Neutral Citation No: [2022] NIMaster 5 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **[2022] NIMaster 5** *ICOS No:* *Delivered:* **28/06/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

CHRISTOPHER JAMES GORDON

FIRST PLAINTIFF

CHRISTOPHER GORDON acting in capacity as director of ORIANNA INVESTMENTS LIMITED

SECOND PLAINTIFF

CHRISTOPHER GORDON acting in capacity as director of FLETCHER GORDON LIMITED

THIRD PLAINTIFF

AND

ULSTER BANK LIMITED

FIRST DEFENDANT

ROYAL BANK OF SCOTLAND PLC

SECOND DEFENDANT

VARIOUS NAMED INDIVUDUALS (unrelated to this application)

THIRD TO NINETEENTH EFENDANTS

AND

MR ANDREW BAILLIE

TWENTIETH DEFENDANT

PRUDENTIAL REGULATION AUTHORITY

TWENTY-FIRST DEFENDANT

FINANCIAL CONDUCT AUTHORITY

TWENTY-SECOND DEFENDANT

MASTER McCORRY

Introductory

[1] This is an application by the 20th defendant Andrew Baillie, the 21st defendant, the Prudential Regulatory Authority ("PRA") and the 22nd defendant the Financial Conduct Authority ("FCA"), which I will refer to jointly as the "regulatory defendants", to strike out the plaintiffs' pleadings pursuant to Order 18, Rule 19 (1) of the Rules of Court, on the grounds that: (i) they fail to disclose a reasonable cause of action, (ii) are an abuse of the process of the court, and are frivolous; and pursuant to the inherent jurisdiction of the High Court.

[2] The proceedings have a convoluted history and in fact encompass two actions. In the first (16/016825) the plaintiffs are Mr Gordon and Orianna Investments Ltd. against the sole defendant the Ulster Bank and were issued when he was legally

represented. The second proceedings (19/020559) were issued by Mr Gordon as a personal litigant, in his personal capacity and as a director of Orianna and Fletcher Gordon Ltd, against the Ulster Bank and the Royal Bank of Scotland (1st and 2nd defendants), a plethora of persons employed by the banks (3rd to 19th defendants) and the three regulatory defendants.

[3] The plaintiffs served a draft amended statement of claim on 19 May 2020, pursuant to a direction of the court at a hearing on 16 March 2020. At that hearing the court permitted the plaintiffs an opportunity to re-cast their case but obviously could not anticipate the actual amendments or grant leave to amend in those terms. The defendants therefore see their application as an objection to the amendments proposed in the draft, which the plaintiffs concede they are at liberty to do. This is not at all an unusual situation in applications such as this and both parties agree that it is the case as pleaded in the amended draft that is the subject matter of the application. Whether it is viewed as an objection to the proposed amendment or application to strike out as if the draft is an amended statement of claim, does not matter as long as the court applies the same principles, in this case those relating to strike out pursuant to Order 18, rule 19 (1) (a) to (d), which is the basis on which the parties approached the case in their submissions at hearing and in their written submissions. It does however have a bearing on the order that would result. I will therefore treat the application as one for leave to amend the statement of claim in the form of the amended statement of claim served 16 March 2020, with the defendants objecting in the same terms as the application to strike out.

[4] Depending upon the outcome of the application the plaintiff may move to consolidate the two actions and reduce the number of parties. It is not clear whether this just concerns the defendants sued or includes the number and identity of the plaintiffs. As regards the latter question, the defendants raise issues as to Mr Gordon's standing and capacity to sue on behalf of some of the plaintiffs, which will be considered later in this judgment. As regards the former, the defendants appear to be just five, the two banks and what the plaintiff in the draft amended pleading

refers to as the third, fourth and fifth defendants, which are the three regulatory defendants in the original action. As there has been no amendment of the writ, or application for leave to amend, for the purpose of this judgment I propose to disregard the plaintiffs' designations and continue to refer to them as the regulatory defendants or the 20th, 21st and 22nd defendants.

The Factual Background

[5] The action concerns loans and interest rate hedging products provided to the first plaintiff, Mr Christopher Gordon, by the Ulster Bank, to finance the purchasing and renovation of properties in Portrush. His business was affected detrimentally by the property crash and eventually in March 2010 his loan accounts were transferred to the GlobalRestructuring Group (the "GRG"), a division within the second defendant the Royal Bank of Scotland. Some of its activities have attracted substantial public interest and indeed criticism. The plaintiffs sues the banks for their alleged unlawful actions in relation to the granting of loans and the management of accounts, including the transfer to the CRG and the actions of the CRG when the plaintiffs' accounts were with them. He also sues the regulatory defendants for their actions and failings in the regulation of the banks, which he says allowed those banks to act unlawfully.

