Easter Term
[2021] UKSC 19
On appeal from: [2019] EWCA Civ 475

JUDGMENT

Matthew and others (Appellants) *v* Sedman and others (Respondents)

before

Lord Hodge, Deputy President
Lady Arden
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

21 May 2021

Heard on 19 January 2021

Appellants	*Respondents*
Jeremy Cousins QC Christopher McNall (Instructed by Steele & Son with Bagot Heyes (Clitheroe))	Clare Dixon QC Nicholas Broomfield (Instructed by Mills & Reeve LLP)

Appellants:-

(1) Peter Matthew
(2) Scott Nixon (as Trustee of the Will Trusts of Evelyn Hammond)
(3) Diana Rose Cook
(4) Sally Ann Evelyn Selby
(5) Colin Richard Henry Cartledge
(6) Philip Cartledge

Respondents:-

(1) Barrie Sedman
(2) Thomas William Hallam
(3) Peter James Roberts

LORD STEPHENS: (with whom Lord Hodge, Lady Arden, Lord Sales and Lord Burrows agree)

Introduction

1. This appeal relates to the calculation of the limitation period in respect of causes of action which accrued at, or on the expiry of, the midnight hour at the end of Thursday 2 June 2011. The respondents contend that part of the proceedings brought against them by the appellants, and which is the subject of this appeal, and which I shall refer to as the "Welcome Claim", had been issued outside the limitation period of six years contained in sections 2, 5 and 21(3) of the Limitation Act 1980. The respondents sought, and Judge Hodge QC ("the judge"), sitting as a judge of the High Court, granted, summary judgment in relation to that part of the proceedings ([2017] EWHC 3527 (Ch)). The Court of Appeal (Underhill and Irwin LJJ) dismissed the appellants' appeal ([2019] EWCA Civ 475; [2020] Ch 85) and subsequently refused the appellants' application for permission to appeal to the Supreme Court. On 17 December 2019, a panel of the Supreme Court (Lady Hale, Lady Black and Lord Briggs) granted permission to appeal.

2. The issue before this court is whether Friday 3 June 2011, the day which commences at or immediately after the midnight hour, counts towards the calculation of the six-year limitation period.

3. The proceedings were commenced by a claim form issued on Monday 5 June 2017. If Friday 3 June 2011 is included for the purposes of calculating the limitation period, then as the High Court and the Court of Appeal held, the period expired six years later at the end of Friday 2 June 2017 so that the Welcome Claim is statute barred. If that day is excluded, then the limitation period expired six years later at the end of Saturday 3 June 2017. Since the necessary act on the part of the appellants was the issue of the claim form in the legal action, something which can only be done when the court office is open, and the office is shut at the weekend, then it is common ground, following *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336, that the final day for issue would be Monday 5 June 2017. That was the date of the issue of proceedings. Hence, on this basis the commencement of the action would be within the limitation period of six years and not statute-barred.

Factual background

4. The first and second appellants are the current trustees of a trust established under the 1948 will of Mrs Evelyn Hammond, who died in 1952 ("the Trust"). They replaced the respondents, who were the trustees until their retirement on 1 August 2014. Each of the respondents was a professional trustee, being employees or partners of the accountancy firm Forrester Boyd, Chartered Accountants.

5. Pursuant to the terms of the Trust: (a) the income is payable to the third appellant during her lifetime; and (b) upon the third appellant's death the Trust assets will be distributed to the fourth, fifth and sixth appellants.

6. The Trust had a shareholding in Cattles plc ("Cattles"), which was listed on the London Stock Exchange. In 1994 Cattles acquired Welcome Financial Services Ltd ("Welcome"). By April 2004 the Trust owned 161,900 ordinary shares in Cattles.

7. In 2007 Cattles published an annual report. Information in that report was then included in a rights issue prospectus which was released to potential investors in April 2008. The Financial Services Authority subsequently found that the information contained in the annual report and prospectus had been misleading.

8. In April 2009 trading in Cattles' shares was suspended and in December 2010, Welcome and Cattles each commenced proceedings for court-sanctioned schemes of arrangement ("the Welcome Scheme" and "the Cattles Scheme" respectively).

9. On 28 February 2011 the court made orders approving the Welcome Scheme and the Cattles Scheme. The terms of each scheme included provision for claims to be submitted by shareholders. As a consequence of the misleading information in the annual report and prospectus, the Trust had a claim in both the Cattles Scheme and the Welcome Scheme.

10. The respondents made a claim in the Cattles Scheme, but the appellants allege that the respondents were in breach of trust and negligent in failing to properly formulate and evidence that claim. I will refer to that part of the proceedings as "the Cattles Claim". The respondents accept that the Cattles Claim was commenced within the limitation period, and so it is not the subject of this appeal.

