**Neutral Citation no. [2003] NIQB 66** | *Ref:* **COGF4037**

Judgment: approved by the Court for handing down | *Delivered:* **30/10/2003**
*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**ARMAGH DOWN CREAMERIES LIMITED**

**Plaintiff;**

**-and-**

**HARRY BELL**

**Defendant.**

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**COGHLIN J**

[1] This is a summons brought by the plaintiff seeking to strike out the proposed amendment to the defendant's counterclaim on the grounds that it discloses no reasonable cause of action, it is frivolous and/or vexatious and it is otherwise an abuse of the process of the court contrary to Order 18 rule 19 of the Rules of the Supreme Court (Northern Ireland) 1980 ("the Rules"). Further, and in the alternative, the plaintiff seeks to strike out a portion of the proposed amendment on the basis that the same is statute barred. Mr Nigel McCombe appeared on behalf of the plaintiff while the defendant was represented by Mr Gerald Simpson QC. I am grateful to both counsel for the clarity and detail of their helpful submissions.

[2] In the statement of claim endorsed upon the writ of summons herein, dated 6 February 1997, the plaintiff company claims £18,320.01 as balance money due by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant. On 8 may 1997 the defendant served a two paragraph defence the second paragraph of which read as follows:

> "The defendant denies that any monies are due by way of stated and settled account.

> The defendant denies that the plaintiff is entitled to any interest or that any sum due and owing to the plaintiff either in the circumstances or at all.
>
> The defendant denies each and every allegation of fact contained in the specially endorsed writ of summons as if the same were herein set forth and traversed seriatim.
>
> If the plaintiff sold and delivered goods to the defendant at the request of the defendant as alleged in the statement of claim, which is denied, all of this was done on foot of an agreement between the parties whereby the plaintiff promised various inducements to the defendant and in breach of this agreement the plaintiff failed to deliver such inducements.
>
> In consequence of the plaintiff's breach of agreement the defendant has suffered loss and damage and the defendant counterclaims in respect of same."

[3] It appears that in or about March 1973 the plaintiff entered into a contract with the defendant in accordance with which the defendant agreed to act as a self-employed milkman operating a "tied" milk round which required the defendant to deliver milk over a designated area included Greenan, Legananny, Scarva Poyntz Pass, Glen, Derrydrumuck, Annabane, Shankill, Edenagarry, Lisnagonnell, Drumnahare and Doughery. The vast majority of the defendant's distribution area involved doorstep delivery to retail customers. The milk and other products delivered by the defendant were exclusively supplied by the plaintiff company which allowed him to pay for these upon an account basis.

[4] In July 1997 the plaintiff applied for judgment in respect of the sum claimed in accordance with Order 14 of the Rules. In response to the plaintiff's Order 14 application the defendant filed an affidavit disputing the claim that he had no defence and asserting that he was induced to remain on in the milk run even though the plaintiff company realised that the run was unprofitable and never could be profitable. The defendant claimed that the plaintiff prevailed upon him to continue with the run until a new person could be trained and that the reason that the plaintiff company did so was because of the defendant's intimate knowledge of the run and his personal relationship with the customers. At paragraph 4 of this affidavit the defendant averred:

> 4. Mr David Ross for the plaintiff company was well aware that I wanted to retire in and around the

> start of 1997 and he met with me and prevailed upon me to stay until a Mr Gary Laffin could be trained and be made familiar with the run. This I reluctantly agreed to do and it was made clear to me that if I did so there would be a set off for any monies due and owing to the plaintiff company. In fact I distinctly remember Mr Ross telling me on 24 December 1996 that 'the good will of 24 years will outdo what is owing to the creamery and you will have money in hand."

[5] By way of response to the affidavit sworn by the defendant Mr David Ross, the plaintiff's creamery manager, swore an affidavit denying any such discussion between himself and the defendant and rejecting the allegation that there had been any agreement to write-off the defendant's debt to the plaintiff company. According to Mr Ross, the defendant had announced that the was quitting the milk run on Christmas Eve 1996 whereupon Mr Ross pointed out that he was required to give one month's notice but that the plaintiff would be prepared to allow him to retire as soon as there was a person to take over his position. Mr Ross stated that the person who took over the milk run was Gary Laffin who was a cousin of the defendant's wife and who required very little training since he had worked on a part-time basis for the defendant for some time. According to Mr Ross Mr Laffin was able to take over the run in less than three weeks from Christmas Eve 1996.

[6] The Order 14 proceedings were heard by Master Kennedy on 12 November 1997 and the Master ordered that judgment should be entered for the plaintiff for the sum of £18,320.01 together with interest and scale costs. It does not appear that any formal record of Master Kennedy's judgment exists but the plaintiff's solicitor recorded a note of her remarks in the following terms:

> "This is a rather sad case. Clearly this defendant has been getting deeper and deeper into debt over the years and it has mounted up. He did not take any definitive action until 24 December 1996 when he decided to give up the milk run. To do this he would theoretically have had to give one month's notice in any event. The debt is not disputed in any way meaningfully in the affidavits and the defence appears to revolve around whether or not the balance debt has been written-off in consideration for three weeks work from the defendant. I find this incredible and unarguable. I find that there is no trial issue between the parties and consequently I make an order

> for £18,320.01 together with interest of £1,120.28 and costs of the Order 14 procedure to include Counsel."