[6] The GRG was established by Royal Bank of Scotland in the wake of the banking crash and consequential government bail-outs, as a "turnaround division" to enable it to remove bad debts from its books, downsize portfolios and divest itself of risky loans (Tomlinson Report). Other financial institutions put in place similar measures but there were concerns about the strategy adopted by some banks to improve their financial performance and its impact on good and viable businesses, in particular allegations of banks unnecessarily engineering defaults by business borrowers to remove the business from local management and into their turnaround division, so as to generate revenue through fees, increased margins and devaluation of assets. Lawrence Tomlinson, a senior civil servant in the Department for Business, Innovation and Skills was commissioned to investigate and report upon these

concerns, and his report was critical of the practices of such turnaround divisions, in particular the Royal Bank of Scotland's GRG. It is fair to say that the allegations now made by the defendants are typical of the sort of practice found by Tomlinson to have occurred, but I emphasize that is not to say that it is to be concluded without further question that it happened in the present case.

[7] On 21 June 2006 and 7 July 2006 the first defendant (Ulster Bank) issued facility letters to Orianna Investments Ltd. to fund the purchase of development properties in Portrush, which were signed and accepted by the Christopher Gordon on behalf of Orianna. On 20 June 2007 a further facility letter offering a loan of £1,350,000 was issued to Orianna, which was accepted and signed by Christopher Gordon. The plaintiffs submitted a planning application for a mixed-use scheme incorporating residential and commercial units. On 2 July 2008 a further facility letter was issued offering an overdraft on Christopher Gordon's account of up to £200,000 for refinancing of the existing loans again accepted and signed by Christopher Gordon.

[8] On 7 October 2008 the chairman of the second defendant, Royal Bank of Scotland, notified the Chancellor of the Exchequer of the bank's impending insolvency resulting in a bank rescue practice leading to its recapitalisation on 1 December 2008. On 9 November 2008 it transferred the basis for the interest rate from the Bank of England base rate to the London Interbank Offered rate ("LIBOR") and following this on 28 November 2008 the Ulster Bank issued a facility letter to Orianna under which the interest rate on the overdraft was changed to the LIBOR rate, an offer of a loan of £1,1,000,000 for further property purchases with the interest rate to be based on "Cost of Funds" rather than the Bank of England base rate,
refinancing of the existing loans at the LIBOR rate and a swap facility based on an ISDA Master Agreement for £95,000 and an acceleration clause. Again Mr Gordon accepted and signed this on behalf of Orianna.

[9] In February 2009 Christopher Gordon was assured by Jason McKnight at the Ulster Bank's Coleraine Business Centre that the Portrush project would be funded by the bank. A further facility letter followed on 25 February 2009 offering 2 loans, each of £1, 1,000,000, for property purchase and refinancing with interest to be calculated against Cost of Funds, refinancing of the existing loans with interest on a LIBOR linked rate, a SWAP facility in respect of the two new loans (each of £1, 1,000,000), and requiring a letter of guarantee by Mr Gordon for £225,000. Again this was accepted and signed by Mr Gordon. On 24 November 2009 planning permission for the Portrush project was granted and Mr Gordon submitted a credit application for construction funding. This was refused but on 14 January 2010 Jason McKnight represented to Mr Gordon that if he sold a specified property in Portrush as well as up to 3 apartments he would get the construction funding.

[10] On 26 March 2010 the plaintiffs' accounts were transferred to CRG. A new facility letter was sent the same day. This offered a series of loans for refinancing the existing loans, and additional loans with interest calculated against Cost of Funds or the "three month LIBOR rate". A further condition specified an increased interest margin across all variable facilities to increase to 3% above the LIBOR rate unless at least £800,000 was repaid by 15th June 2010. There was also a ISDA Master Agreement SWAP facility in respect of one of the £1, 1,000,000 loans. Mr Gordon was told by Jason McKnight the following day that if the facility letter was not signed Orianna would be put into "recoveries". He reached an agreement with a new manager at the Coleraine Business Centre (Mervyn Linton) on the basis of which he signed and accepted the facility letter. On 19 July Mervyn Linton warned that Orianna need to meet agreed debt reduction to get funding. In May 2011 the banks removed £30,000 from Mr Gordon's account. Mr Gordon applied for the Urban Redevelopment Grant Scheme receiving an initial positive response but no guarantee of an offer. On 14 May 2012 RBS informed Mr Gordon that further development funding was not considered a viable option at that stage.

[11] On 21 May 2012 Mr Gordon sent two files of evidence in respect of his complaints about the fixed term two year loans with SWAP and the way that interest was being applied. On 17 June 2012 the Ulster Bank's computer developed a fault (the "IT glitch") which the plaintiffs alleged was the result of an IT patch applied with the purpose of obscuring the fact that it was applying interest for the full term of loans at the rate applicable when the loans were taken out (they had of course fallen since then). The banks told Andrew Tyrie MP and chair of the Treasury Select Committee that the IT glitch was due to "a routine software upgrade". In April 2012 the Ulster Bank called in the plaintiffs' loans and appointed O'Connor, Kennedy Turtle as receivers. The plaintiff alleges this followed, and by implication was prompted by, his complaint about the IT glitch.

