THE HIGH COURT

[2012 No. 13121 P.]

BETWEEN

CAROLINE CAMPBELL

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION) AND IBRC ASSURANCE

COMPANY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 30th day of April, 2019

Introduction

1. This is an application on behalf of the first defendant for an order pursuant to O. 25, r. 1 of the Rules of the Superior Courts for the trial as a preliminary issue of law of the issue as to whether the plaintiff's claim is statute barred by operation of the Statute of Limitations 1957, as amended.

2. Very soon before, or very soon after, 21st December, 2006, the plaintiff invested €500,000 in a unit linked life assurance fund, managed by the second defendant (Anglo Irish Assurance Company Limited as it then was) called the AIAC European Geared Property Fund ("*EGPF*"). It was a high risk investment. The plaintiff lost most of her money.

3. By this action, which was commenced by plenary summons issued on 21st December, 2012, the plaintiff claims damages for negligence, breach of contract, and breach of fiduciary duty. Essentially the plaintiff's case is that she was not properly advised and was sold a financial product that was unsuitable for her.

4. The defendant has pleaded that the action is statute barred. Essentially, the defendant's case is that the date of accrual of any cause of action was the date on which the plaintiff made her investment, which was prior to 21st December, 2006. The plaintiff argues that the date of her investment is a contested issue of fact, but the defendant counters that the date of accrual of the cause of action is a matter of law.

The case pleaded

5. It is common case that at all times before she made her investment the plaintiff dealt with the first defendant (Anglo Irish Bank Corporation plc as it was then called) and that the investment was in a bond issued by the second defendant. The action was not progressed against the second defendant and I will refer to the first defendant as the defendant.

6. The plaintiff's case is that the money she invested in the bond was part of a €2 million award of damages for personal injuries which she had recovered in an action against Clare County Council. The plaintiff initially placed all of her money on deposit with AIB Bank. In early 2006 she went to Anglo Irish Bank Corporation plc (as the first defendant was then called) for investment advice. She was then assessed as having a low to medium attitude to risk. Her investment objectives were to protect her capital and fund her income in the short term and upon her retirement.

7. On 9th March, 2006 the defendant presented the plaintiff with an "*investment proposal*" which suggested a portfolio of low to medium risk assessments. The plaintiff did not then invest.

8. According to the statement of claim, the plaintiff met with a representative of the defendant "*in or about December, 2006*" and, following that meeting, on a date which is not specified in the statement of claim, made her investment in the EGPF. The plaintiff's case is that she was advised and encouraged to make the investment. Her case is that the investment was not suitable and that the defendant was guilty of negligence and breach of contract in recommending it to her.

9. The statement of claim was, I think it is fair to say, in some respects a bit woolly although perhaps not so woolly as to have justified the 32 page notice for particulars which was raised on behalf of the defendant on 4th August, 2016. Particulars were sought of virtually every plea in the statement of claim including, quite correctly, the precise date of the alleged meeting in December, 2006; the precise date upon which the plaintiff alleges she made her investment; and the precise date on which the plaintiff alleges that she had suffered loss and damage.

10. On 19th October, 2016 the plaintiff's solicitors delivered a 29 page document called replies to particulars, but which, in the main, did not answer the questions which had been asked. The precise date of the December, 2006 meeting was said (at para. 30.7) to be 12th December, 2006, although the precise date of the recommendation that the plaintiff invest in this fund was said (at para. 30.9) to be "*in or around December, 2006*".

11. The answer given to the question as to the precise date of the investment (at para. 31.1) was:-

> *"31.1 The plaintiff received policy documentation – on the 16th January, 2007 – which was essential to the formation of the contract and which contained a cooling off period the effect of which [was that] the plaintiff had an option of rescinding the investment within 30 days from the date of the letter of the 16th January, 2007. The plaintiff's assent to the policy documents and the expiry of the cooling off period were necessary prerequisites to the formation of the contract between the plaintiff and defendant. The funds for the investment were received (sic.) on the 10th January, 2007".*

12. The answer given to the question as to when precisely the plaintiff alleged that the loss was suffered (at para. 47.1) was:

> *"This information is within the knowledge of the first named defendant".*

13. The answer given to the request that the plaintiff confirm the date of her investment in the EGPF (at para. 47.3) was "*Please see reply to 31.1 above*".

