Gemalto Holdings BV and Others v Infineon Technologies AG and Others [2022] EWCA Civ 782

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In *Gemalto Holdings*, the Court of Appeal considered the test applicable the commencement of time running for limitation in cases of deliberate concealment (under s 32(1)(b) of the Limitation Act 1980). In particular, it asked what knowledge in the claimant would be sufficient to commence time running.

The Court of Appeal was faced with the question of whether to apply the more venerable "statement of claim" test, which asked whether the claimant had, or could with reasonable diligence have, obtained such knowledge as to allow it and its professional advisers to plead a claim that would not be struck out; or, whether the recent approach to mistake of law set out in *Test Claimants in the Franked Investment Group Litigation v HMRC*[1] ("***FII***") should apply. The test in *FII* instead required that the claimant must objectively know about the mistake with sufficient confidence as to justify embarking on the preliminaries to the issue of proceedings (which would include such steps as submitting a claim to the proposed defendant, taking advice, and collecting evidence). Or, put another way, that the claimant has to objectively know it has a worthwhile claim.

At first instance

On the facts, the European Commission had issued a press release on 22 April 2013 referring to a Statement of Objections sent to Infineon and others alleging a cartel. Gemalto had previously received two Requests for Information from the Commission on 3 July 2012 and 25 September 2012, identifying a time period for their enquiries concerning the alleged cartel. At first instance[2], Bacon J applied the statement of claim test as neither side had identified any practical difference which would arise from the application of either of the two tests. She held there was sufficient knowledge of the claim for the limitation period to commence on 22 April 2013. As proceedings were issued on 19 July 2019 the claim was statute barred.

The Court of Appeal Hearing

Gemalto had made a follow-on claim based on the Commission's Infringement Decision which was dated 3 September 2014. This would place the case in time. Infineon instead argued that the *FII* test should apply in any event. At the hearing of the case in the Court of Appeal, Gemalto moved to relying on *FII*, albeit interpreting the case in a specific way to its benefit.

The meaning of "discovering" a cause of action

The Court of Appeal considered the reasoning of Lords Reed and Hodge in *FII*. The premise of that decision was that, the law prior to *FII* allowed that a claimant might be unable to "discover" a cause of action until long after that person had brought his claim and succeeded

in it. This was because of the test of the majority set out in *Deutsche Morgan Grenfell*[3], in which the majority had held that, in a mistake of law case, time would not begin to run until the matter of law was determined by the court. That could mean that a claimant only became sufficiently aware of their claim for time to run when a judgment provided for the cause of action. Until that determination was made, in the words of Lord Hoffmann, "*they could not have discovered the truth because the truth did not yet exist*".
In *FII* this was rejected. It led to the paradox that a claimant might not discover their claim until long after the claim was brought and they succeeded in it. This suggested, and Lords Reed and Hodge held, the focus should be on the claimant's ability to discover they had a worthwhile claim. Thus, in mistake cases:

- "*…time runs from the point in time when the claimant has discovered, or could with reasonable diligence have discovered (a) that it had been mistaken with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence, or (b) its mistake in the sense of recognising that a worthwhile claim arises. The question before us is whether an analogous test is applicable to deliberate concealment cases.*"
  (Para 43 of *Gemalto*)

In *Gemalto*, Sir Geoffrey Vos MR considered that this principle applies equally in respect of cases of concealment under s 32(1)(b) (and, indeed, fraud under s 32(1)(a)). If there were a difference with fraud, it would have been found in the stricter rules of pleading such cases; something not applicable in competition cases (or cases of deliberate concealment). A suggestion that there was an analogy between pleading cartel cases and fraud cases was rejected. If anything concealment in cartel cases leads to more liberal pleadings in advance of disclosure. The other difference would be that postponement in mistake cases is based on discovering something affecting how the claimant has acted, whereas in concealment and fraud cases it is generally based on discovering conduct by the defendant. Again, the Master of the Rolls thought this a distinction without a real difference for the purposes of understanding "discover".
Thus, time begins to run in deliberate concealment cases when the claimant recognises that it has a worthwhile claim, and a worthwhile claim arises when a person could have a reasonable belief that, in this kind of case, there had been a cartel. *FII* must be applied with common sense. It was suggested that the statement of claim test might now be a gloss on *FII* as the difference is limited. Competition cases are not treated differently to other cases under s 32.
A claimant cannot delay until they are certain of the claim succeeding. In a fraud claim, if an essential fact about the fraud is not discovered, without which there might be no fraud, it would make sense to say the fraud has not been discovered. In contrast, for concealment, what needs to have been discovered is the concealment. Once the claimant knows objectively that a cartel has been concealed, it does not need certainty about its existence or details. "Worthwhile claim" requires a common sense application. The *FII* test applies in all situations where there is mistake, fraud and concealment, to be consistent with the Act more generally.

Conclusion

Crucially, from an *FII* test perspective, it is no longer necessary (at least in a concealment case) for the claimant to discover every essential element of the claim that has been concealed. One does not need to know chapter and verse about the details of the cartel. On the other hand, a claimant does not know it has a worthwhile claim if a claim pleaded on the basis of the details it does know would be struck out.
The Court of Appeal went on to uphold the determination below notwithstanding that the judge had applied the statement of claim case. The Master of the Rolls noted that, in a case where a Statement of Objections has been issued, it is obvious a worthwhile claim arises because a claim based on the information from this document would not be struck out without the court seeing the

Statement of Objections itself, which would provide many of the details that the claimant would previously have been lacking. Further, the RFIs were sufficient for the claim to be pleaded and the claimant to know it had a worthwhile claim. As such, Gemalto was out of time.

This case takes our understanding of s 32 of the Limitation Act 1980 one step further, and completes the work of *FII* in rowing back from the (often paradoxical) results produced by *Deutsche Morgan Grenfell*. Practitioners would be well advised to work quickly in cases of deliberate concealment, now that it is clear one does not need to know chapter and verse of the facts. In respect of fraud, *Gemalto* is a clear indication that the *FII* test now applies. It may be that, because of the stricter approach to pleading required, the test in practice is applied somewhat differently. However, in principle, it would appear that *FII* now occupies the entire field in respect of knowledge under s 32.

[1] [2020] UKSC 47; [2022] AC 1.
[2] [2022] EWHC 156 (Ch).
[3] [2006] UKHL 49; [2007] 1 AC 558.

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