Neutral Citation No. [2014] NIQB 51

Ref:	**OHA9194**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**06/03/2014**

2007 No: 103618

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

THE LAW SOCIETY OF NORTHERN IRELAND

Plaintiff

and

THE GOVERNOR AND THE COMPANY OF THE BANK OF IRELAND

Defendant

O'HARA J

Judgment No 2

[1] I delivered the substantive judgment on liability in this case on 18 December 2013, allowing the plaintiff's claim in relation to cheques cashed by the defendant from July 2000 but only up to January 2002 rather than to December 2003. The effect of this was that the plaintiff succeeded in respect of each of the cheques which was cashed between July 2000 and December 2001.

[2] I was asked at the start of the hearing in April 2013 not to make a decision on quantum, partly because there were still issues about whether some specific cheques fell within the claim. Accordingly, after the December 2013 judgment, the case was listed for hearing on 24 January 2014 to deal with the amount of the final award, the date from which interest would run on that award and the rate of interest. At that hearing the defendant raised for the first time a contention that part of the plaintiff's claim was statute barred. The parties agreed to present submissions on the defendant's application for leave to amend the defence to plead the limitation issue and the interest issues. This judgment deals with those issues.

The Limitation Issue

[3] The plaintiff first wrote to the defendant in 2004 about the cheques which it had cashed at the instigation of DM. A writ was issued on 25 September 2007 but the statement of claim did not follow until 21 May 2010 and only then after the defendant had issued a summons. The defence served on 10 December 2010 raised no limitation defence nor was one raised in June 2012 or April 2013 when amended defences were served. The case ran from 22 April 2013 with final submissions on 10 May 2013.

[4] The leave sought now by the defendant is to amend the defence to include the following:

> "Further and in the alternative any loss and damage sustained by the plaintiff is barred by the passage of time and the provisions of the Limitation (NI) Order 1989 prior to 25 September 2001."

[5] For the defendant, Ms J Simpson recognised the difficulty in seeking leave for this amendment at this stage. If successful, the new defence would have the prospect of reducing the otherwise agreed award of £113,700 (without interest) by approximately 90%. She recognised the force against her client of the decision of the House of Lords in Ketteman and Others v Hansel Properties Ltd [1987] AC 189. That was a building case in which the defendant sought to amend its defence during closing submissions to raise a limitation issue in light of the decision, also of the House of Lords, in Pirelli General Cable Works Ltd v Oscar Faber and Partners [1983] 2 AC 1. The decision in the Pirelli case had been given during the first instance hearing of Ketteman. Using the Pirelli decision, the defendants in Ketteman applied to amend their defence. Although they were allowed to do so at first instance, that decision was overturned by the Court of Appeal and the House of Lords endorsed the Court of Appeal decision. In the leading speech, Lord Griffiths said:

> "I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of the final speeches. Such an application would, in my view, inevitably have been rejected as far too late. A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The

> choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to contest the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and the plea of limitation no longer serves its purpose as a procedural bar.
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> … whatever may have been the rule of conduct 100 years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even in terms that an adjournment is granted and that the defendant pay all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct offence to be raised for the first time."

[6] Of course the defendant here is in an even more difficult position than in the Ketteman case – the application comes before me after the judgment on liability rather than during closing submissions. No explanation is advanced other than oversight on the part of the defendant's legal advisors in failing to identify and plead the defence. Notwithstanding this, Ms Simpson made the following main points:

(i) The Rules of the Court of Judicature allow an amendment to be made at any time.

(ii) Amendments should be allowed if they put the real issues between the parties before the court.

(iii) Parties are not to be refused amendments as a punishment for mistakes made in the conduct of litigation.

(iv) It would be consistent with the overriding objective in Order 1 Rule 1A to allow the amendment.

(v) The amendment, if allowed, would not deny all of the plaintiff's successful claim so the plaintiff would still have an award of damages and costs.

(vi) The amendment would not result in any further evidence, court time or hearings.

(vii) The personal stresses involved in litigation which formed part of the reasoning of Lord Griffiths are absent here because the parties are not individuals but organisations or institutions.

[7] For the plaintiff, Mr Humphreys QC appearing with Mr A J S Maxwell, emphasised the extent to which the Ketteman decision should bear on the exercise of my discretion to allow the application. If the House of Lords would not allow an amendment during closing submissions, how could I allow one after judgment, he asked. He further submitted that:

(i) Limitation is an issue which goes to liability on which judgment has already been given.

(ii) The authorities are clear that a limitation defence must be pleaded.

(iii) The case law does not disclose any example of a comparable application to amend being allowed at such a stage.

(iv) The parties and the court can legitimately expect that all relevant issues are pleaded and tried together.

(v) The proposed amendment would lead to yet further argument and therefore delay because the plaintiff would contend that the limitation defence was of no avail in light of National Bank of Commerce v National Westminster Bank [1990] 2 Lloyds Rep 514. That is a decision to the effect that in an action to challenge a wrongful debit to an account, time does not begin to run until the date of demand for repayment of the amount wrongly debited, not the date of the actual debit. If that is correct, time did not begin to run until in or about 2004 when the plaintiff first wrote to the defendant challenging the pattern of cheques being cashed.

[8] I have considered all of these points in conjunction with the skeleton arguments and oral submissions of both parties. Notwithstanding the attractive manner in which Ms Simpson presented the application for leave to amend, it cannot succeed. It has come so late in the day and is of such consequence for the judgment which I have already given that to allow it would potentially lead to a dismissal of virtually all the plaintiff's claim in a case in which I have already found for the plaintiff. While I entirely accept that I have a discretion as to whether the amendment should be allowed, I believe that if I did allow it I would in effect be ignoring the decision of the House of Lords in Ketteman and the rationale behind

that judgment. Accordingly, the application for leave to amend the defence is dismissed.

Interest

[9] The parties agree that I have a discretion in awarding interest on the agreed sum due to the plaintiff which is £113,700. This discretion is given by Section 33A of the Judicature (NI) Act 1978. At the hearing on 24 January 2014 the plaintiff suggested that I award interest at the rate of 6% from the date on which each relevant cheque was cashed. On that calculation the total amount of interest would be £86,528.73 since the cheques in question go back to 2000.

[10] The defendant's submission is that the rate typically allowed is anywhere between 4% and 6% so that the plaintiff's suggestion of 6% is at the upper end of the range. In addition, so far as the period of time over which interest should be allowed is concerned, the defendant submits that the plaintiff's progression of the case was so slow that it would be unfair and inappropriate to award interest from the dates suggested by the plaintiff. The defendant suggests that an appropriate date would be that on which the statement of claim was finally served, 21 May 2010.

[11] I have already set out at paragraph 3 the rate at which the case progressed. It is clear that it could and should have been advanced much more quickly. In all the circumstances and trying to strike a fair balance between the parties I will allow interest on the full amount of £113,700 at the rate of 5% from 1 January 2008.