11. The Welcome Scheme rules provided by clause 3.6 that "in order to be entitled to any Scheme Payment, Scheme Creditors must, on or prior to the Bar Date, submit a Claim Form". It is common ground that the Bar Date was Thursday 2 June 2011. Accordingly, a valid claim in the Welcome Scheme could have been made up to midnight (at the end of the day) on Thursday 2 June 2011.

12. The respondents did not make a claim in the Welcome Scheme on or before Thursday 2 June 2011. This failure has led to that part of these proceedings which relates to the Welcome Scheme and which I have been referring to, and will continue to refer to, as "the Welcome Claim". The Welcome Claim is couched in the tort of negligence and breach of trust, though on behalf of the appellants it was submitted that it was also couched in breach of contract.

13. These proceedings were commenced by a claim form issued on Monday 5 June 2017 in which the appellants sought damages and/or equitable compensation and other remedies and relief in relation to both the Welcome Claim and the Cattles Claim. In response to the proceedings, on 4 July 2017 the respondents:

> a. Issued an application for strike out/summary judgment in relation to the Welcome Claim ("the application") on the basis that it had been issued out of time and was consequently statute-barred pursuant to sections 2 and/or 5 and/or 21(3) of the Limitation Act 1980, it had no real prospect of succeeding, and there was no other reason why the Welcome Claim should proceed to trial; and
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> b. Filed and served a defence that: (i) did not plead to the Welcome Claim, except to admit its existence; and (ii) set out a substantive defence to the Cattles Claim; which the respondents accept was brought in time.

As I have indicated, the judge granted the application and the Court of Appeal dismissed the appeal.

The limitation periods

14. The relevant limitation periods are set out in materially identical terms in the Limitation Act 1980 for each of the causes of action in these proceedings. Section 2 provides a time limit for actions founded on tort: "An action founded on tort shall not be brought *after the expiration of six years from the date on which the cause of action accrued*". Section 5 makes provision for a time limit for actions founded on simple contract: "An action founded on simple contract shall not be brought *after the expiration of six years from the date on which the cause of action accrued*".

Finally, section 21 makes provision for a time limit for actions in respect of trust property. It is common ground that the relevant time limit is contained in subsection (3) which, in so far as material, provides that "an action by a beneficiary … in respect of any breach of trust, …, shall not be brought *after the expiration of six years from the date on which the right of action accrued*" (emphasis added to each).

The judgments of the High Court and the Court of Appeal

(a) The High Court judgment

15. In an ex tempore judgment handed down on 27 November 2017 the judge granted the application. He proceeded on the basis, at para 28, "that, if the cause of action arose during the course of a day, you exclude that day for the purpose of calculation for Limitation Act purposes". He explained the reason for this as being that "If you do not exclude [that] day, then the claimant would not have a full six year period within which to bring his cause of action". He held, at para 28, that this reason did not apply whenever the cause of action accrues at the very first moment of a day because "if the cause of action accrues at the very first moment of that day, then [the appellants do] have the full six years …". He added at para 31 that "At any moment during that day the [appellants] can bring a claim; and to exclude that day from the calculation for Limitation Act purposes would have the effect of giving [them] an extra day over and above the statutory limitation period for bringing the claim". Relying on *Gelmini v Moriggia* [1913] 2 KB 549 he held, at para 31, that "where it is absolutely clear that the cause of action arises at the very beginning of a particular day, that day should not be excluded from the calculation for Limitation Act purposes".

16. The judge concluded, at para 26, that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011, that this day was to be included for the purposes of calculating the limitation period so that the last day for issuing the claim form was Friday 2 June 2017 (para 31), and on this basis the Welcome Claim, which was issued on Monday 5 June 2017, was out of time. The respondents were therefore entitled to summary judgment on their Limitation Act defence.

17. The judge gave the appellants permission to appeal on the issue of "whether the date when the cause of action accrued in the Welcome Claim (being 3 June 2011) is or is not included in the calculation of when the limitation period expired".