[12] The plaintiffs assert that the third named defendant Mr Baillie, was Chief Cashier of the Bank of England between January 2004 and April 2011 and in February 2009 headed the Bank of England's Special Resolution Unit (SRU), set up to deal with the Banking crisis. In 2010 a Financial Policy Committee was established. In 2012 the Financial Standards Authority identified substantial failings by some banks, in the selling of Interest Rate Hedging Products ("IHRP"), and a number of such banks, including the RBS agreed to review their sale of IRHPs since 2001 to identify eligible customers. This was piloted between January and March 2013. On 1April 2013 a new regulatory structure came into being with the twenty-first and twenty-second defendants (PRA and FCA) replacing the FSA. The FCA assumed responsibility for supervising the conduct of Ulster Bank and RBS with Mr Baillie becoming Chief Executive of the PRA. The PRA and FCA undertook a joint investigation of the IT glitch and the full review into the IRHP began the following month. The Tomlinson report was published on 25 November 2013 and in January 2014 the FCA appointed Promontory as "skilled person" to report on the issues raised by Tomlinson.

[13] Meanwhile, in February 2013 Mr Gordon had contacted the FSA about information he had in relation to the IT glitch. On 14 May he contacted the FCA

about it and on 21 May 2014 he spoke to an official in the FCA (Louise Walker) asking for a private conversation to discuss the matter. A report into the IT glitch was published by the PRA and FCA and RBS was fined £42,000,000 by the FCA, and a further £14,000,000 by the PRA for its IT failures, but Mr Gordon alleges that they issued a false notice to the press and public. Mr Baillie became Chief Executive of the FCA (he was already Chief Executive of the PRA). In September 2016 Promontory presented its report to the FCA which on 13 June 2019 published its report into the CRG. Mr Baillie became Governor of the Bank of England on 16 March 2020.

The Legal Framework

[14] Order 18, Rule 19 (1) provides:

> "(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything and any pleading or the endorsement, on the ground that –
>
> (a) It discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) It is scandalous, frivolous or vexatious; or
>
> (c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) It is otherwise an abuse of the process of the court,
>
> And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a)."

[15] The approach to applications under Order 18, Rule 19 (1) was considered by Gillen J in *Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland* [2011] NIQB 28. He summarised the principles as follows:

"[7] For the purposes of the application, all the averments in the Statement of Claim must be assumed to be true. (See *O'Dwyer v Chief Constable of the RUC* (1997) NI 403 at p. 406C).

[8] *O'Dwyer's* case is authority also for the proposition that it is a "well settled principle that the summary procedure for striking out pleadings is to be used in plain and obvious cases." The matter must be unarguable or almost incontestably bad (see *Lonrho plc v Fayed* (1990) 2 QBD 479).

[9] In approaching such applications, the court should be appropriately cautious in any developing field of law particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. Thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that it raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

> "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim."

(See also E (A Minor) v Dorset CC (1995) 2 AC 633 at 693-694)."

[10] Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."

[16] One further authority worthy of mention is *Swinney v Chief Constable of Northumbria Police* [1997] QB 464 at 473 where Hearst L.J. emphasised that "It is only appropriate to strike out if the defendant establishes beyond peradventure that the plaintiffs would be bound to fail at the trial should the case proceed. So long as the case is arguable it should be allowed to proceed". Ward L.J. in a short judgment in the same action at p 596 placed emphasis on the requirement that the case be "properly arguable", but I see no real contradiction here. The court will quickly discern a proper argument from one which is fanciful, not based on any recognisable legal principles or is nonsensical.

[17] Therefore, so far as the application pursuant to Order 18, rule 19 (1) (a), to strike out pleadings as disclosing no reasonable cause of action, is concerned, the court must deal with it on the face of the pleadings alone and without any reference to affidavit or other evidence. The court may consider affidavit evidence in relation to the remaining grounds for strike out, namely, as in this case, that the claim is frivolous or an abuse of process.

[18] Also relevant is Order 18, rule 7, which provides:

"(1) Subject to the provisions of this rule, and rules 10, 11, 12 and 23, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence,

as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits."

[*Rules 10 and 11 are not in issue in this case. Rule 12 concerns particulars of pleadings and Rule 23 concerns pleading of convictions.*]

And Order 18, rule 12 which provides:

"(1) ……every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including …..

(a) Particulars of any negligence, breach of statutory duty, misrepresentation, fraud, breach of trust, wilful default, undue influence or fault of the plaintiff on which the party pleading relies; and

(b) Where a party pleading alleges any condition of the mind of any person ….. or any malice, fraudulent intention or other condition of the mind except knowledge, particulars of the facts on which the party relies."