14. By letter dated 28th October, 2016 the first defendant solicitors raised 82 rejoinders. On 11th November, 2016 the plaintiff's solicitors delivered replies to rejoinders. It is convenient to set out the material rejoinders and replies together.

> *"Q50. In relation to the matters pleaded at para. 30.7 of the replies to particulars:*
>
> > *The alleged meeting on 12th December, 2006 is central to the plaintiff's claim and the plaintiff appears to allege that the representations or recommendations of Ms. Eileen Redmond at said meeting formed the basis of the plaintiff's decision to invest in EGPF. The plaintiff has grounded her claim in inter alia misrepresentation and negligent misstatement. It is essential that the plaintiff set out the nature of the representations made to the plaintiff at the said meeting and, as far as possible, the words used. It is plainly insufficient that this be left as a matter for evidence by which to ambush the first named defendant at the trial of the action.*
>
> *A50. Eileen Redmond advised the plaintiff to invest in the fund.*
>
> *Q51. In relation to the matters pleaded at para. 30.9 of the replies to particulars (which was the precise date of the recommendation):*
>
> > *This reply is deliberately evasive. The first named defendant requires the plaintiff to identify a specific date and this date is within the plaintiff's knowledge.*
>
> *A51. In Dublin at the plaintiff's sister's house (sic.).*
>
> *Q52. In relation to the matters pleaded at para. 31.1 of the replies to particulars (which was the precise date of the investment):*
>
> > *The plaintiff's reply at para. 31.4 is noted but fails to answer the particular sought. The request is repeated and please identify the date upon which a binding contract is said to have come into being.*
>
> *A52. This has been satisfactorily replied to.*
>
> *Q76. In relation to the matters pleaded at para. 47.1 of the replies to particulars (the date of the alleged loss).*
>
> > *This reply is deliberately evasive. The first named defendant does not require the plaintiff to inform it of what is within its own knowledge. The first named defendant requires the plaintiff to plead its case. Please confirm the date of the alleged loss.*
>
> *A76. This information is within the knowledge of the first named defendant. However, without prejudice to the foregoing the plaintiff received a letter from the first named defendant dated 13th August, 2007 indicating that the plaintiff's investment had fallen."*

15. The first defendant was not satisfied with the replies to rejoinders and by notice of motion dated 28th November, 2016 applied for an order directing the plaintiff to give further and better particulars including (but by no means limited to) the date of the investment and the date of the alleged loss. That application was grounded on an affidavit of the first defendant's solicitor which referred to a bundle of "*investment documents*" dated from 5th December, 2006 to 16th January, 2007, to which I will return. The first defendant's solicitor specifically referenced the date of the plaintiff's investment as central to the date of accrual of the cause of action because, he said, the first defendant was considering bringing a preliminary application in relation to the Statute of Limitations.

16. At the hearing of the first defendant's motion for particulars, counsel for the plaintiff "*volunteered*" to give further particulars and the plaintiff did so, or purported to do so, by a notice called replies to request for further particulars dated 4th February, 2017.

17. That notice did not deal *seriatim* with the particulars identified in the notice of motion. Insofar as is material for present purposes it was said:

> *"Date of investment – Reply to notice for particulars para. 31.1".*

18. The plaintiff did not put a specific date on her alleged loss but did say:-

> *"Value of investment – The plaintiff's total investment was €500,000 of which €490,000 went into the fund and €10,000 was taken in initial charges. As of 16th May, 2016, the plaintiff's remaining position in EGPF was valued at €33,754 as per the Harcourt Life valuation issued for that date. To that must be added the distributions of €27,367 received in March 2015, and €31,929 received in April 2016. After adding the appropriate interest income to these sums (i.e. fourteen months and one month respectively) their combined value in May 2016 would have been approximately €59,629. This puts the actual loss at:*
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> *€500,000 - €33,754 - €59,629 = €406,617.*
>
> *Had the plaintiff not invested in EGPF, she would have kept the money in a bank deposit, the estimated value would have grown to €656,703 by May 2016. (Based on the Central Bank's monthly data series for 'Household Deposit Rates with Agreed Maturity less than Two Years').*
>
> *The combined value of actual loss and interest income forgone would therefore have been, as of May 2016:*
>
> *€406,617 + €156,703 = €563,320"*

19. The plaintiff did not specify the date from which (or indeed the precise date to which), the interest calculation was made but logically, it seems to me, the claim for interest could not have been for a date earlier than the date on which the money was transferred by the plaintiff from her AIB Bank account.