[7] The defendant expanded his claim somewhat in an amended counterclaim delivered on 8 May 2003 paragraph 4 of which read as follows:

> "4. On three occasions between 1992 and 1997 the defendant made a direct approach to the plaintiff's manager, Mr David Ross, and explained to him that the milk round was no longer economically viable. On each occasion Mr Ross promised that he would introduce changes to make the run economic and profitable to operate and promised the defendant if he kept the milk round going that he would receive a '*golden handshake*' and that he would be '*looked after at the end of day*'. In December 1996 Mr Ross stated to the defendant '*the goodwill of 24 years will outdo what is owing to the creamery and you will have money in hand*'."

[8] At some stage the defendant was made bankrupt and his current solicitors became involved in these proceedings on 14 August 2002. On 10 December 2002 the Master in Bankruptcy assigned to the defendant the Trustee's interest in the counterclaim.

[9] On behalf of the plaintiff Mr McCombe submitted that the defendant had raised the counterclaim in his original defence dated 8 May 1997 and he had provided further detail of his case in his affidavit sworn on 4 October 1997. In addition the defendant had been represented by counsel before the Master who, having heard the submissions and read the affidavits, had clearly rejected the defendant's case as being unarguable. In such circumstances, Mr McCombe submitted that, as far as the defendant was concerned, the matter was subject to issue estoppel and the counterclaim should be struck out as disclosing no reasonable cause of action or defence.

[10] Mr Simpson QC, on behalf of the defendant, accepted that the original defence had raised a counterclaim but submitted that, on the face it, the order made by Master Kennedy dealt only with the plaintiff's claim. Mr Simpson QC argued that if the Master had considered the counterclaim the order that she made should have provided for the counterclaim to be dismissed or, alternatively, she should have made an order giving the defendant unconditional leave to defend. Mr Simpson QC submitted that, in the absence of any reference to it in the order made by the Master, the counterclaim had never been dismissed and remained in existence not having been dealt with by the Master. In such circumstances, the amended defence and counterclaim simply provided further detail to an already existing counterclaim and no question of limitation could arise.

[11] I permitted the defendant to file a further affidavit dealing with his apparent inaction from the date of Master Kennedy's judgment on 12 November 1997. The defendant exhibited to that affidavit a letter from his then solicitors, Messrs Campbell and Grant, dated 12 November 1997 in which the solicitors, in a reference to the advice of counsel appearing on behalf of the defendant, said:

> "He has confirmed that the Master did not take too kindly to the arguments being advanced on your behalf and accordingly allowed judgment to be marked. I would advise that you have a right of appeal against this decision and this may be exercised within five days of this date. However your Barrister has advised that he does not see much prospect of success on appeal and in view of the fact that costs were awarded against you today an appeal would only serve to increase the cost without little chance of success."

It appears that the defendant was refused legal aid prior to the hearing by the Master. No further steps were taken on behalf of the defendant who suffered from a fair degree of ill-health for some time.

[12] The rule in Henderson v Henderson has recently been considered by the House of Lords in Johnson v Gore Wood and Company [2001] 1 AER 481 in which Lord Bingham referred to the rule in the following terms at page 498:

> "But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

[13] However, Lord Bingham went on to reject the suggestion that simply because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive saying, at page 499:

> "That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[14] This is not a case in which it is argued that the defendant now seeks to raise a new issue which ought to have been argued before Master Kennedy. On behalf of the defendant, Mr Simpson QC accepted that the counterclaim was pleaded and argued and his real complaint was that it had not been dealt with by the Master probably as a result of an oversight. I cannot accept this submission. Despite the absence of a formal record of the judgment, all the contemporary documents indicate that the Master was well aware of the arguments put forward on behalf of the defendant by way of set off and counterclaim but that she simply rejected such arguments as being so incredible as to be unarguable. This was certainly a "robust" decision on her part but it seems to me that it was one that she was entitled to reach in the circumstances. I think that her failure to formally record the dismissal of the counterclaim was simply an oversight. The defendant could have raised any of the additional factual matters upon which he now seeks to rely, which, at that time, would have been much fresher in his mind and he had a remedy by way of appeal which he chose not to exercise. The absence of legal aid and his illness may have been factors in his decision but, no doubt, so was the legal advice that he received at the time. In the circumstances, it seems to me

that to permit the defendant to re-open an issue which has already been determined against him by the Master some six years after such determination would amount to an abuse of the process of the court and, accordingly, I propose to make an order in terms of the plaintiff's summons.