The Amended Statement of Claim

[19] The defendants have three overarching points in respect of the amended statement of claim. Firstly, failure to plead the basis of any common law duty of care imposed on the defendants. Secondly, aside from reference to the Financial Services and Market Act 2000 (FSMA), failure to plead any statutory duty other than to attempt to attach a duty of care onto statutory arrangements. Thirdly, failure to plead properly the allegations of dishonesty or the facts relied upon to establish dishonesty. They summarise their interpretation of the plaintiffs' allegations in tort as: (a) negligence in failing to properly supervise the manner in which the Banks entered into loan and SWAP transactions with the plaintiff; (b) misfeasance in public office; (c) breach of duties imposed by section 6 of the Human Rights Act 1998 (the "HRA"),

and claims in deceit, fraudulent and negligent misstatement. As is now all too common, and so often the case in these applications pursuant to Order 18, rule 19, the plaintiffs have adopted a lengthy narrative style of pleadings, with particulars mixed in with the narrative, making it difficult for the defendant, and indeed the court, to understand, the plaintiff's case. It also makes it difficult for a defendant to plead to. It should go without saying that a party should not be required to probe around a pleading to see the case being made, and where they do the pleading is poor and may not satisfy the requirements in Order 18, Rule 7 and 12 in particular.

[20] For example, in this case the first actual allegation against the regulatory defendants does not appear until paragraph 51 relating to the selling of SWAPs. Earlier in the narrative at paragraph 34 reference is made to the FSA rules on the sale of such products such as the requirement for registration and the assertion that Ms McKnight was not qualified to sell them to the plaintiffs, but that is an allegation (made not in particulars but as part of the narrative). At paragraph 51, again as part of a narrative rather than particulars, there is reference to the failure of the FSA to monitor the defendant banks selling of SWAPS to ensure compliance, but this is not developed at all in particulars. Similarly, at paragraph 76, there is brief reference to the activities of the regulatory bodies in 2011 and an assertion that the there was a conflict between Mr Baillie, with a foot in each camp, and the FCA, which "improperly always holds itself out as entirely independent from Parliament. Again, this is not developed in particulars and frankly I am uncertain what is meant to be conveyed. These are examples of poor pleading

[21] From para 86 onwards the focus is on the regulatory bodies again in narrative form. It sets out the role of the regulatory defendants but does not set out any duty of care, or the basis of any duty of care, they owe to members of the public, breach of which might give rise to a claim in tort or breach of statutory duty. No clear allegation is made until paragraph 95, dealing with the pilot review into the IT glitch, which was so designed around the point of sale that it meant that many were excluded from the review. It is alleged that "The approach of the Fifth Defendant

was deliberately adopted to avoid considering the hidden credit line and contingent liabilities issue in relation to SME losses". The narrative continues at paragraph 96 where it alleges: "However the Fifth Defendant {FCA} allowed the Second Defendant [RBS] to specifically exclude these Northern Ireland customers from the IRHP review." Once again it is left hanging there without proper particularisation.

[22] At para 103 it is alleged that the FCA was exclusively responsible for determining the scope and design of the s.166 review by Promontory, including data collection and method of assessment, but the design was such that "Promontory would be unable to ascertain the findings purportedly required by the Fifth Defendant." This is a serious assertion which implies dishonesty, attempt to prevent the truth from coming out, attempt to mislead the public and Parliament and misfeasance in public office. Again it is left hanging without the sort of particularisation that the Rules of Court clearly require where such a case is being made. In short, whatever case the plaintiffs are making, it is not, at this point, clearly or properly pleaded. It is enlarged upon narratively in the succeeding paragraphs but does not identify what cause of action the allegations relate to. It is therefore unclear whether it is deceit or misrepresentation, negligence or misfeasance.

[23] Para 120 addresses the liability of the 20th defendant Mr Baillie, stating that he is "sued in relation to his statutory duties imposed on him by virtue of his positions held as set out at paragraph 5 above". Para 5 is just a summary of the posts he held but not what statutory duties he was thereby subject to. As set out above, he was Chief Cashier of the Bank of England from 2004 until 2011. He became Chief Executive of the PRA in April 2013 and subsequently Chief Executive of the FCA. Mr Baillie is not a "regulatory body" but a servant and agent of a regulatory body, so in any claim in negligence, negligent, misstatement, or other torts he would appear to be covered by the principles of vicariously liability, unless he has acted in such a way as to take him outside the terms of his employment so that he accrues personal responsibility. This is mot pleaded by the plaintiff and there is no question that the other regulatory defendants take the view that he acted outside the terms of his

engagement, so that he would be left to vend for himself. At paragraph 121 it is alleged that he was responsible for publications of a false "Final Summary Review of the Promontory report", but no proper particulars are provided of what is a very serious allegation against a senior public official. It would seem however to imply misfeasance in public office, but that is not pleaded. In the amended statement of claim the plaintiffs do not explain how he would incur personal liability given that it is alleged that what he did was done in his various capacities and posts at the time. At para 122 the plaintiffs deal with the liability of the 21st defendant, the PRA, in similar fashion, with brief reference to Part 1A of the Financial Services and Markets Act 2000 with details of the duties arising thereunder which it is alleged to have breached.