20. The defence was delivered on 30th March, 2017. The first plea was that the claim was statute barred.

21. The defence makes a number of admissions and positively pleads the defendant's case.

22. The defence pleads that on or about 24th November, 2006, the plaintiff was provided with a marketing brochure for EGPF, the terms of which are set out. Further, it is pleaded that on 12th December, 2006, the plaintiff was furnished with a "reasons why" letter, which is said to have set out that her then specific investment requirement indicated that her investment choice would be high risk, and that this letter was signed by the plaintiff. The defence admits that the plaintiff invested €490,000 in EGPF. It pleaded that the €10,000 was paid to Anglo Irish Assurance Company rather than Anglo Irish Bank. It pleaded that the plaintiff's investment in EGPF was held by way of investment bond with the second defendant, and that the start date of the investment bond was 13th December, 2006.

The application for the trial of a preliminary issue

23. By letter dated 27th October, 2017 the defendant's solicitors asserted that the action was statute barred and proposed that this be tried as a preliminary issue. They suggested that while the legal issues might be contested, the factual issues were net, readily identifiable by reference to the pleadings and proceedings, and unlikely to be in controversy. Annexed to the letter was a proposed table of facts and a draft notice of motion and affidavit.

24. The proposed table of facts identified seven dates between 24th November 2006 and 10th January, 2007, a corresponding event/document, and a comment/reference. Two of the seven dates were tied back to the plaintiff's replies to particulars, and two to documents referenced in the replies to particulars or previously exhibited by the plaintiff. The 18th December, 2006 was identified as a date on which the plaintiff had first attempted (but failed) to transfer the money for the investment; 10th January, 2007 as the date on which the monies had been received; and 16th January, 2007 as the date on which the plaintiff had received the transactional documents. The draft affidavit envisaged that the table of facts would be agreed.

25. By letter dated 7th November, 2017 the plaintiff's solicitors declined to agree to the trial of the statute issue as a preliminary issue. They also protested that the defendant had delayed in bringing the motion and suggested that discovery might be necessary.

26. This motion was issued on 23rd November, 2017 and is grounded on an affidavit of Mr. Kieran Wallace, sworn on 22nd November, 2017. Mr. Wallace summarised the claim and the history of the proceedings. He went into some detail on the defendant's requests for particulars, mostly, I think, to forestall any complaint that there had been delay in the bringing of the application, which, in the event, did not materialise.

27. The affidavit of Mr. Wallace suggested (as the defendant's solicitors' letter of 27th October, 2017 had suggested) that while the parties might differ as to the legal significance of the various dates and events, *"the fact that these events arose and/or that documents were delivered is unlikely to be in dispute."*

28. Having rehearsed the difficulty of getting the plaintiff to particularise her claim to the defendant's satisfaction, Mr. Wallace identified what he said was a key aspect to the defendant's notice for particulars which, he said, the plaintiff had consistently refused to answer. That was para. 47 of the defendant's notice for particulars, by which the defendant sought to nail down the date on which the plaintiff claimed to have suffered loss, and the date of her investment in EGPF, and sought confirmation that the plaintiff's case was that the loss arose from the very fact of entering the transaction.

29. Mr. Wallace suggested that the trial of the issue as to whether the plaintiff's claims were statute barred as a preliminary issue would be determinative of the proceedings and would result in substantial saving of the cost of discovery and preparation for a full hearing.

30. At the end of his affidavit, more or less as an afterthought, Mr. Wallace observed that the plaintiff also makes allegations of mismanagement against the first defendant but expressed puzzlement as to how she could maintain any such allegation in circumstances in which the investment contract was with the second defendant, against whom the action had been discontinued. I pause here to observe that I do not see where in the statement of claim a case of mismanagement of the fund is made.

The replying affidavit

31. In response to the application, an affidavit of Elizabeth Burke, the plaintiff's solicitor, was filed on her behalf. Mr. Wallace, in a supplemental affidavit, objected that Ms. Burke's affidavit comprised, or included, hearsay, which was inadmissible: but the plaintiff did not later swear any affidavit herself.