(b) The judgments in the Court of Appeal

18. The Court of Appeal handed down reserved judgments on 20 March 2019 dismissing the appeal. The lead judgment was delivered by Irwin LJ and Underhill LJ delivered a concurring judgment. The Court of Appeal accepted, as was common ground, that in cases where the cause of action accrues part-way through a day, that day is to be ignored in the reckoning of time for limitation purposes: see para 17 Irwin LJ and para 38 Underhill LJ. However, Irwin LJ differed from the judge's conclusion that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011. Irwin LJ, relying on *Dodds v Walker* [1981] 1 WLR 1027, held at para 16 that "in the case of a 'midnight' deadline, it is wrong to attribute the accrual of an action … to the day after the relevant midnight, and the analysis must proceed from there". He added at para 32 that "the [midnight] deadline provides a categorical indication that the action accrued by that point in time, *rather than accruing on the day following midnight*" (emphasis added). In this way in a midnight deadline case Irwin LJ did not attribute the cause of action to 3 June 2011. Underhill LJ also differed from the judge's finding that the appellants' cause of action in relation to the Welcome Claim accrued at the first moment of Friday 3 June 2011. Underhill LJ held, at para 38, that "the cause of action arises at, not after, midnight". Both members of the Court of Appeal held that there was a discrete category of cases which could be termed "midnight deadline" cases, which were distinct from cases in which the cause of action accrues part-way through a day. That distinction justified including 3 June 2011, being the day after midnight, in the calculation of time.

Whether 3 June 2011 should have been included or excluded for the purposes of calculating the limitation period

(a) The appellants' submissions

19. The appellants submit that the cause of action accrued on 3 June 2011 and that long-standing authority establishes a rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time in all cases ("the rule"). It was submitted that the rule could be discerned from landmark cases such as *Mercer v Ogilvy* (1796) 3 Pat App 434, *Lester v Garland* (1808) 15 Ves Jun 248 (33 ER 748), *The Goldsmiths' Co v The West Metropolitan Railway Co* [1904] 1 KB 1 and *Stewart v Chapman* [1951] 2 KB 792. Based on this rule, it was also submitted that *Gelmini v Moriggia* was wrongly decided being, it was said, inconsistent with *Radcliffe v Bartholomew* [1892] 1 QB 161, and having been expressly disapproved in *Marren v Dawson Bentley & Co Ltd* [1961] 2 QB 135 and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336.

20. The appellants also relied on the wording of sections 2, 5 and 21(3) of the Limitation Act 1980, and specifically on the following part of sections 2 and 5: "after the expiration of six years from the date on which the cause of action accrued" and the equivalent part of section 21(3), which is identical save that "right of action" is substituted for "cause of action". Three key propositions were advanced, which were said to be derived from the use of the words "from" "date" and "accrued" in those sections.

21. The first key proposition related to the word "date", it being said that it was necessary to identify the date upon which the cause of action or right of action accrued. In that respect Mr Cousins QC, on behalf of the appellants submitted that there was never a moment in time that was neither 2 June 2011 nor 3 June 2011. Relying on *Dodds v Walker* [1981] 1 WLR 1027, he submitted that the law did not recognise the metaphysical concept of a separate point in time between two days. He stated that it was only after midnight at the end of 2 June 2011 that the cause of action accrued, so that the relevant date was 3 June 2011, not some metaphysical point in time between those dates. He also submitted that the suggestion made on behalf of the respondents that the expiry of 2 June 2011 and the loss suffered by the appellants happened simultaneously could not be correct, as the two events were incapable of mutual co-existence. Rather, these events were sequential, so that upon the expiry of the last moment of 2 June it was already the 3 June 2011, when the loss was sustained, and so, it was submitted, the relevant date which should be identified was 3 June 2011.

22. The second key proposition related to the word "from". The appellants submitted that once the date of the accrual of the cause of action was correctly identified as 3 June 2011 the appellants in accordance with sections 2, 5 and 21(3) of the Limitation Act 1980, had six years "from" that date to bring an action. On the basis of long-standing authority, it was submitted that "from" signifies a period subsequent to the date of the event itself, so that the date of the event is to be excluded from the reckoning of time.

23. The third key proposition related to the word "accrued". The appellant submitted that the statutory language focuses not on the time of day at which accrual occurs but rather on the day upon which it occurs, and that day is an indivisible unit of time which is to be excluded from the reckoning of time. Furthermore, if the date is to be excluded in some cases, then it must be excluded in all cases as, it was submitted, it serves no purpose to have a different result in different cases.

(b) The respondents' submissions

24. The respondents' submissions approached the question on the basis that the Welcome Claim was based on negligence by omission (namely the omission to submit a claim form in the Welcome scheme on or prior to 2 June 2011). On this basis it was contended that two things happened at precisely the same moment. First, the time for submitting the claim in the Welcome scheme elapsed, and second, the cause of action arose. These, it was said, were not consecutive events but rather were inextricably linked, so that they occurred simultaneously at the last moment of 2 June 2011. It was also said to be strictly unnecessary to determine whether that moment is "properly ascribed to 2 June 2011 or the very first moment of 3 June 2011", as one can "either look back and call it the end of 2 June 2011 or look forward and call it the beginning of 3 June 2011." In either event, there was no fraction of a day, and the appellants had the entirety of 3 June 2011 in which proceedings could have been commenced so that whether the cause of action arose at the end of the 2 June 2011 or the very start of 3 June 2011, the outcome should be the same.