[24] At paragraph 124 the plaintiff's turn, in much the same fashion, to the liability of the FCA. It is sued in relation to the way that it "discharged its statutory duties under Part 1A of Financial Services and Markets Act 2000". There follow various allegations as to the FSA's knowledge in 2008 of the second defendant's liquidity issues, its involvement in global capital markets etc. but failed to put in place due diligence measures, but monotonous though it may be, I am compelled to point out the lack of particularisation in relation to these or the allegations in the succeeding paragraphs. No amount of allegations and assertions can be a substitute for proper, clear, concise particularisation of a claim, especially where issues of honesty and integrity in public office are concerned.

[25] At para 129 the plaintiff provides "Particulars of the Defendants' Wrongful Acts and Omissions". These run from (a) to (z) followed by (aa) to (ee), with the particulars relating to the regulatory defendants commencing at (u) to (z). These are essentially just a summary of broad allegations already made, or an attempt to tie the narrative with wrongful acts or omissions alleged, rather than proper particulars, and nowhere do they set out the duty of care or statutory duty owed never mind how it was breached. At (aa) for the first time, and as an alternative pleading, there is an allegation of a specific breach namely misfeasance in public office, but rather than

provide the sort of particulars of misfeasance in public office required by Order 18, Rule 12 (1) (b) and explained in cases such as Three Rivers District Council & Ors v Governor and Company of the Bank of England [2003] 2 A.C. 1 [Three Rivers No. 3], the plaintiff's resort to a series of allegations, without attempt to identify individuals or their state of mind or parts of organisations involved. I refer back to Order 18, Rule 12 (1) which states: "…. Every pleading must contain the necessary particulars of any claim …including …. (a) particulars of any negligence, breach of statutory duty, misrepresentation, fraud, breach of trust, wilful default, undue influence or fault … on which the party relies; and (b) where a party pleading alleges any condition of mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies." This of course applies to Mr Andrew Baillie as it does to the FCA and to paragraph 129 (dd) which relates to allegations of Deceit on the part of the three regulatory defendants and (ee) claims in negligent or fraudulent misrepresentation.

[26] The House of Lords in Three Rivers CNo.3) held that the tort of misfeasance in public office involved an element of bad faith and arose when a public official exercised his power with the intent of causing damage to the plaintiff, or acted in the knowledge of, or reckless indifference to, the probability of causing damage to the plaintiff or a class of persons which included the plaintiff. They held that subjective recklessness, that is not caring whether the act was against the law, was sufficient. Their Lordships stressed at [51] – [55], the more serious the allegation of misfeasance, the greater the need for particulars to be given when explaining the basis for the allegation, particularly where it involves bad faith or dishonesty, and there can be no finding of malice fraud or dishonesty, if the facts relied upon are equivocal. This was the approach adopted by Stephens J in *Beechview Aviation ltd v AXA Insurance Ltd* [2015] NIQB [11] and [15]. I agree with the defendants' counsel when he submits that what is required is that the plaintiff set out coherently the facts on the basis of which the court will be asked to find that there has been bad faith or reckless intent. The plaintiff would argue that when the pleaded narrative is read along with the

allegations of the wrongful acts it is clear that what the plaintiff is alleging. Senior counsel submitted that it was not a case of improving the pleading, it is rather, a case of whether or not there is any cause of action. I take it from this that they have pleaded the best case they can and invite the court to deal with the matter on that basis. However, even when one does link the very long narrative: which appears to be more a summary of the evidence as opposed to a concise summary of the relevant facts that Order 18 requires: with the allegations of wrongful acts at para 129, with its long litany of wrongs, the defendants are still left with a lack of clarity as to the particulars of bad faith, and the pleading does not therefore achieve what the Rules of Court and the authorities, require them to do. The plaintiff cannot escape the basic principle that the purpose of a statement of claim is to set out the plaintiff's case in clear concise terms, enabling a defendant to understand the case it must meet, and can plead to. The plaintiffs' pleading in this case falls far short of the standard required for that to be achieved.

The Claim in Negligence Against the Financial Conduct Authority

[27] The allegation of negligence is pleaded against the Financial Conduct Authority (FCA) and its predecessor the Financial Services Agency (FSA) only, and at paragraph 129 u-z asserts failure to discharge certain "regulatory duties". However, the defendant challenges this pleading on the basis that no duty of care is identified or pleaded which would be owed by the FCA to the plaintiffs. The provisions in Part 1A, Chapter 1 of the Financial Services and Markets Act 2000 do not impose any duty on the FCA against the plaintiff on the facts of this claim. *Green & Anor v Royal Bank of Scotland* [2013] EWCA Civ 1197 makes it clear that there is no co-extensive or concurrent common law duties even in circumstances where the duty is one imposed on a firm regulated by the FAC, never mind the FCA itself. That case also demonstrates the importance of pleading out the duty of care at common law. The defendant accepts that at section 138D of the Act that breaches of the rules made by the FCA (and PRC) provide a statutory cause of action against parties regulated by them but the plaintiffs in this case had not pleaded any breach of an actionable

breach of statutory duty, proceeding solely on a claim in negligence. The plaintiffs however, take issue with this interpretation of Green arguing that the decision is confined to its facts and there is no statement that, in principle, no duty of care can arise when there is a concurrent statutory duty. They argue that the claim against the FCA in this case is that it negligently failed to perform their role of regulating a financial institution. However, whether the defendant is interpreting Greene correctly may be neither here or there when one looks at the wider principles surrounding the question when a private law duty of care can be imposed on a public authority.

