Neutral Citation Number: [2024] EWCA Civ 245

Case No: CA-2023-001396

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MRS JUSTICE DIAS
[2023] EWHC 1527 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2024

Before :

LADY JUSTICE KING
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

- -

Between :

DEUTSCHE BANK AG	**Appellant and Claimant**
- and -	
(1) SEBASTIAN HOLDINGS INC	**Defendant**
(2) ALEXANDER VIK	**Respondent**

- -
- -

Andrew McLeod (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Appellant**
Tom Morris (instructed by **Brecher LLP**) for the **Respondent**
The Defendant did not appear and was not represented

Hearing date : 8 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 14 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

LORD JUSTICE POPPLEWELL:

Introduction

1. This appeal raises a short point of construction on s. 24(2) of the Limitation Act 1980, as to when time commences to run for limitation purposes on interest on costs where the order is for costs to be assessed.

2. The appellant ('DB') brought proceedings against Sebastian Holdings Inc ('SHI'), and following a trial in 2013 before Cooke J, succeeded in its claim for some US$243m. By an order dated 8 November 2013 Cooke J ordered SHI to pay 85% of DB's costs of the action on the indemnity basis, to be subject to detailed assessment if not agreed ('the Costs Order'). An order for a payment on account of costs of £32m plus VAT was made. Cooke J subsequently made an order pursuant to s. 51 Senior Courts Act 1981 that the Respondent, Mr Vik, was liable as a non-party for the payment on account. That order was paid by Mr Vik, but he sought to challenge it up to the Supreme Court and the European Court of Human Rights. Meanwhile by an order dated 10 October 2016 Cooke J made a further non-party costs order against Mr Vik ('the NPCO') in relation to all the costs which were the subject of the Costs Order, as to which no detailed assessment had yet commenced by reason of Mr Vik's pursuit of appeals against the first non-party costs order. Mr Vik also sought to challenge the NPCO. His appeals were unsuccessful.

3. The assessment process commenced in 2017. DB served its final detailed bill of costs on 25 January 2019. The assessment hearing commenced before Senior Costs Judge Gordon-Saker for three days in February 2020. For reasons into which it is unnecessary to go, the assessment lasted an unprecedented 100 hearing days (longer than the trial had taken), spread over three years. The assessment was not concluded until a Final Costs Certificate was issued on 11 May 2023. Shortly before the conclusion of the assessment, on 20 April 2023, the Costs Judge referred to the High Court the issue of construction which arises in the appeal. In the final assessment the Costs Judge disallowed 12 months' interest as a result of DB's delay in pursuing the detailed assessment proceedings.

4. Section 24 of the 1980 Act provides:

   (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

   (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

5. Three aspects of an order for costs to be assessed are common ground. First, an order for the payment of costs to be assessed is a judgment debt within the meaning of the Judgments Act 1838 so as to carry interest pursuant to section 17 of that Act. Secondly, interest accrues from the date of the order, not the date of assessment: *Hunt v R M Douglas (Roofing) Ltd* [1990] 2 AC 398. In this it differs from a judgment for damages to be assessed, on which interest runs from the date of assessment: *Thomas v Bunn* [1991] AC 362, 380. Thirdly, the costs order is not enforceable as a judgment until the detailed assessment has been carried out and the costs liability thereby quantified: *Times Newspapers Ltd v Chohan* [2001] 1 WLR 1859 at [33].

6. Dias J ('the Judge') held that "due" in s. 24(2) means the date on which the interest liability accrues; and that interest on the costs as assessed first became due on the date of the Costs Order on 8 November 2013 and daily thereafter. The result is that DB is precluded from recovering some 3 ½ years' worth of interest on the assessed costs, which is said to deprive it of about £775,000.

7. DB contends that the Judge was wrong to treat "due" in s. 24(2) as referring to the date on which the interest liability accrues. It submits that "due" means payable (in the sense of enforceable, which is the sense in which I will use the word); and that no interest on costs was payable until the costs had been quantified in the Final Costs Certificate in May 2023. In the alternative, DB contends that if the Judge was correct in her construction of s. 24(2), the relevant date is not that of the Costs Order in 2013 but that of the NPCO in 2016, because the NPCO is the judgment debt which it is seeking to enforce against Mr Vik, and it was only upon the NPCO in 2016 that Mr Vik's liability arose for costs payable under the Costs Order and interest thereon.