(c) The case law on which the appellants rely

25. The appellants primarily relied on four authorities to establish what they submitted was a long-standing rule that the day of accrual of the cause of action should be excluded from the reckoning of time. However, on analysis none of those cases considered the position in relation to midnight deadlines.

26. The first is the decision of the House of Lords in *Mercer v Ogilvy* (1796) 3 Pat App 434. On its facts this case involved a fraction of a day. On 22 February 1791 at 8.00 pm Robert Mercer, executed a deed of entail of his lands of Lethindy, in favour of Katherine Mercer his niece, and various substitutes. He died between 10.00 and 11.00 pm on the 22 April 1791. Sir John Ogilvy brought an action against Miss Mercer and the other substitutes to set aside the entail, on the basis that Mr Mercer had not survived its execution for the 60 days required by a statute of 1696 for regulating deeds executed on deathbeds. The question arose as to whether the day of death was to be included or excluded from the calculation of 60 days. The decision of the House of Lords in relation to the computation of time was stated by Lord Thurlow as follows (p 442):

> "The terminus a quo mentioned in the act, is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *60 days after* is descriptive of another and *subsequent* period, which begins when the first period is completed. The day of making the deed must therefore be excluded, so the maker only lived 59 days of the period

> required. Had he seen the morning of the 60th, or subsequent day, it would have been sufficient; the rule of law above mentioned, (dies inceptus pro completo habetur,) then applying and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed."

I consider that, as Lord Thurlow stated, "the date or day of the deed … is indivisible" so that if there is a fraction of a day then that day is to be excluded. However, *Mercer v Ogilvy* did not consider the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

27. The second is *Lester v Garland* (1808) 15 Ves Jun 248 (33 ER 748). This case concerned the calculation of time in relation to a condition in a will which had to be fulfilled within six calendar months after the testator's death. The question was whether the six months were to be calculated inclusive or exclusive of the day of the testator's death. The Master of the Rolls, Sir William Grant, concluded that the day of the testator's death should be excluded from the period of six months, so that the condition was fulfilled in time. In his judgment he stated that "It is not necessary to lay down any general rule upon this subject". However, he went on to state that (p 257, ER p 752):

> "upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects *fractions of a day* more generally than the civil law does. … The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed." (Emphasis added)

I make two observations. First, despite the Master of the Rolls disavowing any general rule, subsequent authorities have consistently adopted the principle of rejecting fractions of a day. Second, the factual situation in that case involved a fraction of a day. The Master of the Rolls did not consider the position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

28. The third is *The Goldsmiths' Co v The West Metropolitan Railway Co* [1904] 1 KB 1. The issue was whether, as required by the terms of a statute passed on 9 August 1899, a notice to treat for compulsory purchase given on 9 August 1902 was

given within three years from the date on which the Act was passed. That in turn depended on whether the day of the passing of the Act was to be excluded in the computation of the three years. The Court of Appeal held that the day of passing should be excluded, and that the notice was therefore valid. Collins MR stated (p 5):

> "It appears to me that no distinction can be drawn between the day determined by the passing of the Act, and any other day from which time might be reckoned. If this view is correct, then the day from which the period is to run must be excluded in computing the three years."

Mathew LJ in a concurring judgment referred to *Lester v Garland* and later authority. He stated (p 5):

> "The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded."

Here again, however, it appears from the report of submissions of counsel that the facts of *Goldsmiths' Co* involved a fraction of a day, because Royal Assent was given part-way through the day of passing of the Act. Mulligan, KC, is reported, at p 4, as submitting that "If in this case one day were substituted for three years the effect of the argument for the plaintiffs would be, not to give a day, *but only to give the portion of it between the time when the Royal assent was given and midnight*" (emphasis added). In any event, the Court of Appeal did not consider the position that arises in a midnight deadline case. I note, for completeness, that section 4 of the Interpretation Act 1978 now makes provision as to the time at which an Act comes into force by providing that "An Act or provision of an Act comes into force - (a) where provision is made for it to come into force on a particular day, at the beginning of that day; (b) where no provision is made for its coming into force, at the beginning of the day on which the Act receives the Royal Assent."