[28] In *Robinson v Chief Constable of West Yorkshire Police* [2018] EWCA Civ 15, the Supreme Court revisited the question of when a duty of care exists, and the defendant would say, why it does not arise in the present case. Robinson is the most recent of a long line of cases going back to *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53, grappling with the issue of what, and when a duty of care is owed to a member of the public by the police acting in the course of their operational and investigatory duties. Lord Reed, delivering a judgment with which Lady Hale and Lord Hodge concurred, referring to *Caparo Industries v Dickman* [1990] 2AC 605, on the approach to the question of deciding when a duty of care arose, stated at [21]:

"The proposition that there is a Caparo test which applies in all claims in the modern law of negligence and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in Michael .....para.106, that understanding of the case mistakes the whole point of Caparo, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law on precedent, and on the development of the law incrementally and by analogy with established authorities."

[29] And importantly for the present case he continued at [26]:

> "Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable ..."; and per Lord Hughes delivering a minority judgment, at [100] "For the reasons very clearly set out by Lord Reed at paras 21-30 it is neither necessary nor appropriate to treat Caparo Industries v Dickman ..... as requiring the application of its familiar three-stage examination afresh to every action brought. Where the law is clear that a particular relationship or recurrent factual situation, gives rise to a duty of care, there is no occasion to resort to Caparo, at least unless the court is being invited to depart from previous authority."

[30] And at [27]

> "It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following Caparo, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgment whether deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgment in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millen observed in McFarlane v Tayside Health Board [2000] 2 A.C. 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for

justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper"."

[31] Lord Reid reassesses the general principles in respect of public authorities, such as the FCA and PRA at paragraph [31]:

> "Before focusing on the position of the police in particular, it may be helpful to consider the position of public authorities in general, as this is an area of the law of negligence which went through a period of confusion following the case of Anns (v Merton London Borough Council [1978] AC 729) … . That confusion has not yet entirely dissipated, as courts continue to cite authorities from that period without always appreciating the extent to which their reasoning has been superseded by the return to orthodoxy achieved first in Stovin v Wise [1996] AC 923 and then, more fully and clearly, in Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15."

[32] At paras [32] and [34] he affirms that at common law public authorities are generally subject to the same liabilities in tort as private individuals and bodies save for the Crown (which is provided for by section 2 of the Crown Proceedings Act (1947). "Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority subject to the common law or statute providing otherwise. This really concerns positive acts by public authorities causing damage to members of the public, such as the police car knocking down a pedestrian. Liability by public authorities for positive acts as opposed to omissions is dealt with extensively elsewhere in the judgment, but Lord Reed continues at [34]

> On the other hand, public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in Michael (v Chief Constable of South Wales Police [2015] 2

ALL ER 635), "the common law does not generally impose liability for pure omissions".

[33] At para [35] he acknowledges that there are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm but otherwise public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body. He continues at para [36]:

"That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. A well-known illustration of that principle is the decision of the House of Lords in East Suffolk Rivers Catchment Board v Kent [1941] AC 74. The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then, "it would be, to say the least, unusual if the mere existence of the statutory duty (or, a fortiori, a statutory power) could generate a common law duty of care." Gorringe, para 23."

"[39] … Lord Hoffman ….. said that he found it difficult to imagine a case in which a common law duty could be founded simply on the failure, however irrational, to provide some benefit which a public authority had power (or a public law duty) to provide (para 32). He was careful to distinguish that situation from cases where a public authority did acts or entered into relationships or undertook responsibilities giving rise to a duty of care on an orthodox common law foundation".

[34] Two points emerge from this. Firstly, the FCA, as a public authority, unless it has assumed some particular responsibility providing a particular benefit to the

plaintiffs to prevent the harm complained off, or the relevant provision of the 2000 Act is so constructed as to confer a private right of action on the plaintiff, the existence of a statutory or statutory power could generate a common law duty of care owed by the FCA to the plaintiff. The second point is that a court assessing whether such a duty of care could arise in a particular circumstance would require that duty of care to be identified and clearly pleaded, which has not been done in the present case. The plaintiff argues that there is no requirement to plead the duty of care, failure to satisfy which justifies strike out of the claim. That is correct if amendment would remedy the defence, though I am mindful in so saying that we are considering an amended pleading where the plaintiff has already had an opportunity to properly plead their case. However, the difficulty for the plaintiffs in this case is that if they seek to further amend to plead a duty of care in negligence they immediately raise the issue whether such a private law duty is arguable in the present case, having regard to the general principle that public authorities such as the FCA owe no duty of care to private individuals or bodies absent some assumption of such a duty or something in the 2000 Act which grants to private individuals and bodies a private law cause of action for failure by the FCA to properly exercise it statutory duties or powers under the Act. It is clear that the mere existence of a statutory duty does not generate a common law duty of care, to repeat the words of Lord Hoffman in Grorringe at para 23.

