Neutral Citation Number: [2024] EW Misc 14 (CC)

Case no: H63YJ821

IN THE COUNTY COURT SITTING AT BRADFORD
ON APPEAL FROM THE DECISION OF DJ SKALSKYJ-REYNOLDS

Date: 22 January 2024

Before:

HHJ MALEK

- -

Between:

MR TAJUDEEN ADIGUN AGIA	**Claimant/ Appellant**
- and -	
SKIPTON BUILDING SOCIETY	**Defendant/ Respondent**

- -

Mr. Makinde (instructed by **SLA Law Ltd**) for the **Claimant**
Ms. Chelsea Carter (instructed by **Walker Morris LLP**) for the **Defendant**

Hearing date: 23 November 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek:

Introduction

1. This is an appeal from the decision of DJ Skalskyj-Reynolds (the "**Judge**") dated 21 August 2023 (the "**Order**") to strike out the Claimant's claim, at a preliminary hearing, as being statute barred and ordering the Claimant to pay the Defendant's costs of the claim to be assessed if not agreed.

Background

2. The facts relevant to the instant appeal can be briefly stated. The Appellant opened a deposit bank account with the Respondent building society in around 1987. He thereafter, by letter dated 17 September 1990, made a written demand to the Respondent for the money held to his account and asked for his account to be closed (the "**First Demand**"). The Respondent sent a cheque to the Appellant in Nigeria shortly thereafter for the entire sum that stood to the Appellant's credit.

3. The Appellant's case is that he misplaced this cheque and did not "cash it" and only discovered it in 2020 when he sent it to the Respondent seeking a replacement cheque (the "**Second Demand**").

4. The Respondent's case is that the first cheque sent to the Appellant was "*stopped or cancelled*" and that a replacement cheque was sent to the Appellant in around October 1990 (again for the entire amount held to the Appellant's credit) and that this latter cheque was presented for payment resulting in the Respondent making payment out. The Respondent, accordingly, does not hold any monies to the Appellant's credit.

5. In addition, the Respondent pleads a complete limitation defence on the basis that particulars of claim plead an alleged breach of contract and/or breach of duty that can only have taken place in 1990.

The decision of the lower court

6. Following the listing of the matter, of the court's own motion, for a preliminary hearing to deal with limitation, the Judge gave judgment after hearing from counsel for the parties. The pertinent part of her judgment is worth setting out in full and is as follows:

"*22. It is a specific area of law: bankers and customers. There is case law on this point. The relationship between a banker and a customer is the contractual one of debtor and creditor. Skipton Building Society is the debtor and the claimant is the creditor because Skipton Building Society owed him money in 1990 because of the deposit account that the claimant had with the building society.*

23. It is well settled law, going back to the 1800s, that unless the contrary is agreed, a demand by the customer for his money is a condition precedent to repayment. The bank cannot suddenly think, oh, we do not like Mr Agia, we are going to send him his money back. It cannot do that. It cannot say, oh, we do not like Judge Skalsky-Reynolds, she's got a bank account with us, we're going to send her the money back, no.

24. There has to be a demand for payment by the customer either for closure of the account or just for an amount of money. It does not have to be for closure but there has to be a demand. A demand by the customer is a condition

precedent to repayment whether the money is on a current or a deposit account. Mr Agia had a deposit account not a current account, but that is not relevant. Accordingly, time runs, limitation runs, from the date of the demand and not from the date when the account was opened or the money was paid in, otherwise banks could be faced with claims that have lain dormant for many years where there is no demand. There has to be a demand for payment.

25. It is agreed in this case that Mr Agia made a demand for payment on or about 17 September 1990 and a cheque was issued. Limitation runs from September 1990. Mr Agia may say, well, where is is the fairness in that? You know, I didn't know they had closed my account. The point is that, once a customer makes a demand for payment, they cannot sit back and think, oh, well, I will wait 30 years, 20 years or whatever, and then I will renew my demand for payment. Once you have made a demand for payment to a bank, time starts to run. You have got six years to follow up that demand for payment. Not six months, six years.