29. The fourth is *Stewart v Chapman* [1951] 2 KB 792 which again on its facts involved a fraction of a day. The question in that case was whether a notice of intended prosecution had been served in time under section 21 of the Road Traffic Act 1930. That section provided that "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating … to careless driving he shall not be convicted unless … (b) *within 14 days of the commission of the offence* a summons for the offence was served on him; or (c) *within the said 14 days* a notice of the intended prosecution … was served on or sent by registered post to him …" (emphasis added). Lord Goddard CJ delivering the judgment of the Divisional Court, with which Ormerod J agreed, held that it was not enough to post the letter

within the 14 days, but rather that it must be posted within such time that in the ordinary course of post it would reach the person to whom it is addressed within the 14 days. The alleged offence was committed at 7.15 am on January 11, 1951. The prosecutor did not send the notice of intended prosecution by registered post until 1 pm on January 24, and it was not delivered to the defendant until January 25 at about 8.00 am. The outcome of the issue as to whether the notice of intended prosecution had been served in time depended on whether the date of commission of the offence was to be excluded from the calculation of the period of 14 days. The Divisional Court held that in calculating the 14 days the date of the commission of the offence was to be excluded. Lord Goddard CJ stated at 798-799:

> "[The earlier] cases were all considered by the Court of Appeal in *The Goldsmiths' Co v The West Metropolitan Railway Co* in 1903; and it was in that case that the Master of the Rolls … held that it was now well established that, whatever the expression used, the day of the doing of the act was to be excluded. Mathew, LJ, put it very succinctly and shortly in his judgment; he said:
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> > 'The true principle that governs this case is that indicated in the report of *Lester v Garland*, where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Parke B, in *Russell v Ledsam*, and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.'
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> That case, which is binding on this court, seems to me entirely to apply to the words of this section. This letter was received on the morning of January 25. It follows, in my opinion, that the notice was served in time, and accordingly this appeal must be allowed. The case must go back to the justices with an intimation that the notice was served in time and a direction to them to continue the hearing of the case."

Stewart v Chapman did not consider the position that arises if the day of the commission of the offence was undivided. Furthermore, it did not consider the

position that arises in a midnight deadline case, in which in practical terms there is a complete undivided day.

30. I consider that none of the cases relied on by the appellants establishes a general rule applicable to a midnight deadline case. The only midnight deadline case is *Gelmini v Moriggia*, which the appellants submit was wrongly decided.

(d) Gelmini v Moriggia

31. The case of *Gelmini v Moriggia* concerned an action upon a promissory note. The time for payment of the promissory note expired at midnight on 22 September 1906 and the writ in the action against the makers was issued on 23 September 1912. Section 3 of the Limitation Act, 1623 provided that "All actions … shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) … within six years next after the cause of such actions or suit." Channell J held that the cause of action was complete at the commencement of 23 September 1906. On that basis the question whether the action was commenced in time depended on whether the six-year period was inclusive or exclusive of 23 September 1906. Channell J was referred to authorities including *Lester v Garland* and *Goldsmiths' Co v West Metropolitan Railway Co*, but not to *Radcliffe v Bartholomew*, in support of the proposition that the 23 September 1906 ought to be excluded. Channell J held that that day must be included in calculating the six years within which the action could be brought, so that the six years expired on 22 September 1912, which meant that the writ was issued too late. Channell J's reasoning was expressed in the following terms in the Kings Bench report (pp 552-553):

> "An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon which payment is due in which to pay; therefore until the expiration of that day an action cannot be brought because until then there is no complete cause of action. The result is that an action cannot be brought until the next day; but it can be brought on that day because *the cause of action is complete at the commencement of that day*. If the cause of action is not complete, the action cannot be brought. It therefore follows that that day is one of the days upon which the action can be brought. The words of the statute are 'within six years next after the cause of such action or suit.' Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises, and *on that day an action can be brought, and that day is the first of all the days in the six years*. Therefore, assuming that the day

> upon which the action can be brought to be a Thursday, and the period for bringing the action to be a week, the creditor can bring it at any time up to and including the following Wednesday, but not the Thursday. And the same rule applies where the period, as under the statute, is six years. I do not think that the day on which the cause of action arises is excluded. It is the previous day which is excluded, ie, the day at the expiration of which the cause of action becomes complete. Any other construction would place upon the statute an interpretation which has not hitherto been accorded to it. Therefore, so far as the cause of action arises on the promissory note, the writ was issued too late." (Emphasis added)

32. In this passage Channell J addressed the question as to the date upon which the cause of action accrued, though there is a degree of confusion in relation to that issue. Channell J stated that "until the expiration of that day an action cannot be brought because until then there is no complete cause of action". That could be interpreted as a finding by him that there was a complete cause of action *on the expiration of the day* rather than there being a complete cause of action on the next day. However, he goes on to state "The result is that an action cannot be brought until the next day; but it can be brought on that day because the cause of action is complete at the commencement of that day". That is a finding that the cause of action accrued at the commencement of the next day, rather than on the expiration of the previous day. He also stated: "Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises …". Again, that is a finding that the cause of action accrued on the next day. However, he went on to hold that "It is the previous day which is excluded, ie, the day at the expiration of which the cause of action becomes complete" which could again be interpreted as a finding by him that there was a complete cause of action on the expiration of the previous day. The reports in (1913) 109 LT 77 and (1913) 29 TLR 486 do not resolve this confusion. However, regardless as to whether the cause of action accrued at the very end of 22 September 1906 or at the very start of 23 September 1906 the essential point being made by Channell J is that the action could have been brought throughout the 23 September 1906. In practical terms there was no fraction of a day on the facts in *Gelmini*.