[35] Further, not only does the 2000 Act not provide for a the statutory power or duty intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action, it in fact does the opposite by providing the FCA and PRA with completion exemption from private law claims in tort (para.25 of Schedule 1Z A and para 33 of Schedule 1ZB) unless it has been shown to have acted in bad faith or there is a claim under section 6(1) of the Human Rights Act 1998.. In the case of negligence that would of course create new law . As bad faith suggests an element of deliberateness which does not sit readily with negligence in the sense of a failure to take reasonable care. The mental state of the defendant would require to be fully pleaded in accordance with Order 18, rule 12: (1) ….. every

pleading must contain the necessary particulars of any claim …. including (a) particulars of any negligence, breach of statutory duty, misrepresentation, fraud, breach of trust, wilful default …. on which the party pleading relies; and (b) any condition of the mind of any person, or any malice, fraudulent intention … on which the party pleading relies." Whilst in its narrative pleading the plaintiff raises issues surrounding the IT glitch and its consequences it does not plead the state of mind of the FCA or an agent of the FCA in that respect. This may be curable by amendment but that will only take the plaintiff so far. It simply means that the defendant cannot rely on the exemption clause to avoid liability. The defendant of course need not rely on the exemption clause but on the failure to plead, and according to the case law, the absence of, any duty of care in negligence owed by the FCA to the plaintiffs.

[36] Finally, in respect of the claim in negligence, the defendant raises two further specific issues, namely: (a) the inadequacy of the pleading of the claim for damages for psychiatric injury and (b) the claim for financial loss. Clearly these stand and fall with the rest of the claim in negligence. If the court rules that there is no duty of care owed by the FCA to the plaintiff's and the pleading relating to the claim in negligence is to be struck out, then this applies to the claims for financial loss and psychiatric injury too.

The Claim Under the Human Rights Act 1998

[37] At para 129 (cc) of the amended statement of claim pleads breach of section 6 (1) of the Human Rights Act, read along with Article 1 of the First Protocol.to the European Convention on Human Rights (breach of the right of protection of a person's peaceful enjoyment of his property from unlawful interference by a public body). The specific acts alleged are those set out at paragraph 129 u – z, namely the particulars of negligence. The allegations are general in nature and broadly assert failure to properly regulate the banks. The defendant alleges that these allegations are parasitic on the action in negligence which they say, and this court agrees, is unsustainable, and in respect of which the pleadings should be struck out. I do not believe that it necessarily follows that the striking out of particulars u – z (as

particulars of negligence) means that the Human Rights claim which relies on, and in effect repeats, those particulars must also fail for that reason, as this is something which could be cured by amendment.

[38] The defendant also argues that the unlawful act of the public body must be an act not in accordance with the law, or one that is irrational or taken in bad faith (for example as set out in an Order 53 statement supporting an application for judicial review), none of which is pleaded in the amended statement of claim. They also argue that any Human Rights claim is now out of time but of course limitation is a defence (to be raised by pleading it in the defence) and an issue for trial which should not be dealt with in an interlocutory application to strike out a pleading as disclosing no reasonable cause of action. The plaintiff of course argues that the Human Rights Act claim is adequately pleaded but I respectfully disagree. Firstly, if the particulars of negligence u – z are struck out then there are no particulars at all to the Human Rights claim and the Order 53 type of detail is not adequately pleaded. However, at this stage, I will not strike out the claim at paragraph (cc) because it can be cured by amendment, by providing separate particulars which do not ride on the back of the negligence claim supplemented by the Order 53 style particulars. As McCloskey LJ stated in Rural Integrity (Lisburn 01) Limited [2020] NIQB 25: "It does not follow inexorably that the cases must be struck out, as this draconian consequence, though doubtless envisaged as appropriate in the ordinary run of every non-compliant case, is not expressly spelled out in the terms of the rule. Furthermore, the court must be alert to the inherent jurisdiction as to which see Ewing v Times newspapers [2010] NIQB 65 at [10] – [14]. Thus I consider that there is a judicial discretion to be exercised." The other issues raised by the defendant are not appropriate to be dealt with in this application.

THE IDENTITY OF THE PLAINTIFFS ISSUE

[39] The defendants also raise the issue of the identity of the plaintiffs in whose names the action is taken. As I have set out at paragraph [2] herein the present

proceedings actually encompass two separate actions. In the first (16/016825) the plaintiffs are Mr Gordon and Orianna against the sole defendant the Ulster Bank and were issued when he was legally represented. The second proceedings (19/020559) were issued by Mr Gordon as a personal litigant, in his personal capacity and as a director of Orianna and Fletcher Gordon Ltd, against the Ulster Bank and the Royal Bank of Scotland (1st and 2nd defendants), persons employed by the banks (3rd to 19th defendants) and the three regulatory defendants who are the subject of the present application. The defendants argue that this offends Order 5, rule 6 (2) which stipulates that a corporate body cannot commence proceedings otherwise than by a solicitor. Rule 6 (3) provides an exception in circumstances where an employee, with the leave of the court, is authorised by the body corporate to commence the proceedings. In the amended statement of claim, and in his replying affidavit, Mr Gordon describes himself as a sole shareholder or director of Orianna and Fletcher Gordon Ltd. He does not claim to be an employee of either company, and did not seek the leave of the court to commence the proceedings as an employee. Advocating that the court adopt the strict approach to this rule affirmed by McCloskey LJ in Rural Integrity, the defendant argues that the actions should be struck out.

