Any extension of more than fifty-six (56) days needs to be agreed by the court. The court is required to take into account the impact of the pandemic in considering such applications.³⁵ In India, the Supreme Court has suspended limitation periods. Specifically, the Court invoked its plenary powers under Article 142 of the Indian Constitution to extend limitation period of appeals from high courts or tribunals on account of coronavirus (COVID-19) pandemic with effect from March 15, 2020 till further order(s) on the issue is passed by the Supreme Court.³⁶

The foregoing does suggest some level of liberty on the part of the government to facilitate the passing of the relevant bill by the affected states legislature, to

³¹ Guneev Bhinder and W. Brad Hanna COVID-19: Ontario Suspends Limitation Periods and Procedural Deadlines McMillan LLP.

³² Ibid.

³³ Nixon Peabody: Update Statute of Limitations suspended for additional period in New York accessed online via <https://www.nixonpeabody.com/en/ideas/articles/2020/03/23/statute-of-limitations-suspended-in-new-york> on April 19, 2020

³⁴ Covid-19 and Statutes of Limitations: Legal Underpinnings of the United States Judicial Response to the Pandemic- Matthew D. Ingber; Christopher J. Houpt, Alison J. Zolot.

³⁵ 118th Practice Direction Update to the Civil Procedure Rules – Coronavirus Pandemic related.

³⁶ The Economic Times: SC invokes its plenary power to extend limitation period of appeals. Accessed online on: <https://economictimes.indiatimes.com/news/politics-and-nation/sc-invokes-its-plenary-power-to-extend-limitation-period-of-appeals/articleshow/74777321.cms?from=mdr>

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

the extent that such laws are not currently in place. This may enable the relevant authority to make the relevant regulations just as in the Ontario scenario. For instance, the EMCPA pursuant to which the Ontario Order was made was first introduced as the “*Emergency Management Act*” in 2002, following the “Y2K” scare and the events of September 11, 2001.³⁷ In 2006, the Act was amended to become the *Emergency Management and Civil Protection Act* based on the Ontario government’s experience with the SARS outbreak that occurred in 2003. This is however, the first time that the statute has been used to suspend limitation periods in Ontario.³⁸

THE NIGERIAN EXPERIENCE



In practical terms, to the extent that such laws are in fact currently not in existence in Nigeria and given that the pandemic has affected the sittings of both the national and state legislature, the legislature may very well make those laws after the pandemic with a proviso that such laws shall have a retrospective effect. While laws with retrospective effects are generally discouraged,³⁹ greater injustice will be done

to a claimant who is unable to ventilate his grievance in court for reasons beyond his control. Indeed, a counter-argument may be made that a claimant who waits till the very last months of the limitation period before commencing an action is himself indolent and should be left alone to face the consequences of his indolence. To the extent that the law generally provides a timeline which becomes shortened without the claimant’s “indolence” (at least in this case), some protection ought to be offered to the claimant. In addition, some claimants have a very short window within which to commence their actions. For example, those who are aggrieved by an action done by a public official in an official capacity generally have three months within which to ventilate their claims in court. One of the ways to wrong this brewing prejudice, is to promulgate laws which permit the suspension of the limitation period during the pandemic period. Furthermore, such legislations should also be permitted to have retrospective effect to at least take effect from the period when the lockdown effectively began.

Another way to go around this issue, though it may be bedeviled with uncertainty, is for the court to adopt a purposive interpretation⁴⁰ of the relevant limitation laws when faced with this issue. The purposive rule of interpretation enables a court to consider not only the letter of the legislation but the spirit. Lord Denning succinctly captures this in *Nothman v. Barnet Council*⁴¹ when Master of Rolls held as follows:

³⁷ Daniel Waldman- Limitation Periods Suspended in Ontario in the Wake of the COVID-19 Pandemic

³⁸ Ibid.

³⁹ The rationale behind this is that a person’s reliance on the existing law or recognized practice ought not to be altered without at least giving him notice of the proposed change. See *University of Jos & Anor v. Victor Aro* (2019) LPELR-46926(CA)

⁴⁰ A purposive approach ensures that the entire statute is considered, and the general object meant to be secured by the statute is considered. See *Pastor I. F. Olaniyan v. Oyewole* (2007) LPELR-8694(CA)

⁴¹ (1978) 1 W.L.R. 220

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

“Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach” In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision. It is no longer necessary for the judges to wring their hands and say: “there is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind”.

A primary aim of limitation laws is to ensure that claims are filed within a specified time frame. Therefore, to the extent that the “*specified time frame*” may be affected, however minutely, a fair approach is to consider that the purpose of the statute has not been met in a situation where the effects of an unforeseen pandemic unilaterally reduces that time frame. Thus, to stick with the purpose of the statute, the courts employing the purposive rule of interpretation should “subtract” the lockdown period in determining whether an action is statute barred or not, post COVID-19.

In adopting this approach, the courts may find comfort in the appellate courts approach in *Sifax* which is a product of judicial activism or “*filling in the gaps*”⁴². This is because Section 8(1)(a) of the

Limitation Law of Lagos State *which provides that claims based on simple contracts cannot be commenced after six (6) years* and other relevant sections, does not recognize or stipulate the time spent prosecuting an action in a wrong venue as one of the factors capable of freezing the limitation period of a claim.

The foregoing therefore underscores the point that where sticking to the letter of a statute of limitation will not accord with the overriding objective of the statute or lead to absurdity or produce a wholly unreasonable result, it is suggested that such statute of limitation must be interpreted in such a manner as to discover the intention of the legislature.

It is of moment to state that the legislature when promulgating the statute of limitation must have intended or presumed that there would not be any situation or circumstance which will prevent access to court within any specific period when a claim or an action should be initiated. Whereas in the present COVID-19 pandemic situation which has prevented access to courts to a large extent (contrary to the intention of the legislature), the court must be willing and ready to do what is fair and just in the circumstance of a case. To drive home the point being made, in *Luke v IRC*⁴³, Lord Reid stated as follows:

⁴² As used by Lord Denning LJ when commenting on the advantage of focusing on judicial attitude to interpretation of statutes in *Seaford Court Estates Limited v Asher* [1949] 2 All ER 155 at 164

⁴³ [1963] A.C. 557 at 577; [1963] 1 All ER 655 at 664.

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

“To apply the words literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result we must do some violence to the words...”



CONCLUSION

Certainly, the COVID-19 situation will test the courts' seemingly stable attitude to statutes of limitation in Nigeria and it is hoped that the judiciary will yet again seize the opportunity to set another precedent on a freezing period in computing the time limit for the purpose of determining whether an action is statute barred or not, as seen in the **Sifax's case**. Alternatively, the legislature may set the judiciary on the right path by promulgating the relevant laws which allows for freezing of statutory limitation timelines during the pandemic period.

Covid-19 And The “New Normal”- A Case For Freezing Of Limitation Laws?

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