33. Another aspect of the decision in *Gelmini* which is unclear is as to whether Channell J was determining that the decision in that case was an exception to the general rule applicable in midnight deadline cases, or whether the decision could be seen as endorsing a wholesale departure from the general rule in all cases. In his ex tempore judgment Channell J did not expressly state that this was a midnight deadline case not involving any fraction of a day, and therefore an exception to the general rule. I nonetheless consider that a fair reading is that he was defining an exception to the general rule. However, in considering any subsequent judicial

expressions of disapproval of *Gelmini*, one should bear in mind that such expressions of disapproval could have assumed that Channell J was incorrectly departing from the general rule.

(e) Was Gelmini inconsistent with earlier authority or subsequently disapproved?

34. The appellants submit that *Gelmini* was inconsistent with *Radcliffe v Bartholomew*, expressly disapproved in *Marren v Dawson Bentley & Co Ltd* and implicitly disapproved in *Pritam Kaur v S Russell & Sons Ltd*.

35. The decision of the Divisional Court in *Radcliffe v Bartholomew* concerned the question as to whether a criminal complaint under the Prevention of Cruelty to Animals Act 1849 had been made within one calendar month after the cause of complaint had arisen. That question in turn depended on whether the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made. Willis J, giving the judgment of the court with which Lawrence J agreed, held that the day was to be excluded so that the complaint was therefore made in time, and the justices had jurisdiction to hear the case. In arriving at that conclusion Wills J (p 163) referred to the remarks at the end of the judgment of Parke, B in *Young v Higgon* (1840) 6 M & W, 49, as follows:

> "Apply the criterion which has been before suggested - reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted."

Wills J then considered that those remarks were entirely applicable to the decision in *Radcliffe v Bartholomew* stating that "The result of reducing the time to one day would be that an offence might be committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity".

36. I do not consider that the decision in *Gelmini* is inconsistent with *Radcliffe*, as the decision in *Radcliffe* did not involve a midnight deadline. Furthermore, if one applied the criterion of reducing the time limit to one day in the present case then there would still be a complete day in which to commence an action. Indeed, if one excluded the day after midnight from the calculation of a one-day time limit then there would be two complete days in which to commence an action. On that basis the decision in *Gelmini* is consistent with the criteria suggested in *Radcliffe*.

37. *Marren v Dawson Bentley & Co Ltd* concerned an industrial accident in which the plaintiff sustained personal injuries. The accident occurred at 1.30 pm on 8 November 1954. On 8 November 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the negligence of his employers, the defendants. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on 8 November 1954, and that the proceedings had not been commenced within the three-year limitation period contained in section 2(1) of the Limitation Act, 1939. Havers J was referred to a number of authorities including *Gelmini v Moriggia* but he did not approach that case as being an exception to the general rule applicable in midnight deadline cases. This meant that Havers J did not consider distinguishing *Gelmini* from the facts before him where there was a fraction of a day, the accident having occurred at 1.30 pm. Rather, Havers J considered that the approach in *Gelmini* was in conflict with *Radcliffe v Bartholomew*. He considered that he was bound by the decision in *Radcliffe*, but even if he were not bound by it, then he preferred the decision in *Radcliffe* and the reasons on which it was based to that in *Gelmini*. He accordingly declined to follow *Gelmini*. However, as I have indicated, I consider that the principle in *Gelmini* is an exception to the general rule applicable in midnight deadline cases. In this way the decision in *Marren* is consistent with *Gelmini*, which ought to have been distinguished.