The Judgment

8. The Judge's reasoning may be summarised as follows. There is a conceptual difference between an amount being "due" and being "payable". The plain and ordinary meaning of the word "due" is that a sum becomes due when the liability "crystallises", by which she meant accrues. This is supported by the fact that an accrued liability which is not yet payable can be set-off against a debt from the judgment creditor; and if an accrued debt is paid before it becomes payable, it ceases to be a debt: it is no longer due. This is reinforced by the contrast between the use of the word "due" in s. 24(2) and the word "enforceable" in s. 24(1). The other parts of the 1980 Act in which the word "due" appears, upon which DB relied, namely sections 19, 20(5) and 22, provide no assistance because they are concerned with the bringing of suit rather than execution.

9. The Judge considered the legislative history of section 24, which originated in sections 40 and 42 of the Real Property Limitation Act 1833, and can be traced into the consolidating Limitation Acts of 1939 and 1980. The history is recounted in detail in the speech of Lord Lloyd in *Lowsley v Forbes* [1999] 1 AC 329. The Judge concluded that this showed that s. 24(1) is concerned with actions on the judgment only, not execution; whereas s. 24(2) is concerned with execution. Since there is no limitation period for enforcement by execution, there was nothing unjust in Parliament having imposed a cut-off point for the recovery of interest; on the contrary, otherwise a judgment creditor could execute a judgment whenever it saw fit and recover interest in full going back decades. She treated this as a powerful policy argument in favour of her construction because it encouraged a judgment debtor to enforce its judgment with due expedition and discouraged the pursuit of stale claims. She derived further support from the fact that the House of Lords in *Lowsley* was seemingly unperturbed that, even in circumstances where enforcement had been delayed beyond six years by fraudulent concealment on the part of the judgment debtor, the blameless judgment creditor could still only recover interest going back six years. Although a judgment creditor might not be at fault in not achieving an assessment within six years, the court had sufficient tools to do justice by issuing interim costs certificates. Conversely, a receiving party who delays unnecessarily may find all or part of the Judgment Act interest disallowed [under CPR Part 47.8(3)]. The two appellate authorities upon which DB relied, namely *Barclays Bank plc v Walters* (unrep) 13 October 1988 and *Toft v Stephenson* (1851) 1 De G M & G 24 (42 ER 461), (1854) De G M & G 735 (43 ER 1955) (sub nom *Toft v Stevenson*), did not dictate any different conclusion.

Submissions

10. Mr McLeod and Mr Morris presented their arguments on the appeal with exceptional skill and economy, to which no summary can do full justice. I will refer to them in the course of my analysis and conclusions.

Principles of statutory interpretation

11. There was no real dispute about the principles applicable to statutory construction, following the recent Supreme Court decisions in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3 [2023] AC 255; and *Potter v Canada Square Operations Ltd* [2023] UKSC 41 [2023] 3 WLR 963. So far as relevant they can be summarised as follows:

    (1) Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words under consideration. Words and passages in a statute derive their meaning from their context, and must be read in the context of the section as a whole, a relevant group of sections, or the statute as a whole.

    (2) One aspect of this context is that there is a presumption that where the same words are used in an Act, they have the same meaning; and that where different words are used they have a different meaning; the weight of any such presumption will itself depend upon the context: *Bennion, Bailey & Norbury on Statutory Interpretation* 8th edn. section 21.3.

    (3) The words are the primary source by which meaning is ascertained. External aids to construction can assist if they enable the court to identify the purpose of a statutory provision or the mischief at which it is aimed, but these play a secondary role to the language used by Parliament. They cannot displace the meaning conveyed by the words of a statute which after consideration of the context are clear and unambiguous and do not produce an absurdity.

    (4) In the case of consolidating legislation it is unnecessary and impermissible to look to the antecedent legislative history for guidance unless there is real difficulty and ambiguity in the statutory language which is incapable of being resolved by construing the words used in the statute.

Analysis

12. I shall approach the issue under four headings: (1) the language of the section and the Act; (2) the authorities; (3) policy; and (4) the legislative history.

The language of the section and the Act

13. I start with the ordinary meaning of the word "due", without resort to context. Each side submitted that its natural meaning favoured the construction for which it contended. Mr McLeod submitted that its natural meaning was payable. Mr Morris submitted that its natural meaning was owing (which is the expression I shall use to mean an amount in respect of which a liability has arisen notwithstanding that it may be payable at a future time).

14. I would reject both submissions. As a matter of language, devoid of context, "due" may mean owing or payable. If a lease provides for rent to accrue from day to day but to be payable monthly in arrears, one might equally say that the rent falls due daily or that it falls due at the end of the month. Either is a natural use of language.