32. I need to deal first with the admissibility of the contents of Ms. Burke's affidavit.

33. Order 40, r. 4 of the Rules of the Superior Courts provides, insofar as is material:-

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements of his belief, with the grounds thereof, may be admitted."*

34. Ms. Kelley Smith, for the defendant, argues that this is not an interlocutory motion, and in support of that argument refers to the decision of Murphy J. in *F & C Reit Property Asset Management plc v. Friends First Managed Pension Funds Ltd*. [2017] IEHC 383, and to the authorities referred to in that case.

35. *F & C Reit* was a decision on a motion to inspect documents. An affidavit of discovery had been sworn on behalf of the plaintiff by a Mr. Meads, who described himself as the plaintiff's general counsel and partnership secretary. The plaintiff claimed legal professional privilege and litigation privilege over several documents. The plaintiff's claim for privilege was challenged by the defendant who relied on an affidavit of a Mr. McGibney, its head of investment, who deposed that he had dealt with Mr. Meads as a principal and not as a legal adviser. In response, an affidavit of the plaintiff's solicitor was filed. Murphy J. appears not to have been immediately convinced by what the solicitor had to say, but first had to decide whether it was admissible. That issue depended upon whether the application

before the court was an interlocutory application. On the authority of the decision of the Supreme Court in *Minister for Agriculture v. Alte Leipziger AG* [2000] 4 I.R. 32, Murphy J. found that the application was for the determination of a discrete issue within the proceedings which was not to be revisited in the course of the plenary hearing, the decision of the court on which would be final, subject only to an appeal, and so was not an interlocutory motion. That being so, the affidavit of the plaintiff's solicitor was not admissible.

36. *F & C Reit Property Asset Management plc* changed its name to BMO Rep Property Asset Management plc and in *BMO Rep Property Asset Management plc v. Friends First Managed Pension Funds Ltd*. [2018] IECA 357, the Court of Appeal upheld the decision of Murphy J. as to the nature of the motion and the admissibility of hearsay evidence. The appeal on the issue of privilege was allowed, but only on the basis of an affidavit of Mr. Meads, which the Court of Appeal permitted the appellant to adduce by way of further evidence.

37. Applying the same test to this application, it seems to me that it is not an interlocutory motion. If the order sought is granted, it will direct how the issue of the statute is to be disposed of. If the order is made, the issue will be determined as a preliminary issue of law. If the plaintiff's claim is found to be statute barred, that will be the end of the action. If the claim is found not to be statute barred, that issue will not be revisited at the trial of the action.

38. Order 40, r. 4 requires that affidavits be confined to facts within the knowledge of the witness. It does not follow, however, from the fact that the affidavit contains hearsay that it must be excluded altogether. Rather, what is inadmissible is any averment other than an averment within the knowledge of the deponent.

39. Ms. Burke in her affidavit offers a background to the application. Her account is expressed in terms of positive averments as to what happened, which is inadmissible, but she would be entitled to say, by reference to the pleadings, what the plaintiff's case is. Ms. Burke is aware from her own knowledge of the progress of the litigation and the correspondence.

40. The statements in the affidavit of Ms. Burke to which exception is taken are that "*the plaintiff does not dispute the various documents to which reference is made in the said Appendix [the draft table of facts], although, while the plaintiff does not dispute her signature on the various documents, there are issues as to when the documents were actually signed and made available to her*" and "*while the plaintiff does not deny [the Investment Bond Contract Schedule], the plaintiff says that she did not receive this document until 16 January 2007".* On one view these averments are hearsay, and I think that Ms. Burke probably intended to assert as facts matters which were not directly within her knowledge. On the other hand, the statements could be read as a summary of the issues disclosed by the pleadings.

41. While exception is taken to Ms. Burke's averment that the plaintiff did not receive the investment bond schedule until 16th January, 2007, this is what is asserted by the defendant and is one of the few facts which the plaintiff unambiguously accepts. Once the fact is agreed, any dispute as to whether Ms. Burke is entitled to say so seems rather arid.

42. It is said that what Ms. Burke says (or would say) in her affidavit contradicts the pleadings. For the reasons which I shall come to, I do not believe that it does. In any event, I think that the plaintiff's solicitor's statements are irrelevant to the issue which I have to decide: which is whether the legal issue could be decided by reference to the facts pleaded by the plaintiff.