38. *Pritam Kaur v S Russell & Sons Ltd* concerned a plaintiff who was the widow and administratrix of a foundry worker who had been killed at work on 5 September 1967. The writ was issued against her late husband's employers, claiming damages for negligence and breach of statutory duty. The defendants claimed that the cause of action did not accrue within three years before the commencement of the action so that it was statute barred by virtue of section 2(1) of the Limitation Act 1939. Whether the action had been commenced within the limitation period depended on whether the day of the accident was included or excluded in the computation of time. Lord Denning succinctly stated at p 348E that "The first thing to notice is that, in computing the three years, you do not count the first day, September 5, 1967, on which the accident occurred. It was so held by Havers J in *Marren v Dawson Bentley & Co Ltd* … The defendants here, by their cross-notice, challenged that decision; but I think it was plainly right". Karminski LJ agreed with Lord Denning. Megarry J addressed the issue more fully at p 350F-H not only by reference to *Marren* but also by reference to the statutory wording. He stated:

> "At one time there was some argument on whether or not the period was to be reckoned by excluding the date on which the accident occurred, but in the end the point was not pressed. The decision of Havers J in *Marren v Dawson Bentley & Co Ltd* …, based on section 2(l) of the Limitation Act 1939, was that the day of the accident was to be excluded in the computation of the time; and in the present case the judge applied that decision.

> The language of section 2(1) with the phrase 'after the expiration of three years from the date,' plainly supports that view. If the wording of the Fatal Accidents Acts, with the phrase 'within three years after the death,' is less apt, it would nevertheless be regrettable to introduce any fine distinctions, especially as the period of three years was inserted into each statute by the same Act, that of 1954. I would therefore agree with the judge in excluding the day of the accident from the computation under both heads."

On behalf of the appellants, it is submitted that the express approval of *Marren* by the members of the Court of Appeal implicitly carried with it the disapproval of *Gelmini*. I do not agree. Rather, the court in *Pritam* based their decision on *Marren* which was a case involving a fraction of a day. There was no analysis in *Pritam* or indeed in *Marren* of whether the day of accrual of the cause of action would be included in the computation of time when that day was a complete undivided day as it was in *Gelmini*.

39. I consider that the decision in *Gelmini*, when viewed as an exception to the general rule, is consistent with *Radcliffe*, ought to have been distinguished in *Marren* and was not disapproved in *Pritam*.

(f) Megarry J's reasoning in Pritam

40. In *Pritam* Megarry J also based his reasoning on the statutory wording which included the word "from". However, the question as to whether the word "from" is inclusive or exclusive was considered by Lord Mansfield in *Pugh et, Uxor v Duke of Leeds* (1777) 2 Cowp 714, 725 (98 ER 1323, 1329). Lord Mansfield having reviewed the authorities concluded "that 'from' may in the vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive". I consider that it would be inappropriate to decide the present case purely on a textual analysis of the meaning of the word "from".

(g) McGee on Limitation Periods, 8th ed (2018), paras 2.005-2.007

41. In addition to *Gelmini*, the respondents relied on *McGee on Limitation Periods*, 8th ed (2018), paras 2.005-2.007) where the editors wrote:

> "2.005 The general rule in calculating the expiry of a limitation period is usually expressed as being that parts of a day are ignored. This formulation is ambiguous, and needs to be

clarified by example. In *Gelmini v Moriggia* the defendant had given a promissory note. The time for payment of this expired on 22 September 1906. The claimant's writ on the note was issued on 23 September 1912. Channell J held that the cause of action was complete at the beginning of 23 September 1906, since that was the earliest moment at which proceedings could have been commenced, notwithstanding that the court office obviously would not have been open at midnight. Consequently the six-year limitation period expired at the end of 22 September 1912, and the writ issued on the following day was out of time. This is the simplest possible example, since the cause of action was held to accrue at the very beginning of a day.

…

2.006 … Perhaps the most satisfactory of the authorities on this point is *Marren v Dawson Bentley & Co*. The claimant was injured in an accident at 13.30 on 8 November 1954, and the writ was issued on 8 November 1957. The question was whether time had expired at the end of 7 November 1957, and Havers J held that it had not. The day on which the cause of action accrues is to be disregarded in calculating the running of time. It therefore followed that time began to run at the first moment of 9 November 1954 and expired at the end of 8 November 1957. Havers J expressly declined to follow *Gelmini v Moriggia*, but it is not clear whether his decision is inconsistent with that in *Gelmini*. The latter case deals with one very specific situation, namely where the cause of action must accrue on the stroke of midnight. It is arguable that here there is no question of disregarding any part of a day; the cause of action was in existence throughout 23 September 1906. Consequently, it may be argued that on those very special facts the decision is still good law.

2.007 The alternative is to say that time did not begin to run until the start of 24 September, which seems a very odd conclusion, given that the time for payment expired at the end of 22 September. It is submitted that the cases are reconcilable and that both are correct on this point. The rule is that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period. Strictly speaking this will normally lead to the extension of the limitation period by a few hours but it could

> equally be argued that the contrary rule would lead to the shortening of that period."