15. Others have expressed the same view. In *In Re Fastnedge Ex parte Kemp* (1874) 9 Ch App 283, Mellish LJ said at p. 387:

> "Now, the words "debts due to him" are certainly words which are capable of a wide or a narrow construction. I think that prima facie, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word "due" is constantly used in the sense of "payable"…."

16. In *In re Stockton Malleable Iron Company* (1875) 2 Ch D 101 Sir George Jessel MR said at p. 103:

> "On the 7th article the argument addressed to me was this. It was said that "moneys due" included moneys owing, but not at present payable. To that I answer, adopting the criticism of Lord Justice Mellish in *Ex parte Kemp* on the words of the Bankruptcy Act, that the word "due" may mean either owing or payable, and what it means is determined by the context."

17. Mr Morris also relied on the Judge's reasoning that when a debt is owed but not payable, it can cease to be owing if paid or subject to set off before payment is due. This too seems to me entirely neutral. Payment or part payment of a debt which is owing does indeed discharge the debt pro tanto: to that extent the debt ceases to be owing. A payment on account of as yet unassessed costs reduces the liability for costs, albeit that the liability is not yet ascertained or payable. However, that tells one nothing about whether "due" in s. 24(2) means owing or payable. If it means payable, payment of or towards what is owing prior to the time for payment will also necessarily reduce or extinguish what is payable when the time would otherwise come for payment because it reduces or extinguishes what is owing. Payment will therefore reduce what is "due" whether due means owing or payable. The same is true of set-off. A bank's debt to a customer on a current account is not payable until demand (*Joachimson v Swiss Bank Corporation* [1921] 3 KB 110), but the bank can nevertheless reduce the amount owing on the account by an authorised debit by way of set-off, for example agreed bank charges.

18. The word "arrears", however, is not neutral in the same way as "due", and its place in s. 24(2) supports DB's construction. There are no "arrears" of an amount owing until it has become payable. In an interest only mortgage with interest accruing daily but payable in arrears at the end of the month, one would not speak of there being arrears of interest unless and until there was a failure to pay the interest at the end of the month. As Mann CJ put it in the Australian case of *Paice v Ayton* [1941] VLR 63, 68: "The word arrears presupposes a time fixed for payment of a sum of money and the lapse of time thereafter without payment."

19. Section 24(2) bars recovery of "arrears of interest". That which must have become due in order to commence time running is "*the* interest", which is a reference back to the "arrears of interest", recovery of which is precluded by the subsection. In other words the starting

point for the commencement of the running of time which is identified in the subsection is "the date on which the [arrears of] interest became due." That can only mean when the interest became payable, rather than owing, because there are no arrears of interest unless and until the interest is payable.

20. Mr Morris, like the Judge, relied on the contrast between the use of "due" in s. 24(2) and "enforceable" in s. 24(1). However, if "due" in s.24(2) means payable it becomes necessary to use a different word in s. 24(1) because s. 24(1) applies to judgments of all kinds, and is not confined to money judgments. Conversely the word "enforceable" could not have been used in s. 24(2) in place of "due" without recasting the language of the section. The difference in the wording does not support Mr Vik's construction.

21. Further support for DB's construction lies in the use of the word "due" in other sections in the same Part of the Act, and in particular section 19 of the Act which is concerned with "arrears of rent"; and sections 20(5) and 22 which are concerned with "arrears of interest".

22. Section 19 provides:

> "No action shall be brought, and the power conferred by section 72(1) of the Tribunals Courts and Enforcement act 2007 shall not be exercisable, to recover arrears of rent or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due."

23. Section 7(1) of the 2007 Act which is there referred to provides that a landlord under a lease of commercial premises may distrain (by taking control of goods) to recover from the tenant rent "payable" under the lease.

24. This clearly makes time start to run from when the rent is payable, not when it accrues. That is the natural meaning of when *arrears* become due. It also makes practical sense. If a commercial lease has a rent 'holiday' by providing that rent is to accrue from day to day but that payment should start in arrears only after 7 years unless the lease is earlier determined, it would be surprising if s. 19 were to have the result that the first years' rent could never be recovered, which would be the result of "due" meaning owing.

25. Mr Morris accepted that the effect of s. 19 was as I have indicated, but sought to draw a distinction between the wording of s. 19, which talks of when *arrears* become due, and that of s. 24(2) which talks of when *interest* becomes due. That is not, however, a relevant distinction, because as I have explained, s. 24(2) uses the word interest to mean arrears of interest.