[40] The plaintiff however argues the defect does not necessarily render the action a nullity but rather an irregularity which the court has the power to cure. They repeat the comment by McCloskey LJ in Rural Integrity which I set out at paragraph [37] herein, noting that strike out is not inexorable and there is a judicial discretion to be exercised, on the basis that the mischief which the rule is designed to avoid has been rectified now that the plaintiffs have legal representation. However, I think that this would require a proper application by the plaintiffs pursuant to Order 2 rule 2, grounded on a proper affidavit. Order 2, rule 1 provides:

> *"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the*

failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.

(2) ……..the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

In relation to Order 2, rule 1 generally, The Supreme Court Practice 1999 Edition ("The White Book") at paragraph 2/1/3/ states: "The authorities show that O.2, r.1 should be applied liberally, in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules. As the matter stands the action is not properly constituted but rather than striking it out on that ground, and whilst I do not wish to encourage a proliferation of interlocutory proceeding, the plaintiff's should be allowed an opportunity to rectify the situation. Such an application should be made properly by summons, in accordance with the Rules of Court, with the defendants to have an opportunity either to consent to or contest the application.

In Conclusion

[41] I find, for the various reasons stated herein, that the pleading in the proposed amended statement of claim in the combined action are either deficient, but possibly curable by further amendment, or relate to a cause of action which is inarguable in law and cannot therefore be cured by further amendment. More specifically, the claim in negligence against the Financial Conduct Authority (FCA) pleaded at paragraphs 124 to 128 and at paragraph 129 u to z, is deficient in a number of respects set out at [27] – [36] herein, including in particular a failure to properly plead the duty of care owed by the FCA to the plaintiffs. This might of itself be curable by amendment but the plaintiffs face a more fundamental difficulty in that

the court finds that the case in negligence against the FCA is inarguable in law because on applying the relevant principles no duty of care exists and no amendment can cure that defect. Leave to amend the statement of claim to plead a claim in negligence against the FCA is refused because the claim does not survive an application to strike out for failure to disclose a reasonable cause of action.

[42] In the amended statement of claim in the combined action Mr Gordon sues in his personal capacity and as "acting in capacity as director of Orianna Ltd (2nd plaintiff) and Fletcher Gordon Ltd (third plaintiff). He did not seek the leave of the court to issue proceedings for the company and did not at that stage proceed by a solicitor. As it is presently constituted the actions offend Order 5, rule 6 (2). The court cannot permit an amendment of the statement of claim, which is the proposed pleading in the combined action, until it is placed on a proper footing, by a separate application by the plaintiffs to cure an irregularity, pursuant to Order 2, rule 1. Leave to amend the statement of claim so far as it relates to the second and third named plaintiffs cannot be given until this is resolved, and is therefore at this stage refused.

[43] With respect to the remaining causes of action, including claims in misfeasance in public office, deceit, fraudulent and negligent misrepresentation and under section 6 of the Human Rights Act, the pleading in the proposed amended statement of claim is deficient for the reasons discussed herein but may, and I emphasize the word 'may' be curable by adequate amendment. The court will permit the plaintiffs, if they so choose, to serve further proposed amendments, to correct the deficiencies, but subject to the entitlement of the regulatory defendants to object to such further amendments on the ground that they remain deficient or, for example, raise new causes of action out of time, or otherwise prejudice the defendants in a manner which is not compensatable in costs. The plaintiff's must notify the defendants in writing, within 28 days of the date of handing down of this judgment, time to run in the long vacation, whether or not they intend to further amend the proposed amended statement of claim, and if they so intend, to serve the further amendments within 28 days of any order of the court pursuant to an application by

the plaintiff's to cure an irregularity. Such an application must be issued by summons no later than 31 August 2022. In the event that the plaintiffs do not serve a further amended statement of claim then leave to amend in terms of the current proposed amended pleading is refused, because the pleadings as they stand do not disclose a reasonable cause of action. In that event, the defendants should notify the court and request a final order striking out the remaining pleading as disclosing no reasonable cause of action. The same applies in respect of the identity issue. As the actions as they stand offend Order 5, rule 6, if that situation is not rectified then the actions must be struck out by the Court, upon notification by the defendant that no step has been taken to rectify the defect within the time specified, or such steps as have been taken have failed.

[44] The regulatory defendants are entitled to the costs of this application and I certify for counsel.