(h) The extent of the Limitation Act 1980 and a comparison with the legislative provisions in Scotland and Northern Ireland

42. The Limitation Act 1980 has no provision addressing the issue we have to decide in this case. Section 41(4) of the Limitation Act 1980 provides, subject to one limited exception in relation to Northern Ireland, that "this Act does not extend to Scotland or to Northern Ireland". There are separate legislative provisions in relation to limitation in both Scotland and in Northern Ireland.

43. In Scotland section 14(1)(c) of the Prescription and Limitation (Scotland) Act 1973 provides that "if the commencement of the prescriptive period would, apart from this paragraph, fall at a time in any day other than the beginning of the day, the period shall be deemed to have commenced at the beginning of the next following day". The respondents submit that section 14(1)(c) applies the approach in *Gelmini* of including the day after midnight in the computation of time.

44. In Northern Ireland article 2(1) of the Limitation (Northern Ireland) Order 1989 (SI 1989/1339 (NI11)) provides that the computation of time is governed by the Interpretation Act (Northern Ireland) 1954. Section 39(2) of that Act provides that: "Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period". Therefore, the respondents submit that the Northern Ireland legislation expressly excludes the day on which the cause of action accrues. However, that raises the question as to the day upon which the cause of action accrues in a midnight deadline case. For instance, does it accrue at, not after, midnight?

45. I mention these different legislative provisions in Scotland and Northern Ireland solely for the purpose of explaining that specific statutory provisions apply in those jurisdictions to the situation which arises in this case, and that this judgment addresses the issue identified in para 2 above in relation to the law in England and Wales only.

(i) Conclusion

46. It is not surprising that there are conflicting views as to the date upon which the cause of action accrues in a midnight deadline case. There were potentially differing answers to that question in *Gelmini* (see para 32 above). In this case the issue was decided in different terms both at first instance (see para 16 above) and in

the Court of Appeal (see para 18 above). For my own part I would prefer the approach of Underhill LJ that "the cause of action arises at, not after, midnight". However, it is not necessary to endorse any of the competing answers to that issue and I do not do so, because, as in *Gelmini*, whether the cause of action accrued at the expiry of 2 June 2011 or at the very start of 3 June 2011 there is no significant difference, in that 3 June 2011 was for practical purposes a complete undivided day.

47. I consider that the reason for the general rule which directs that the day of accrual of the cause of action should be excluded from the reckoning of time is that the law rejects a fraction of a day. The justification for that rule is straightforward; it is intended to prevent part of a day being counted as a whole day for the purposes of limitation, thereby prejudicing the claimant and interfering with the time periods stipulated in the Limitation Act 1980. However, in this case it was, in my opinion correctly, submitted that in a midnight deadline case even if the cause of action accrued at the very start of the day following midnight, that day was a complete undivided day. I consider that it would impermissibly transcend practical reality if the stroke of midnight or some infinitesimal division of a second after midnight, led to the conclusion that the concept of an undivided day was no longer appropriate. In that sense this would not only be impermissible metaphysics but also, in this context, such a minimum period of time does not cross the threshold as capable of being recognised by the law. Whether the issue is framed in terms of metaphysics, which the common law eschews, or of the principle that the law does not concern itself with trifling matters, the conclusion is the same: realistically, there is no fraction of a day. That being so, the justification in relation to fractions of a day does not apply in a midnight deadline case. During oral submissions Mr Cousins QC, in answer to an enquiry from Lady Arden seeking to identify the rational justification for excluding a whole indivisible day from the calculation of the reckoning of time, sought to do so based on continuing the application of the rule, as he submitted it had been understood since the 18th century, so that in relation to something as important as limitation there should be continuity of interpretation. I reject the premise to that submission. As I have indicated there is no long-standing authority which excluded a whole indivisible day. Furthermore, I consider that the premise is undermined by the decision of Channell J in *Gelmini*. So, I reject this argument as a sufficient justification for excluding a whole day from the reckoning of time in a midnight deadline case. Rather, I prefer to consider the impact of holding that a full undivided day in a midnight deadline case is to be excluded from the reckoning of time. If that day were excluded from the computation of time then the limitation period would be six years and one complete day. I consider that would unduly distort the six-year limitation period laid down by Parliament and would prejudice the defendant by lengthening the statutory limitation period by a complete day.

48. I also consider that the impact of excluding 3 June 2011 can be seen by applying the criteria suggested in *Radcliffe* of imagining a limitation period of one day. If in this case 3 June 2011 were excluded from the computation and if the

limitation period were a single day, then the impact would be to allow two complete days within which to commence an action (see para 36 above).

49. I consider that *Gelmini* is an exception to the general rule so that any part of a day (but not a whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period for the purposes of the provisions of the Limitation Act with which this appeal is concerned. The 3 June 2011 was a whole day so that it should be included in the computation of the limitation period.

Disposal of the appeal

50. I would dismiss the appeal.