26. Mr Morris had a further argument on s. 19 (which he also advanced in relation to s. 20(5) and 22). I confess I found it elusive, but I understood it to be as follows. Section 19 makes time run from when rent is payable, not owing; but this is not, in his submission, because "due" has a different meaning from its meaning in s. 24(2); in s. 19 it also means owing, not payable. However, because the section refers to an action being brought, which presupposes an enforceable obligation to pay rent, it would have the same practical effect as if "due" meant payable.

27. I am unable to accept the argument because it conflates the point from which the limitation period starts to run (when arrears become due) with the point at which it stops running (the bringing of an action). It does not, therefore, have the same effect as treating due as

meaning payable. The (false) logic of the argument would not in any event assist Mr Morris' construction of s. 24(2), in which it is "recovery" which stops time running, which like an action in s. 19, presupposes that the amount has become payable.

28. Sections 20(5) and 22 of the Act use the word "due" for the purposes of commencing time running in relation to recovery of interest. Section 20(5) provides:

> "Subject to subsections (6) and (7) below, no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due."

29. Section 22 provides:

> "Subject to section 21(1) and (2) of this Act—
>
> (a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued; and
>
> (b) no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due."

30. Section 20(5) was the subject of a decision of this court in *Barclays Bank plc v Walters*. In that case the bank was seeking to recover interest under a five year loan agreement made on 21 July 1976, secured by a mortgage, under which there was a variable rate of interest, 5% above base, to be compounded six monthly. There were to be monthly repayments by the borrower, which were intended to result in both principal and interest being fully repaid at the end of the five year term. Some 18 months into the term, in about January 1978, the borrower defaulted. A claim was commenced by the bank in February 1985. There were a number of issues at the trial, but the relevant issue on the appeal arose out of an argument on behalf of the borrower that the interest elements added to the principal at the six-monthly rests in June 1978, December 1979 and December 1978, being more than six years prior to the commencement of proceedings, were time barred under s. 20(5) of the 1980 Act. Nicholls LJ, with whom O'Connor LJ agreed, rejected this argument. His critical reasoning is contained in the following passage:

> "But section 20(5) is intended, in my view, to give a mortgagee six years in which to sue for the interest after the interest has become due. It is intended that his right to recover interest shall not be barred until he has let pass six years during which he could have taken action. "Due" in the phrase "from the date on which the interest became due", in my opinion, means due for payment, and due for payment means due for payment in accordance with whatever terms have been agreed between the parties to that end. Those terms may be in the mortgage deed itself, or they may be found elsewhere. Take this case. If the terms of the loan agreement, for example, were that nothing was payable for principal or interest for five years, plainly the bank could not have sued for interest until the end of that period. Interest would be debited by the bank to [the borrower's] account in the ordinary way at intervals during the

> five year period, but it would not become due for payment or, in my view, due within section 20(5), until the expiration of the five year period. As it seems to me, in order to succeed on this point [the borrower] has to show that in this case payment of interest was not postponed to the end of the five year period, but it became due at some earlier date. The only candidate for an earlier date for payment consists of the monthly dates on which the monthly instalments became due, so that on this footing, a six year limitation period began in respect of each intended monthly instalment as each month passed by without any payment being made. However, the insuperable difficulty on that point in this case is one of evidence."

31. The evidential findings of the trial judge on this question were considered to be insufficiently clear for the borrower to have discharged the burden, which was treated as being on him, of showing that interest was payable monthly. O'Connor LJ, having agreed with Nicholls LJ for the reasons he gave, added this about the evidential position:

> "I would only add that I am sure that [the borrower] will understand that he would have been very surprised if, when he fell ill in 1977 and the first instalment of £141 or £135 according to the going rate at the time had not been paid, he got a summons taking him to the county court and asking for that sum to be recovered. On the evidence available, particularly that of the bank manager, who said that there was no default clause in the loan agreement, it seems to me to be quite wrong, merely because there was a going arrangement for a variable sum to be paid monthly, to deduce that the bank had taken the right to recover any failure to pay the instalment by action immediately it had not been paid. It is for those reasons that I have come to the conclusion that the limitation defence is not made out."

32. This decision, that "due" in section 20(5) means payable, is not merely persuasive but binding on us in respect of that subsection. The Judge thought it significant that the decision was ex tempore, but it is none the less binding for that; she also thought it significant that there was no consideration of the legislative history, but there is nothing in that history which casts any doubt on the correctness of the decision.

33. Mr Morris advanced the same argument as for s. 19, namely that due meant owing, consistently with the meaning of the word in s. 24(2) but that the effect of the section was the same as if it meant payable because it was concerned with *actions* to recover interest. However, not only is that a mistaken argument, for the reasons I have already given, it is inconsistent with the clear reasoning of Nicholls LJ, which expressly addresses the meaning of the word "due", and treats that word in the subsection as meaning payable.