The law

43. Order 25 of the Rules of the Superior Courts provides:-

> *"1. Any party shall be entitled to raise by his pleading any point of law, and any point of law so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.*
>
> *2. If, in the opinion of the Court, the decision on such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order as may be just."*

44. There was no dispute between the parties as to the principles of law applicable to this application. The purpose of the procedure is to save time and costs in cases in which an issue of law can be identified, the determination of which may dispose of the whole, or a substantial part, of the proceedings. The availability of the procedure, however, is limited to cases in which the facts have been agreed or can be established.

45. In *McCabe v. Ireland* [1999] 4 I.R. 151 Lynch J. said:-

> *"A preliminary issue of law cannot be decided in vacuo: it must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter in issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party. In Kilty v. Hayden [1969] I.R. 261 O'Dálaigh C.J. said:-*
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> > *'When Order 25 is contrasted with Order 36 it becomes clear that Order 25 is not providing for the separate trial of issues which are partly of fact and partly of law, but for the separate trial of a net point of law dissociated from issues of fact, that is to say, the point of law must arise on the basis of the facts being as the opposing party in his pleadings alleges them to be.'"*

46. In *Campion v. South Tipperary County Council* [2015] 1 I.R. 716 McKechnie J. undertook a comprehensive review of the authorities and, at para. 35, summarised in twelve points the factors to be taken into account on an application under O. 25. The first two of those points are that there cannot exist any dispute about the material facts as asserted by the relevant party such as can be agreed by the moving party or accepted by him or her, solely for the purposes of the application, and that there must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.

Discussion

47. The decision as to whether the plaintiff's action is statute barred will turn upon the date on which her cause of action accrued. The date on which the cause of action in tort accrued is the date on which the plaintiff suffered loss.

48. As I have previously observed, Mr. Wallace, in his affidavit grounding this application, protested that the plaintiff has consistently refused to confirm that her case is that she suffered loss by the very fact of making the investment, and has failed to specify either the date upon which she alleges that she suffered loss and damage, or the date of her investment in EGPF. In my view, Mr. Wallace is perfectly correct when he says that a clear response to those questions would have narrowed the issues considerably. The question is whether without such a clear response the facts are sufficiently clear to allow a decision to be made as to when the plaintiff's cause of action arose.

49. Ms. Smith submits that any cause of action arose when the plaintiff relied, to her detriment, or the advice of the defendant, that is, the date on which she entered the transaction. That, she says, is a matter of law. Reference was made to *Gallagher v. ACC Bank plc* [2012] 2 I.R. 620 as well as to *Agar v. Conroy* [2012] IEHC 164, *Komady v. Ulster Bank Ltd.* [2014] IEHC 325, *Brandley v. Deane* [2017] IESC 83 and *Elliott v. ACC Bank plc* [2017] IEHC 808.

50. Mr. Mark Sanfey S.C., for the plaintiff, does not accept that the date of the transaction is the relevant date. Mr. Sanfey did not definitively identify the date on which the plaintiff suffered loss, but suggested, variously, that it might have been 16th January, 2007, when the plaintiff was provided with the transactional documents, or, perhaps, the expiration of the 30 day cooling off period provided for in the transactional documents, or, perhaps, the date on which the investment began losing money.

51. Mr. Sanfey submits that if the court cannot, at this stage, say when the losses were incurred, it cannot order the trial of a preliminary issue. Ms. Smith counters that the date on which the loss was suffered is a matter of law; and that if the court orders the trial of a preliminary issue, the defendant will argue that the date of the loss was the date on which she entered the arrangement. Reference was made to made to *Agar v. Conroy, Gallagher v. ACC Bank plc Elliott v. ACC Bank plc and to Cantrell v. Allied Irish Banks plc* [2017] IEHC 254.

52. It seems to me that the position is more nuanced. The date of accrual of the cause of action might be said to be an issue of law, but the date on which the losses were suffered is a mixed question of law and fact. That said, I am unconvinced that the court needs to know the date on which the plaintiff suffered loss, or even, unequivocally, the date on which she alleges that she suffered loss, before ordering the trial of a preliminary issue. The essential question, after all, is not when the plaintiff suffered loss but rather whether the loss was suffered upwards of six years prior to the date of issue of the summons. For the purposes of this application it does not matter whether the plaintiff suffered loss on 10th January, 2007, when she paid over her money, or on 16th January, 2007, when she got the transactional documents, or 30 days later when the cooling off period expired, or on some unascertained later date when the value of the portfolio of properties underlying her investment collapsed (or was recognised as having been overstated). All of those dates were within six years of the date of the summons.