26. The court cannot allow the claimant to say, well, I forgot, I was busy. The witness statement says that the claimant went to America and then went to prison. For the policy reasons that I set out from the beginning, the courts cannot allow claimants to wait for 30 years and then suddenly wake up to the fact that banks owe them money. It was argued by Mr Modha that, however, time does not run from the first demand for payment. It runs from the second demand for payment when Mr Agia suddenly remembered that he was owed nearly £20,000. By then, it would have been over £20,000 because of all the interest.

27. Mr Modha argued it is the second demand for payment that started the limitation period running. But the courts have already dealt with the issue. It is settled law. Repeated demands for payment by a customer do not start time running afresh. Mr Modha did his best, and all credit has to go to him for attempting to distinguish the Bank of Baroda case from this case but I am afraid I was not influenced by his arguments. I did not accept his argument that this case is totally different because the building society issued a separate cheque when they were not asked to do so and closed the account.

28. Essentially, the law remains as stated in Bank of Baroda v Mahomed, which is that the cause of action starts when the customer first demands payment. Mr Modha argued that it did not because the building society issued a cheque, therefore it complied with the first demand and so the first demand fell by the wayside. Therefore, we do not count the first demand because it complied. It is the second demand made in 2021 which is the relevant one, but that is not right because, as Ms Carter pointed out, if the defendant complied with the first request by issuing the cheque, then there is no breach. There is nothing to complain about.

29. If the defendant did not comply with the first request for payment, then there was a breach then and that is the relevant breach and time starts to run then. Basically, the first demand in 1990 was to pay £19,500 odd - that is not the exact figure - and to close the account. Either the defendant complied with that request, in which case there is no claim, or it failed to comply with that request and time starts to run.

30. The claim is pleaded in such a way as to say that the defendant was in breach in 1990 because it closed the account and it should not have done so. The way the claim is pleaded, the breach is the closure of the account in 1990. However it is pleaded, it is not the point. What the point is that, when a customer makes a demand for payment, the limitation period starts to run and he has got six years to chase up that payment."

The law relating to appeals

7. It is common ground that this appeal is limited to a review of the decision of the lower court and that I should only allow an appeal where the decision of the lower court was (a) wrong, or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court (CPR 52.21(3)).

8. "wrong" presumably means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion.

9. In the present case I assume, from the way the appeal is advanced, that it is being alleged that the Judge erred in law.

Grounds of appeal

10. The Appellant's notice dated 11 September 2023 advanced only two grounds of appeal. By the time that I heard this matter the appeal bundle contained "amended" grounds with the addition of a third ground. I dealt with the "amendment" as a preliminary matter noting that no permission for the amendment had been obtained and, further, for the reasons I gave in open court I declined to hear the application for permission to amend.

11. This appeal proceeds, then, only on the two original grounds of appeal advanced by the Appellant.

First ground

12. The first ground of appeal is that:

"*The learned judge erred by failing to properly apply the Limitation Act as it applies to banking in particular the fundamental propositions set out in the case of Joachimson v Swiss Bank Corporation [1921] 3 KB 110 which specifically spelt out when the Limitation period applies. The proposition are as follows:*

....4. The limitation period on the debt runs from the time when the customer makes demand and is refused." [emphasis added].

13. The Appellant argues that the demand made by him for his money by letter dated 17 September 1990 was not refused, but was in fact honoured by the issuing of a cheque dated 21 September 1990 for the total sum which stood to the Appellant's credit at the time. There was, therefore, it is argued, no cause of action in 1990.

14. The point was expanded on in the Appellant's skeleton argument with the addition that the only time that the Respondent failed to "*honour the demand...was in 2021*" when the Appellant demanded a replacement cheque.

Second ground

15. The second ground of appeal provides:

"*The learned judge erred in law and on the fact when she ruled that limitation period started to run from 17/09/90 as there was no breach in 1990. D honoured the demand from C and consequently, there was no cause of action. Had C brought a claim against D without any further act by D which indicates a breach/refusal, such action would be prima facie failed as there was no ground for such a claim. The learned judge cited the case of Mahomed v Bank of Baroda: CA 10 Dec 1998. However, the circumstance in that case complies with the fundamental proposition as stated above in that the bank refused to honour the customer's demand*."