34. The same points arise in respect of s. 22(b), although there has been no judicial decision on it.

35. The use of due to mean payable in s. 20(5) and s. 22 is another clear pointer in favour of due meaning payable in s. 24(2), because of the presumption that the same word conveys the same meaning when used for the same purpose of defining when time starts to run in relation to recovery of interest. The presumption is a strong one in the present context and there is nothing to rebut it.

36. For these reasons, the language of the subsection, in its surrounding context in the Act, dictates that "due" means payable.

Authority

37. There were two other authorities at appellate level upon which the parties relied. Mr McLeod relied on *Toft v Stephenson*. In that case land had been sold in March 1811 with completion to take place in May 1811. The purchaser went into immediate possession but there was no conveyance in May 1811 and no payment of the price. Some three decades later, in 1844, the successors in title to the vendor sought to enforce a lien on the property for the amount of the purchase money plus interest running from May 1811 when completion had been due to take place. There had been an acknowledgement of the principal sum at a time which meant that the principal was not time barred under s. 40 of the Real Property Limitation Act 1833; but it was argued that the interest was time barred under s. 42 of that Act, which was the ultimate precursor of s. 24(2) of the 1980 Act, and barred recovery of arrears of interest six years after it "shall have become due". In 1854, some 10 years after the commencement of proceedings, the argument was rejected by the Court of Appeal in Chancery. This was not, however, as Mr McLeod submitted, because the interest had become due but not payable in May 1811. It is clear from the judgment of Turner LJ that the essential reasoning for the decision was that without a conveyance of the property in May 1811, neither the principal sum nor interest became due in either sense of the word, because the right to payment of the price could not arise without a conveyance of the property. Interest did not become owing because the principal was not owing. Turner LJ said:

> "Now in this case interest could not be due until the principal money became payable. If no title was made, there was no right to principal or interest. It seems to me that the time has not yet arrived at which the money is due."

38. As Males LJ observed during argument, it is an example of a 19th century case in Chancery in which a claim adjudicated upon over 40 years after the event was treated as premature. It is not, however, a case which supports either of the rival constructions of s. 24(2), as the Judge correctly held; it is equally consistent with either.

39. Mr Morris relied on *Lowsley* as supporting his construction. However, that decision is also neutral on the point at issue in the current appeal. In that case the plaintiffs obtained judgment in 1981 for £70,000 but the defendant went abroad, and the judgment debt remained unpaid. In 1992 the plaintiffs discovered that the defendant owned property. They obtained leave to enforce the judgment (which was necessary then under the Rules of the Supreme Court if seeking to execute more than six years after judgment, as it remains now under CPR Rule 83.2(3)(a)). The master granted a charging order nisi over the property and a garnishee order nisi over the defendant's bank account. In each case the amount included interest from the date of the judgment in 1981, a period of some 11 ½ years. The defendant sought to set aside the orders on the grounds that execution of the judgment was barred by s. 24(1). Tuckey J held that s. 24(1) applied only to fresh actions on a judgment, not other forms of execution, and did not apply to the garnishee or charging orders made by the master; but that the interest recoverable was limited to six years under s. 24(2). He also held that s. 32 of the Act did not apply to s. 24(2). The Court of Appeal upheld the decision on s. 24(1) but reversed that on s. 24(2). The House of Lords restored the decision of Tuckey J. In upholding the decision of both the lower courts on s. 24(1), Lord Lloyd, with whom the other members of the Judicial Committee agreed, traced the history of the subsection from its origins in section 40 of the Real Property Limitation Act 1833, concluding that the Parliamentary intention in the 1980 Act, when the period was reduced from 12 years to 6, was to distinguish between actions and other forms of

execution, Parliament intending to adopt the construction put upon identical language in s. 2(4) of the Limitation Act 1939 by the Court of Appeal in *W. T. Lamb & Sons v Rider* [1948] 2 KB 331 (notwithstanding that Lord Lloyd considered that decision to be wrong). The decision that s. 24(2) covered interest in all forms of execution was based simply on the breadth of the language, barring "recovery", language which had remained the same since the enactment of s. 42 of the 1833 Act from which it ultimately derived (at pp. 342F-343B). Lord Lloyd did not address what if any policy reasons there might be for such a distinction from s. 24(1).