53. Parenthetically, I cannot forbear to observe that, having regard to the decision of the Supreme Court in *Gallagher v. ACC Bank plc* [2012] 2 I.R. 620, I have difficulty understanding how it can be contended that the loss could be referable to the performance of the investment but that is not an issue I need to decide.

54. In principle, it seems to me that while the date on which a plaintiff alleges that he suffered loss will often be important, it will not necessarily be determinative.

55. *Agar v. Basil Conroy and Company Limited* [2012] IEHC was a professional negligence action against a building surveyor. The plaintiffs' case was that they bought a house in reliance on a negligent survey report. In the statement of claim the plaintiffs put the date of their loss as the date they completed the purchase and went into occupation of the house. On a motion for the trial of a preliminary issue as to whether the claim was statute barred, the defendant sought to argue that the date of any loss was the date on which the plaintiffs had become bound by an unconditional contract to purchase. The defendant's solicitor had sworn an affidavit referring to the contract for purchase but (as in this case) objection was taken that anything the solicitor could say was hearsay and inadmissible. It is clear from the judgment that Peart J. was of the view that the defendant might very well have had a case to make that the loss was suffered at the date of the contract to purchase, but in circumstances in which that date had not been pleaded, agreed, or proved, refused to order the trial of a preliminary issue. In principle, however, I see no reason why, in a case like *Agar*, the defendant could not lay the ground by raising particulars or interrogating the plaintiff as to the date of the contract, and then apply to have a preliminary issue tried as to whether a claim made by an action brought upwards of six years later was statute barred. Once the fact and date on the unconditional contract had been established, a legal issue could be identified as to whether that was the date of the loss and, for the purposes of deciding whether that issue should be decided as a preliminary issue, it would not matter that the plaintiff was contending for a later date.

56. It seems to me that the core issue on this application is whether the defendant can point to sufficient uncontested or uncontroverted facts to lay the ground for the trial of a preliminary issue of law as to whether the plaintiff's cause of action arose on a date upwards of six years prior to the date of issue of the plenary summons.

57. I am not on this application to decide whether the plaintiff's claim is statute barred. I do, however, need to identify the date upon which the defendant contends that the cause of action accrued, and why it is said that the cause of action accrued on that date.

58. The fundamental premise of the defendant's application is that the loss was suffered, and the cause of action arose, before 21st December 2012: specifically, on 13th December, 2006. The draft table of facts suggests that there was a discussion between the plaintiff and the defendant on 24th November, 2006; that the plaintiff signed an application form on 5th December, 2006; that there was a meeting on 12th December, 2006, at which advice was given; that the plaintiff attempted to make a bank transfer on 18th December, 2006; that the money was successfully transferred on 10th January, 2007; and that the transactional documents were received by the plaintiff (from the second defendant) on 16th January, 2007. When the documents arrived with the plaintiff on 16th January, 2007, the Investment Bond Contract Schedule showed a "*start date*" of 13th December, 2006. The defendant's case is that this was the date of the plaintiff's investment, and the date on which she suffered loss and, accordingly, the date on which her cause of action accrued.

59. The only document signed by the plaintiff referred to in the suggested table of agreed facts is the Investment Bond Application Form. The draft table indicates that that was signed by the plaintiff on 5th December, 2006 but the "*comment/reference*" is that "*The Investment Bond Application Form is appended to the Plaintiff's Replies to Request for Further Particulars dated 9 February 2017 and is dated 5 December 2006. We trust that this is not in issue."* [Emphasis added.]

60. In principle, I do not believe that it would necessarily follow from the fact that the plaintiff relies on a document signed by her and bearing a particular date, that she signed the document on that date. It is, perhaps, a reasonable assumption or presumption that a document which shows that it was signed on a particular date was then signed, but the date on the document may not be the date on which it was signed. This, it seems to me, is effectively acknowledged by the draft table in which the defendant's solicitors "*trust*"

that the date of signature is not in issue. However reasonable it might have been to expect that the date of execution would not be in issue, the fact of the matter is that it is.