Discussion

16. Both grounds are, in my judgment, better answered together.

17. Firstly, the Appellant has failed, in my judgment, to properly distil the relevant ratio from *Joachimson v Swiss Bank Corporation [1921] 3 KB 110* ("*Joachimson*"). It is not clear to me which part of the three speeches in that decision the Appellant seeks to rely upon when presenting proposition 4 and nor was I taken to any particular part during the course of submissions. The only discernible principle to be derived from *Joachimson* is that as between a banker and his customer there is implied a term that a demand is a condition precedent to repayment.

18. The decision in *Bank of Baroda v Mahomed, [1999] C.L.C. 463 (1998) ("Baroda")* is only of partial assistance to the Appellant. Whilst *Baroda* is clearly authority for the proposition that where the debtor is a bank the limitation period on the debt runs from the time when the customer makes a demand it is,

just as clearly, not authority for the proposition that the demand must also be refused before limitation can run. *Baroda* simply does not go that far.

19. Secondly, the above error appears to be compounded by the erroneous way in which the Appellant seeks to interpret the Limitation Act 1980 (the "**1980 Act**"). Section 6 of the 1980 Act contains special rules in respect of certain loans varying the principle stated in section 5 that an action founded on simple contract is barred six years after the cause of action accrues. Section 6 applies to contracts of loan which do not provide for repayment of the debt on or before a fixed or determinable date and do not make the obligation to repay conditional upon a demand for payment or upon anything else. The Appellant does not plead that the debt was repayable on a fixed date or that the obligation to repay was conditional upon a demand for payment or upon anything else (see paragraph 23 of the particulars of claim) and accordingly the section must apply.

20. Section 6(3) of the 1980 Act provides:

"*Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made*."

21. This means that the cause of action for any action in contract for the recovery of a debt by the Appellant must accrue on the date that a written demand was made. This is a deeming provision. It is irrelevant whether or not a cause of action could be properly made out, sustained or a breach of contract identified. Put another way, the fact that the Respondent had complied with the demand

might well mean that the cause of action was unsustainable both in fact and in law (because the Respondent's simple answer to any claim would be that the demand had been complied with), but that does not prevent the cause of action from accruing on the date that the demand was made for the purposes of the 1980 Act.

22. If I am wrong about the above and the 1980 Act, read as a whole, might be construed to the effect that where section 6 applies a contractual breach needs to be identified before a cause of action can accrue (about which point I did not hear any submissions) then I should have no trouble in agreeing with the following submission made by the Respondent in the alternative. Namely, that if the Respondent honoured the First Demand (as contended for by the Appellant) then there is no basis for making the Second Demand. Whilst, like Simon Brown LJ giving the lead judgment in *Baroda*, I too find it "unattractive" to see a bank taking the 1980 Act defence I also can see no basis upon which a statute barred claim could be resurrected by simply making a fresh demand. To allow a customer to do so would prevent the bank from ever successfully invoking the 1980 Act and would drive a coach and horses through sections 5 and 6 of the 1980 Act.

23. It is, accordingly, apparent to me that (i) both grounds of appeal are entirely misconceived, and (ii) the Judge accurately summarised the law and properly applied it to the facts such that she did not fall into error.

24. It should also be noted that the Judge struck out the entirety of the Appellant's claim and not just that part relating to his contractual claim. No point was taken (either at first instance or on appeal) in relation to any other claims that the

Appellant may have had - perhaps for good reason; but the point is that this was not an issue before me in relation to which I heard any argument.

Conclusion and disposition

25. For the reasons given the Appellant's appeal is dismissed and I uphold the decision of the learned Judge.

26. The parties are invited to agree any consequential orders and present a draft to me in advance of this judgment being handed down. In the event that a draft order is agreed the parties and their representatives are excused from any further attendance. Alternatively, if agreement is not possible I shall hear submissions on any consequential orders following the handing down of judgment.