40. Mr Morris sought to derive support from the way in which the decision on s. 24(2) was expressed at p. 343B by Lord Lloyd, which was to endorse the conclusion of Tuckey J and restore his order; although the parties have not found a copy of that order in any report, Mr Morris relied in particular upon what Lord Lloyd said about the issue which had given rise to the order which he defined at p. 334C as "… whether, when a judgment is executed after six years, interest on the judgment is limited under section 24(2) to a period of six years before the date of execution." This, he submitted, was judicial endorsement of an approach of counting six years back from the time of execution. This is to place more weight on the passage than it will bear. In that case the judgment was for a fixed sum, £70,000, so that there was no issue about when interest "became due". There was no distinction to be drawn in that case between when it was owing and when it was payable, both of which occurred daily under the Judgments Act from the date of the judgment. Accordingly counting back six years from the time of execution gave effect to s. 24(2) on the facts of that case, irrespective of the rival constructions of "due" which arise on the present appeal.

41. The parties referred to a number of other cases at the margins of their arguments, but none provides any useful guidance on the point at issue in the appeal.

Policy

42. The English law on limitation of actions has been subjected to regular criticism for its uncertainty, complexity and lack of coherence. The history of statutes of limitation is set out in the Law Commission Consultation Paper CP151 dated January 1998 ('the Consultation Paper') at paragraphs 1.6 to 1.20, leading to the conclusion at 1.21 that "… the law of limitations has been subjected to a wide range of ad hoc reforms, following the recommendations of reform bodies charged with recommending reforms of particular pockets of law. This accounts for much of the law's incoherence and complexity". The attempt by the Law Commission to remedy, or at least minimise, these deficiencies in its Report of 3 April 2001 (Law Com No 270) failed when its recommendations were not adopted by Parliament.

43. One must therefore approach questions of policy as a guide to interpretation of statutes of limitations with a degree of caution. Nevertheless, it is legitimate to seek to identify what policy considerations justify removing a person's ability to exercise their rights by reason of lapse of time; and to examine whether such policy reasons favour one or other of the rival interpretations of s. 24(2) of the 1980 Act.

44. Paragraphs 1.22 to 1.38 the Consultation Paper consider the strands of policy which have been identified as justifying the statutory limitation of actions. In summary they represent a balance between the fundamental and core function of a civil justice system to enable a claimant to vindicate their legal rights; and the countervailing interests applicable to claimants, defendants and the state by reason of lapse of time.

45. As to the interests of defendants these have been identified as twofold. First, there are evidentiary considerations which may put a defendant at a disadvantage in having to meet claims after a lapse of time, including loss of documents, unavailability of witnesses and lapse of memory: see for example *Thomson v Eastwood* (1877) 2 App Cas 215, 248 per Lord Hatherley; and pp. 8-9 of the Law Revision Committee Fifth Interim Report (Statutes of Limitation) (1936) Cmnd 5334) leading to the Limitation Act 1939. Secondly, limitation gives certainty for a defendant after a lapse of time. This is in part a question of peace of mind, which led to statutes of limitation being described as "acts of peace" or "standards of repose" (e.g. *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540); but more substantively, it prevents unfairness to defendants who may have changed their position in ignorance, or without expectation, of the right being asserted against them: *Thomson v Eastwood* at p. 249.

46. As to the interests of the state, one of the justifications for limitation periods is the concern that after a lengthy lapse of time it will no longer be possible to have a fair trial of disputes. This is for the same evidentiary reasons which protect the defendant's interest, but focuses on the state's own interest in the efficient and effective administration of justice. There was also a public interest in promoting finality and legal certainty, particularly in the context of unregistered title to land (see Consultation Paper para 1.34).

47. As to the interests of claimants, statutes of limitation have been seen as a means of encouraging claimants to take steps within a reasonable period to enforce their rights, by depriving the claimant of the remedy if not pursued timeously. This might be described in modern slang as a "use it or lose it" justification. Lord Atkinson said in *Board of Trade v Cayzer Irvine & Co* [1927] AC 610, 628:

> "The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use."

48. These policy considerations support a construction that "due" means payable in section 24(2). As to the defendant's position, the section only applies once there has been a judgment which establishes the defendant's liability. Evidentiary considerations about a defendant's ability to meet a claim no longer apply, as Lloyd LJ observed in *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156 [2009] 2 All ER (Comm) 164 at [36]. Nor is a defendant thereafter a deserving candidate for peace of mind. If the judgment creates a judgment debt which is immediately payable he should be expected to pay it. If it is owed but not yet payable because the amount is being assessed he can prevent interest accruing by making a payment on account of his established liability.