61. The Investment Bond Application Form said in the proposed table of facts to have been appended to the plaintiff's further particulars of 9th February, 2017 does not appear from the text of that document to have been so appended. Neither, in the very careful and comprehensive book of pleadings made up by the defendant's solicitors for the purposes of this application, does it follow the further particulars. The Investment Bond Application Form was referred to in the plaintiff's first replies to particulars dated 19th October, 2016. What was there said, in response to a request that the plaintiff should say what was meant by the term "*financial advisor*" and set out the facts relied upon as supporting the contention that the defendant had assumed the role of a financial advisor, was that the term "*financial advisor*" was used in various documents, including the Investment Bond Application Form dated 5th December, 2006. This was not an assertion that the form had been signed on 5th December, 2006.

62. The Investment Bond Application Form was exhibited by the defendant's solicitor as part of the defendant's application for further and better particulars. It bears the plaintiff's signature and is dated 5th December, 2006. The plaintiff was asked to agree that she signed this document on 5th December, 2006 but refused to do so. She does not plead that she did. The defence pleads that "*the plaintiff's application*" was part of the contract governing her investment, but does not specifically allege that she signed it on 5th December, 2006. Even if that had been pleaded (or was sufficiently pleaded by the plea in the statement of claim that the defendant will rely on the bond and documents comprising the same in their entirety for their proper meaning and effect) it would have been put in issue fourteen days later when the plaintiff did not deliver a reply.

63. In the written submissions filed in support of this application the defendant makes the case that when asked to agree to the trial of a preliminary issue, the plaintiff's solicitors declined but did not then say that there was any dispute as to the dates identified in the draft table of facts. That is so, but I do not believe that the defendant is entitled to rely upon any failure to say that the facts were not agreed as an acceptance that they were.

64. The point is also made in the defendant's written submissions that there is no issue in the pleadings that the documents were not signed on the date they bear. This also is true. The plaintiff does not, on the pleadings, deny that she signed the application form on 5th December, 2006 but it is not alleged that she did.

65. Even if the plaintiff did sign the application form on 5th December, 2006, it seems to me that the fact that the possibility of her investing in EGPF was still under discussion until at least 12th December, 2006 makes it unlikely that the date of signature can be definitive.

66. The critical date for the purposes of this application appears to be 13th December, 2006, which is shown on the papers provided to the plaintiff on 16th January, 2007 as the "*start date".* The 13th December, 2006 is not a date which appears in the pleadings or particulars. At para. 31.1 of the first replies to particulars the plaintiff acknowledges receipt of the policy documentation on 16th January, 2007. This, she says, was essential to the formation of the contract. The defendant argues that in the affidavit which the plaintiff swore to ground the application to lift the statutory stay on proceedings against the first defendant, the plaintiff expressly referenced a number of dates, including "*the second named defendant's Investment Bond Contract Schedule of the 13th day of December, 2006*." The plaintiff did make that reference, but she did so immediately after a reference to an Investment Bond Receipt of 16th January, 2007.

67. It would have been better if the plaintiff had clearly and unambiguously specified the date on which she allegedly made her investment but it is clear from para. 31.1 of her first replies to particulars that her case is that the investment date was no earlier than 10th January, 2007, when she paid over her money.

68. It does appear to me to be common case that the plaintiff was provided with papers which showed a "*start date*" for her investment of 13th December, 2006. This was a date which was upwards of three weeks before she paid over her money and upwards of a month before she was told that her proposal (whenever it was made) was accepted. As Mr. Wallace has observed, the plaintiff has steadfastly refused to specify a precise date for her investment. It follows that there is a dispute as to the date of her investment. Certainly the plaintiff does not accept that 13th December, 2006 was the date of her investment.

69. It seems to me that the "*start date*" of the plaintiff's investment gives rise to contested issues of fact, as well, perhaps, as issues of law, not least fundamental questions of offer and acceptance. Without getting bogged down in the detail or attempting to anticipate what arguments may arise, I note that the Investment Bond provides that the first contribution is due on the "*Commencement Date*" of the bond, that details of contributions paid will be shown on the Contract Schedule, and that the Valuation Date for the allocation of units is the Valuation Date immediately following the date on which value is received for the contribution. It seems to me that the issue as to whether the date, or the effective date, of the plaintiff's investment was 13th December, 2006 is a mixed issue of fact and law which is not appropriate to be tried as a preliminary issue of law.

Conclusion

70. It is clear that the facts in this case are not agreed. I am not satisfied that defendant has succeeded in identifying sufficient facts pleaded by the plaintiff as to allow a preliminary issue to be tried as to whether her claim is statute barred and so this application must be refused.