49. There is no statutory limitation period for the execution of judgments generally, to which s. 24(1) does not apply. As the House of Lords held in *Lowsley*, that was the clear parliamentary intention of the 1980 Act. CPR rule 83.2(3)(a) requires permission to issue execution more than six years after judgment, reflecting an equivalent filter dating back to the first Rules of the Supreme Court scheduled to the Supreme Court of Judicature (1873) Amendment Act 1875; but this creates no statutory bar.

50. Nor is there any statutory limitation period within which the receiving party has to commence or conclude a detailed assessment of costs. CPR rule 47.7 provides that a

detailed assessment is to be commenced within 3 months of the conclusion of proceedings (broadly speaking). However, if the receiving party fails to do so, the paying party may seek an order that they be commenced by a particular time (rule 47.8(1)), which may include the sanction that part or all of the costs will be irrecoverable. If the paying party does take this course, rule 47.8(3) provides that the only sanction for failure to commence or pursue an assessment expeditiously is a discretionary disallowance of interest unless there has been misconduct within the meaning of CPR rule 44.11. Again there is no statutory bar. Subject to these discretionary provisions, an assessment may be commenced many years, even decades, after a costs order is made, just like other forms of execution of judgment debts which are due.

51. It is not difficult to understand why, as a matter of policy, there is no statutory bar on execution of judgment debts, or assessments of costs, many years or even decades after the judgment is given. Enforcement steps can only be taken where the judgment creditor is aware of assets amenable to effective enforcement. A judgment creditor may not know of any assets against which it can enforce until long after the judgment, even in the absence of concealment, and their discovery may be a matter of happenstance. The judgment debtor may not have such assets at the time, but may acquire them later. A judgment creditor is not to be put to the potentially expensive and time consuming burden of conducting a detailed assessment of costs if it knows of no assets against which it will be able to enforce the costs order once assessed. A judgment creditor should not be deprived of his ability to vindicate his rights by enforcement merely because it is many years or decades before he can reasonably be in a position to do so. There is no bar based simply on lapse of a defined period. The law does not treat a judgment debtor as entitled to the peace of mind of knowing that after a fixed period they are absolved from complying with the court order against them.

52. So far as concerns the interests of the state, the same is true. The interests of the state are that its orders should be obeyed and performed, not that judgment debtors should avoid paying.

53. So far as the claimant's position is concerned (or in the costs context, that of the receiving party, which might be a defendant) the use it or lose it rationale dictates that time should not start to run until that party is in a position to enforce their rights. Until the conclusion of the assessment, the receiving party cannot enforce the right to interest. This dictates that time should not start to run in s. 24(2) until the interest is payable. I recognise, of course, that it is possible for limitation periods to expire before claimants are in a position to enforce their rights. Where this possibility arises, Parliament has in certain pockets of the law sought to protect claimants by making time run from the date of knowledge and/or providing for a discretion to extend the period, for example in cases involving latent damage, personal injuries and consumer protection; and it has more generally given further protection in the case of fraud concealment or mistake under s. 32 of the 1980 Act. These interventions have been introduced in a piecemeal and ad hoc way, and have left the possibility in some cases of time expiring before a claimant has had a reasonable opportunity to exercise their rights. But that is unsatisfactory and anomalous, and if the language permits, a statute of limitations should be interpreted in a way which avoids this unjust result.

54. Mr Morris submitted that the circumstances of the present case, in which the assessment took such a long time, were highly exceptional. I would accept that the length of the assessment in this case was highly exceptional, but not that it will only be in exceptional

circumstances that the six years might expire, on his construction, before a judgment creditor can enforce a liability for interest on costs. Orders for costs to be assessed may be made by way of interlocutory order throughout proceedings, and the assessment will not normally commence until the conclusion of the proceedings. That is the presumption imposed by CPR rule 47.1. In heavy litigation, with interlocutory or final appeals, that may well be more than six years after the first interlocutory or costs order. Mr Morris suggested that in such a case injustice could be avoided by the receiving party seeking permission to start an assessment before conclusion of the proceedings if the six year deadline were approaching. But this would not provide a satisfactory solution for a number of reasons. Not all costs orders are capable of assessment until the conclusion of the litigation; for example, a party given permission to amend may be ordered to pay costs of and occasioned by the amendment, in which case assessment may be dependent on the future course of the litigation. Moreover it may be impossible to tell who is going to end up being the paying party until the final resolution of the proceedings, so that until then the receiving party under a particular interlocutory costs order will not know whether having a detailed assessment is in its interests. Further, the commencement of a detailed assessment does not stop time running; it is only at the conclusion of the assessment when the costs liability becomes ascertained that any question of recovery of interest on it arises; a costs judgment creditor under an interlocutory order cannot protect its limitation position merely by commencing a detailed assessment of those costs prior to the conclusion of the proceedings. Moreover since it is only the completion, not commencement, of assessment which stops time running, Mr Morris' construction provides an incentive for the paying party to create delay in the assessment process. Finally it would not be in the interests of the efficient administration of justice in lengthy litigation to encourage piecemeal detailed assessments of individual costs orders.

55. The Judge's suggestion that injustice to the costs judgment creditor can be avoided by the issue of interim costs certificates ignores the possibility that an assessment will not have been commenced or sufficiently progressed so as to enable an interim costs certificate to be granted within six years of the costs order. It is also only a partial protection of interest on costs because interim certificates are not for the full amount of the costs which will be the subject matter of a final certificate.

56. I recognise also that s. 24(2) imposes a cap of six years' worth of interest on either side's case. To that extent it represents a statutory policy which does favour judgment debtors over judgment creditors. That is the effect of the decision of the House of Lords in *Lowsley* in holding that s. 24(2), unlike s. 24(1), was not confined to interest claimed in actions on a judgment but applies to all forms of execution, although as I have said, that reasoning was based solely on the language of the statute rather than any policy considerations. The Judge treated this as providing a strong policy reason in favour of Mr Vik's construction of s. 24(2) in that otherwise a judgment creditor could execute a judgment whenever they saw fit and recover interest going back many years, if not decades. However, this ignores the fact that the judgment debtor could prevent interest accruing by meeting their liability to pay the judgment debt. Moreover enforcing a judgment debt decades after it is given is exactly what the judgment creditor *is* permitted to do in terms of the timing of execution generally, by virtue of the limited scope of s. 24(1), subject only to a discretionary filter of seeking leave. If that is permissible in relation to execution generally, and for good reason, the anomaly, as it seems to me, is the cap on interest in s. 24(2), which results in the judgment creditor being deprived of compensation for being out of their money by reason of a cap on recoverable interest, thereby conferring the benefit of withholding payment on

the recalcitrant judgment debtor, in circumstances where the conduct of the judgment creditor is entirely reasonable. If s. 24(2) is to have this anomalous effect, it should at least be confined to cases in which the judgment creditor has the full six years from the time when their judgment debt is enforceable.

57. However that may be, and whether or not the interest cap in s. 24(2) is anomalous, I cannot identify any justification for such a cap, other than the use it or lose it policy consideration, which in this context becomes use it or lose the interest on it. If that is the justification, it favours DB's construction of s. 24(2) which is that time should not start to run until there is at least the ability to commence enforcement.

58. As to the Judge's point that in *Lowsley* the House of Lords were seemingly unperturbed by the idea that there was a six year cap on interest even where there was fraud concealment or mistake, by finding that s. 32 had no application to s. 24(2), this does not in my view assist Mr Vik's case. If there is no exception for the six year cap even in cases of fraud concealment or mistake, that is a further reason for construing s. 24(2) in a way which does not make time start to run until at least the receiving party is in a position to enforce payment of the judgment debt.

The legislative history

59. This is not a case in which it is either necessary or permissible to resort to the legislative history of what is a subsection in a consolidating statute. The meaning derived from the language of the subsection, in the context of the language of the surrounding sections in the same part of the Act, is not subject to any real ambiguity or difficulty, despite the ingenuity of Mr Morris' submissions. It is a meaning which is consistent with, and gives effect to, the policy considerations which underlie statutes of limitation.

60. However even if resort to the legislative history were permissible, it would do nothing to support Mr Vik's case. The language of s. 24(2) has its ultimate origin in s. 42 of the 1833 Act, which was not concerned with interest on judgments as such, but with interest on money charged on land or rent; or damages in respect of such interest. Section 42 was enacted before interest became payable on judgments under the Judgments Act which was passed some five years later. When the consolidating legislation was passed in 1939 and again in 1980, there is no reason to think that Parliament had in mind cases where a distinction needed to be drawn between interest on a judgment debt which was due and such interest being payable. There may be judgment debts other than orders for costs to be assessed in which the distinction arises, but neither side was able to provide us with an example. In short, there is nothing in the legislative history to support Mr Vik's case, even were it a permissible source of guidance.

DB's alternative case

61. DB's alternative case does not therefore arise for decision.

Conclusion

62. For these reasons I would allow the appeal.

LORD JUSTICE MALES :

63. I agree.

LADY JUSTICE KING :

64. I also agree.